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Institute of Bill of Rights Law, William & Mary Law School

A CHECK ON EXCESS: COURT PUTS RARE HARNESS ON FINES

The Post and Courier (Charleston, SC)

July 4, 1998

James J. Kilpatrick

The Supreme Court ordinarily proceeds with the deliberation of Percherons pulling a beer truck. Now and then, to the pleasure of the press corps, one of the justices jumps the traces and surprises us all. This was the case on June 22 when the court gave a break to Hosep Bajakajian.

On the surface the facts seemed damning. Bajakajian, his wife and two daughters were waiting at Los Angeles International Airport for a flight that would take them to Italy, thence to Cyprus. Trained dogs sniffed the family baggage, and behold: The bags contained $230,000 in U.S. currency. A further search turned up another $127,000, much of it in a suitcase with a false bottom.

Customs agents seized the currency and charged Bajakajian with violating a federal law against smuggling. It is not against the law to take $357,000 out of the country, but it is against the law if one fails to report it. The government demanded that the whole sum be forfeited to the Treasury.

At trial in U.S. District Court, it developed that the defendant had told agents a pack of lies. He said a friend named Abe Ajemian had lent him $200,000. Abe denied it. Bajakajian said Saeed Faroutan had lent him $170,000. Saeed denied it. The best Bajakajian could say in his own defense was that as a member of the Armenian minority in Syria, he had developed a pervasive fear and distrust of government.

A weaker defense never was offered in the history of criminal law, but clearly it made an impression on the trial court. The judge concluded the defendant had not amassed the money illegally; there was no evidence of money laundering; the defendant was not a crook, he was only a respectable businessman, the owner of a prosperous filling station, who was on his way to Syria to pay a business debt.

Thus the trial court refused to impose a total forfeiture. The court imposed a forfeiture of $15,000 and a fine of $5,000, plus three years on probation. The government appealed, but the U.S. Court of Appeals for the 9th Circuit affirmed the sentence. The government went to the Supreme Court, where the token forfeiture once again was affirmed on June 22.

It was a historic moment. Since he came on the high court seven years ago, Justice Clarence Thomas has served as a kind of Percheron conservative. In writing a majority opinion, until this day, he never had found himself in a jurisprudential bed with Justices Stevens, Souter, Breyer and Ginsburg. But there he was. You wonder if they all hated themselves in the morning.

The decision was notable in another way. The Supreme Court does not sit to remedy individual problems of injustice. That is not its function. The high court's primary duty is to resolve large questions of constitutional and statutory law. In Bajakajian's case, the Supremes had to interpret the Eighth Amendment prohibiting the imposition of "excessive" fines. Remarkably, this had never been done before.

What is "excessive"? It is whatever five members of the high court say it is, and neither more nor less. The meaning "involves solely a proportionality determination." Thomas and his colleagues found that a total forfeiture of $357,000 would be "grossly disproportional" to the gravity of Bajakajian's offense.

In sum, the court majority concluded that a total forfeiture would be - what? It would be unjust - and that is the interesting thing, because the justices are rarely concerned with injustice. They are concerned with law, and law and justice often are total strangers.

Justice Anthony Kennedy is ordinarily a sober fellow, not much given to raising his voice. This time he hollered:

"For the first time in its history, the court strikes down a fine as excessive under the Eighth Amendment. The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows. ... It portends serious disruption of a vast range of statutory fines. The court all but says the offense is not serious anyway. This disdain for the statute is wrong as an empirical matter and disrespectful of the separation of powers."

My inclination would be to say to Justice Kennedy, there, there, Tony, it's not that bad. The determination of an "excessive" fine cannot present a more difficult constitutional problem than the determination of an "unreasonable" search. What is "appropriate" legislation? When is a trial "speedy"? What law "abridges" freedom of speech? Who knows? The high court knows.

In the case at hand, I have a notion that brother Bajakajian got off pretty easy, but I doubt that any earth-shaking precedent has been set. Justice Thomas kicked up those Percheron heels. Three days later he was back in the stable again. Hooray!

Kilpatrick is a Universal Press Syndicate columnist who lives in Charleston.

FORFEITURE OF CASH AT LAX STRUCK DOWN

Los Angeles Times

June 23, 1998, Home Edition

David G. Savage, Times Staff Writer

Four years ago, a Hollywood service station owner went to Los Angeles International Airport with $357,144 hidden in his luggage--determined, he said, to prevent the money from being stolen by corrupt customs officials when he arrived in his native Syria. Instead, he has spent the years since fighting to get the money back from U.S. officials who seized and kept it.

On Monday, he triumphed before the nation's highest court, winning a potentially landmark ruling that rebuked the government and ordered his money refunded.

The government's claim to Hosep K. Bajakajian's money, under currency forfeiture laws, amounts to a grossly excessive fine for a minor paperwork offense, said Justice Clarence Thomas for the court. The 5-4 ruling marked the first time the Supreme Court has struck down a forfeiture as unconstitutional.

Told of the news at his service station Monday morning, Bajakajian said it affirmed his faith in the U.S. justice system.

"This is great news. It makes my eyes fill up," he said in a phone interview. "I believe in God, in justice and the United States."

His attorney, James E. Blatt of Encino, was equally elated. "This has been a very long battle. The Customs Service went overboard in taking Mr. Bajakajian's money and we're thrilled the Supreme Court agreed."

Bajakajian's troubles are not over, however. A $5,000 fine and $15,000 forfeiture will be deducted before the money is returned, and the Internal Revenue Service has notified him that it thinks he underreported his income by an amount similar to that seized.

The ruling, however, may rein in the government's heretofore unchecked power in forfeiture cases.

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Over the last decade, forfeitures have become a powerful weapon in the war on drugs. Police and prosecutors have seized houses, boats, bank accounts and businesses owned by drug dealers.

But many others have loudly complained that these government seizures can be unfair and excessive. At times, people have lost a house or a business because they or friends or family members have been involved in minor drug offenses, such as growing marijuana in their backyards.

In the past, the Supreme Court has said a forfeiture might be so extreme as to violate the 8th Amendment ban on "cruel and unusual punishment and excessive fines." But until Monday, the court had never declared a seizure unconstitutional.

The case of the Hollywood gas station owner seemed to illustrate a government zeal that offended, in turn, a federal judge in Los Angeles, the U.S. 9th Circuit Court of Appeals in San Francisco and now the Supreme Court.

It began on June 9, 1994, when Bajakajian went to the Los Angeles airport with his wife and two children and planned to fly to Syria. Family members had helped him get started in business in Los Angeles and, he said, he was taking money there to repay his debts.

A drug-sniffing dog detected the hidden currency, and customs agents stopped Bajakajian from boarding the flight. Though he denied having the money at first, he later admitted that it was his.

He was charged with violating the currency reporting law. People who move at least $10,000 of currency into or out of the United States must file a report. Passengers arriving on international flights are given reporting forms before landing. Those who are leaving the country are not similarly notified.

Congress passed the law in 1970 to try to nab organized crime bosses and drug traffickers who moved large amounts of cash. The law remains on the books and is not directly affected by the high court ruling, which pertained only to the "excessive" amount of the forfeiture in Bajakajian's case.

Brought before U.S. District Judge John G. Davies in Los Angeles, Bajakajian was able to show that his money was obtained lawfully and was not tainted by crime. The judge imposed a $5,000 fine and a forfeiture of $15,000. Any further forfeiture would be "extraordinarily harsh," Davies said. He ordered the rest of the money returned. It was not clear whether the government will pay Bajakajian interest, his lawyer said.

But the U.S. attorney's office in Los Angeles appealed, arguing that the government was entitled to keep the entire amount. The 9th Circuit Court disagreed, but the Justice Department appealed again. All "undeclared cash that is brought into or taken out of the this country is subject to forfeiture," the Clinton administration asserted in its appeal in the case (United States vs. Bajakajian, 96-1487).

Thomas, in Monday's ruling, wrote that the gas station owner "is not a money launderer, a drug trafficker or a tax evader." A "full forfeiture of Bajakajian's cash would be grossly disproportional to the gravity of his offense" and, therefore, unconstitutional.

The ruling marked a rare instance in which Thomas joined with the court's more liberal members--John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer--to rule against the government. At his nomination, friends said Thomas had a libertarian streak, but it had not been evident until Monday.

"Money launderers will rejoice" at the decision, Justice Anthony M. Kennedy said in dissent. He was joined by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and Antonin Scalia.

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Although the ruling returns Bajakajian's money--minus the $5,000 fine and the $15,000 forfeiture ordered by the district court judge in Los Angeles--his legal fees have been "substantial," according to Blatt, his lawyer. But Blatt declined to specify the exact costs.

Nor are Bajakajian's tussles with the government over.

Soon after his case was argued in the Supreme Court, he received a notice from the Internal Revenue Service saying he owed $334,000 in back taxes and penalties for 1994.

Former Assistant U.S. Attorney Mark A. Byrne, who is representing him in the tax matter, said the IRS move is questionable. He added that it seemed "unbelievably coincidental" that the IRS was seeking roughly the same amount involved in the forfeiture case.

UNITED STATES v. RAMIREZ

Legal Times

July 13, 1998, Monday

Paul Butler

Early one morning someone sneaks up to your house, breaks a window in the attached garage, and waves a gun through the window. What would you think?

When that happened at the house where Hernan Ramirez, his wife, and their three-year-old child were sleeping, Ramirez thought that his home was being burglarized. He ran to a closet, grabbed a pistol, and fired at the ceiling of the garage in an effort to scare off whoever was seeking to invade his home. The intruders--there were approximately 45 armed men and women outside-- announced that they were the police and began shooting into the house.

When Ramirez realized it was the government, and not criminals, that had broken into his home, he ran into the living room, threw the pistol on the floor, and lay down in a prone position. He was shaking with fright. The police entered the house and took Mr. Ramirez, Mrs. Ramirez, and their child into custody.

It turned out that the police were executing an arrest warrant. But the warrant was not for Ramirez or his wife or his child, but rather for Alan Shelby, an escaped fugitive. Someone had told an officer of the Bureau of Alcohol, Tobacco and Firearms that he had seen Shelby at Ramirez's house. The person with this information was described as a confidential informant, so we have no way of knowing who he was. We know that the police did not find Shelby at the Ramirez residence. Nor did they find the cache of guns in Ramirez's garage that the informant claimed he had heard were there. We know that prior to breaking into Ramirez's home, the police had no probable cause to implicate him in any crime.

But when 45 law enforcement agents, including three SWAT teams, break into your home at 6:30 in the morning, there is a possibility that the government will learn something about you that it did not previously know. And so the government learned that Ramirez had a gun.

Two guns, actually. Ramirez admitted it when he, his wife, and child were ordered out of their home on that morning. And because Ramirez had, some time ago, been convicted of a felony, it was illegal for him to possess a gun. So the agents obtained another warrant to search Ramirez's home, this time for two guns, which the agents found right where he had told them they would be. Ramirez was subsequently indicted for being a felon in possession of firearms.

At trial, Ramirez sought to suppress the guns on the ground that they were obtained in violation of his Fourth Amendment right to be free from unreasonable searches and seizure. Although the trial judge and

a federal appellate court agreed and suppressed the evidence, the Supreme Court disagreed. In *United States v. Ramirez, 118 S. Ct. 992* (March 4, 1998), the Supreme Court unanimously endorsed the actions of the police. Chief Justice William Rehnquist wrote that the police conduct was "clearly reasonable and we conclude that there was no Fourth Amendment violation."

Little Castle

The issue in Ramirez is, in the dry parlance of criminal procedure, whether " no-knock" execution of search warrants must meet a higher standard when entry results in destruction of property. To Ramirez, and perhaps to you, the issue is how much information the government needs to have before it is allowed to kick down your door and enter and search your home.

The U.S. Court of Appeals for the 9th Circuit, in affirming the trial court's suppression of Ramirez's guns, ruled that the Fourth Amendment requires more than a "mild exigency" before the police may destroy property when they execute a search warrant. Judge Ferdinand Fernandez, joined by Judge Stephen Reinhardt, described the home as every person's "little castle" and the "last real retreat in this technological age." Thus,

> the fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families. Indeed, the minions of dictators do not kick in doors for the mere purpose of satisfying some voyeuristic desire to peer around and then go about their business. Something much more malevolent and dangerous is afoot when they take those actions. It is that which strikes terror into the hearts of their victims. The Fourth Amendment protects us from that fear as much as it protects our privacy.

Accordingly, the 9th Circuit required a higher standard for no-knock entries in which the police must break windows or ram doors, and ruled that the higher standard was not satisfied on the Ramirez facts.

Judge Alex Kozinski wrote a scathing dissent, castigating Judges Fernandez and Reinhardt's "cheap" words and "high-fallutin rhetoric." He did not quarrel with the higher standard established for destructive entries, but thought that the standard was satisfied here, based on the dangerousness of the felon whom the police originally sought to apprehend. He also contended that the 9th Circuit precedent had found exigent circumstances in less extreme situations.

Kozinski agreed with the principle of the "sanctity of every man's little castle, " but opined that "the principal reason we can sleep safely at night is that the men and women of law enforcement put their lives on the line to keep our castles from being invaded by brutal criminals." It was easy for the court, sitting in its "well-guarded offices, and with the benefit of hindsight, to issue pronouncements about what the police should or could have done, " but the Constitution demands mere reasonableness, and the police acted entirely properly. "To have done less would have been foolhardy; to have done more would have been excessive."

It must be kind of fun to be Alex Kozinski, a conservative judge sitting in a relatively liberal circuit that is subject to review by a conservative Supreme Court. You're not allowed to actually pick up the telephone, and call Nino and Clarence, and say, "You'll never guess what these half-brains have done now." That would be too easy, anyway. The sport is in ending your dissents with words like these: "Opinions like the majority's lend support to the notion that the Ninth Circuit is not a single court but a series of disaggregated panels whose judges are guided by their predilections rather than precedent. Because I cannot join in this wholesale flouting of circuit authority, I dissent." And you know your boys in Washington are going to come through for you.

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To explain its reversal of the 9th Circuit decision, the Supreme Court's opinion begins, as the lower court's did, with a story, but it is the story of Shelby, the fleeing felon, and not that of Ramirez, the not-so-innocent homeowner.

In 1994, Shelby was being transported to an Oregon courthouse to give testimony when he slipped his handcuffs, punched a deputy sheriff, and absconded. He had been facing a sentence of 248 months and had reportedly stated that he would "not do federal time." Shelby had attempted escape several times before, and during these attempts had assaulted a woman, had stolen an automobile, and "was reported to have made threats to kill witnesses and police officers." Justice Rehnquist noted, "It was also thought that Shelby had had access to large supplies of weapons."

Based on these contentions (one hesitates to call them facts since they are largely unsupported by evidence, and the other "facts" about Shelby's whereabouts turned out to be wrong), Rehnquist found that the police were correct in reasonably suspecting that Shelby posed a threat to their safety when they executed the search warrant. But is "reasonable suspicion" the correct standard for determining when the government is allowed to burst unannounced through one's door?

In the last few years, the Supreme Court has been deciding knock-and-announce cases at about the rate of one each term. In *Wilson v. Arkansas, 514 U.S. 927 (1995),* the Court reversed the Arkansas Supreme Court's holding that the Fourth Amendment never requires police officers to knock and announce their presence when executing a search warrant. Last year, in *Richards v. Wisconsin, 117 S. Ct. 1416 (1997),* the Court overturned the Wisconsin Supreme Court's determination that officers executing search warrants in felony drug cases never have to knock and announce first. The Court stated that "in order to justify a no knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile."

While both Wilson and Richards ostensibly supported the knock-and-announce requirement, they left room for exceptions based on exigent circumstances-- for example, danger to the police. But because the standard for determining exigency is so low--"reasonable suspicion, " as opposed to the traditional criminal law requirement of "probable cause"--the exception seems likely to devour the rule. Considering that this issue arises only when police wish to search places where they believe there are criminals or

evidence of crimes, any police officer worth her salt should be able to make a case that she reasonably fears for her safety, and thus circumvent the knock-and-announce requirement. Never mind that this requirement has been a fixture of Anglo- American jurisprudence since the 13th century.

An Exception to the Exception

Perhaps in anticipation of the weakening of the knock-and-announce rule (the 9th Circuit decided Ramirez prior to the Supreme Court's decision in Richards) , the 9th Circuit tried to carve out an exception to the exception. It required heightened scrutiny of exigent circumstances in cases in which police destroy property. But Justice Rehnquist, while not as harsh as Judge Kozinski, wrote that it is "obvious from the holdings" in Wilson and Richards that destructive police searches are subject to the same standard as any other government search.

That the Court's decision in Ramirez is "obvious" based on its earlier cases is true, but it is also troubling. Given the minimal requirements of " reasonable suspicion, " the officers had sufficient cause to believe that the fleeing felon posed a danger to them, even if their information was not particularly strong or credible. Yet "probable cause" remains the standard for police determination of exigency outside the knock-and-announce context. The ironic result is that, on the issue of how sure the police must be before they search in an emergency, one's "little castle" is afforded less constitutional protection than one's automobile or purse.

So the law is simply that if the police have a reasonable suspicion that knocking and announcing would expose them to danger, they may barge right in, eliminating whatever windows or doors happen to be in their way. And the 9th Circuit is out of touch with modern law enforcement and its embrace of zero tolerance and three strikes. The fact is that no other circuit and only two states have chosen to impose higher standards for search warrants that result in the destruction of property.

Ultimately, we may decide that the Fourth Amendment is also out of touch. (It is a commonplace among criminal law professors that the Fourth Amendment's warrant requirement would have a tough time making it through Congress today; as for the Fifth Amendment's privilege against self-incrimination--forget about it.) There is no question that the Fourth Amendment impedes law enforcement. It would indeed be easier to enforce the criminal law if police were not required to act reasonably.

The 9th Circuit's opinion in Ramirez noted, optimistically, that the "flame of our Fourth Amendment liberties is bright and strong, " but cautioned, " Still, it is just a flame, and it will be quickly quenched if it is not protected." It is an overstatement to say that the Supreme Court's decision is that quick quenching. But Wilson begat Richards begat Ramirez. What will Ramirez beget?

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POLICE GET BROADER SEARCH LEEWAY

The Legal Intelligencer

March 05, 1998

Laurie Asseo, Associated Press

Washington Police with search warrants do not need extra justification to enter a home without knocking first even if the entry results in property damage, the Supreme Court ruled yesterday.

The unanimous ruling allows prosecutors to use as evidence weapons seized from an Oregon man's home after police broke a window while making a no-knock entry.

The high court previously has ruled that police with search warrants can enter someone's home without knocking if they have a "reasonable suspicion" that knocking and announcing themselves would be dangerous or harm the investigation.

"Whether such a reasonable suspicion exists depends in no way on whether police must destroy property in order to enter," Chief Justice William H. Rehnquist wrote for the court.

However, Rehnquist said such entries still are governed by the Constitution's Fourth Amendment ban on unreasonable searches.

"Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful," the chief justice wrote.

But the court upheld the 1994 search of Hernan Ramirez's home in Boring, Ore.

Police came to his home on a tip that an escaped inmate may have been there. Officials said the inmate struck a guard, stole a vehicle and threatened to kill police officers and others.

The 45 officers arrived early in the morning and announced over a loudspeaker that they had a search warrant. Without waiting for a response, one officer broke a garage window and began waving a gun through the window.

Ramirez said he and his wife thought they were being burglarized He got a gun and fired it into the ceiling, but surrendered when he realized the window was broken by police.

The escaped inmate was not found, but police got a new search warrant and seized two guns. Ramirez was charged with possession of a firearm by a convicted felon.

A federal judge ruled the search unlawful, saying officers' knowledge of the escaped inmate's violent past justified entering Ramirez's home without knocking, but only if they could do it without damaging his property.

The 9th U.S. Circuit Court of Appeals upheld the ruling, but the Supreme Court disagreed.

The police officers' conduct in breaking into Ramirez's home was "clearly reasonable," the chief justice said.

"The police here broke a single window in (Ramirez's) garage" because they wanted to keep the house's occupants from grabbing weapons that an informant had said were inside, Rehnquist wrote.

KNOWLES v. IOWA

By Darren Welch

Imagine being pulled over for a simple speeding ticket and being subjected to a full-blown, suspicionless search of your person and your car. This is legal in Iowa, and this coming term the Supreme Court will rule on the constitutionality of the law which authorizes such a search.

Iowa Code section 805.1(4) confers upon police officers the authority to search the driver and the interior of her car when a traffic violation has occurred that would constitute grounds for an arrest. Iowa is the only state to offer such broad authority to its police officers. This authority was upheld in *State v. Doran* (Iowa 1997). The *Doran* court noted that ensuring officer safety is a legitimate public policy reason for granting police officers such authority.

On March 9, 1996, Defendant Patrick Knowles was pulled over for speeding. The officer checked Knowles' drivers license and found no outstanding warrants. The officer then searched the interior of Knowles' car. Under the drivers seat the officer found a pipe and some marijuana. Knowles was later convicted of possession of a Schedule I controlled substance and keeping a controlled substance in an automobile. Knowles challenged evidenciary rulings that permitted the marujuana to be introduced against him.

The conviction was affirmed in the Supreme Court of Iowa in *State v. Knowles*. Justice Carter's majority opinion summarily disposed of Knowles arguments as precluded by the *Doran* ruling and recited officer safety as a legitimate purpose for the statute. Carter also noted that Knowles did not contest that he was speeding or that there was a statutory basis for an arrest.

The Supreme Court granted certiorari on the question "whether the Fourth Amendment allows a state to enact a statute conferring blanket authority to the police to conduct a full-blown search of a vehicle upon issuance of a traffic or equipment citation?"

The American Civil Liberties Union (ACLU), joined by the Iowa Civil Liberties Union and the National Association of Criminal Defense Lawyers have submitted an amicus curiae brief in support of petitioner Knowles. They argue that the statute unconstitutionally authorizes "unreasonable" searches, in violation of the Fourth Amendment. No probable cause exists for the search, and the "search incident to arrest" exception is not invoked upon mere issuance of a traffic citation. The brief suggests that the *Terry* doctrine allows only a patdown, to ensure officer safety when an individual is detained, not a full-blown search. Furthermore, the ACLU brief argues that the statute fails a balancing test, because the violation of personal privacy is severe and should only be justified by probable cause.

The National Association of Police Organizations (NAPO) has filed an amicus brief in favor of the respondent, the state of Iowa. The NAPO brief stresses the need for police safety during unpredictable, potentially dangerous traffic stops. The NAPO brief also asserts that the number of arrests when

citations would suffice will increase, and that police officers should be afforded the same rights to search when they opt for a less intrusive citation.

NATIONAL ASSN. OF POLICE ORGANIZATIONS FILES AMICUS CURIAE BRIEF TO U.S. SUPREME COURT

U.S. Newswire

June 29, 1998

WASHINGTON, June 29 /U.S. Newswire/ -- Today, the National Association of Police Organizations, Inc. (NAPO), representing more than 4,000 police unions and associations and over 220,000 sworn law enforcement officers from across the nation, submitted a legal brief in support of law enforcement officers in the case of Patrick Knowles v. State of Iowa, a Fourth Amendment vehicular search and seizure case.

This case directly bears on the authority of law enforcement officers to protect themselves and the public by conducting a search for weapons, whenever they stop a motor vehicle for a traffic violation and issue a citation instead of making an arrest (assuming there is authority to do both). NAPO and its members have a significant interest in the resolution of this case. The Iowa State Police Association is a member of NAPO, with approximately 3,000 police officer members, whose safety during traffic stops will be impacted by the Court's decision. In addition, NAPO is vitally concerned with the impact that this case will have on the safety of law enforcement officers throughout the nation. NAPO's amicus brief provides the Court with the perspective of the police profession and an insight into the serious danger inherent in routine traffic stops.

BACKGROUND: FACTS OF THE CASE

On March 9, 1996, Officer Ronald Cook of the Newton, Iowa, Police Department stopped the vehicle of Petitioner in this case, Patrick Knowles, for speeding. The officer checked the Petitioner's driver license and determined that there were no outstanding arrest warrants. The officer issued Knowles a speeding citation and then conducted a search of both Knowles and the passenger compartment of his vehicle. During that search, the officer found a pipe and some marijuana under the driver's seat. Knowles was subsequently convicted of possession of marijuana and keeping marijuana in his vehicle.

The officer issued a traffic citation and conducted this search as incident to that citation, pursuant to Iowa Code 805.1. That special provision allows law enforcement officers to issue a citation in lieu of making an arrest, as long as the officer initially has the grounds for an arrest. Under the statute, the issuance of a citation in lieu of an arrest or continued custody does not affect the officer's authority to conduct an otherwise lawful search.

Knowles moved to suppress the admissibility of the seized evidence, claiming that the search violated his Fourth Amendment rights. The following facts were undisputed: (1) The officer stopped Knowles for speeding, an offense for which he could be arrested; (2) Officer Cook had probable cause for the

stop, based on the excessive speed, but had no probable cause or suspicion to believe that Knowles was involved in any other criminal activity; and (3) Knowles did not consent to the search of his vehicle.

The trial court rejected Knowles' motion to suppress the incriminating evidence, and he was then convicted. On appeal the Iowa Supreme Court upheld his conviction, stating "an election by the officer to pursue a lesser intrusion, such as issuing a citation, may be conditioned on certain aspects of detention and search that are conducive to the officer's safety."

Knowles has appealed to the U.S. Supreme Court, and the ACLU and the National Association of Criminal Defense Attorneys have jointly submitted an amicus curiae brief on his behalf, arguing against the constitutionality of this Iowa code provision and searches conducted under it.

SUMMARY OF KEY POINTS IN NAPO'S AMICUS CURIAE BRIEF

"Traffic stops are inherently dangerous and risky and pose a significant threat to the physical safety of law enforcement officers. Stopping a motor vehicle constitutes one of the least predictable and potentially most dangerous duties of a law enforcement officer. Each traffic stop presents a situation where an officer, usually alone and without any other officer support, must confront unknown individuals, who may be hiding weapons or concealing evidence. It is not uncommon for routine traffic stops to escalate into violence, without any prior warning to the officer," said Robert T. Scully, NAPO's executive director.

In fact, tens of thousands of officers have been assaulted. From 1987 through 1996, there were 4,333 law enforcement officers assaulted through use of weapons during traffic stops and pursuits. And since the advent of the automobile, hundreds of officers have been feloniously killed by drivers or other occupants of vehicles involved in traffic stops or pursuits.

Under the Fourth Amendment, the reasonableness of a stop and search of a vehicle and its driver stop rests on the balance between an individual's right of privacy and the public's significant interest in the safety of its law enforcement officers. In Maryland v. Wilson (upholding the right of officers to order passengers out of vehicles), the Supreme Court recognized that officer safety during a vehicle stop is the crucial "public interest" factor in analyzing the reasonableness of searches and seizures. (In Maryland, the Court cited statistics showing the danger to officers, which were taken directly from NAPO's amicus curiae brief filed in that case.) Iowa Code 805.1(4), allowing for searches incident to a citation, is a reasonable effort by the State of Iowa to reduce this danger to police officers during traffic stops in a less intrusive manner than a full custodial arrest.

Past Supreme Court cases authorize searches of persons and vehicles incident to an arrest based on probable cause, even before an actual arrest occurs. The purpose of such searches is to discover weapons (in order to disarm the driver) and to preserve evidence (to prevent its destruction). The application of the Iowa statute recognizes that a law enforcement officer is exposed to a potentially dangerous situation whenever the officer stops and detains a vehicle, based on probable cause that a traffic violation has occurred. The statute is also based on the realization that this danger exists at the

onset of the stop and detention, regardless of whether the officer eventually decides to make a formal arrest or issue a citation in lieu of an arrest.

The brief urges the Supreme Court to recognize that the ultimate charging decision made by the police officer (an arrest or a citation) should not determine the validity of a search of the driver and the passenger compartment. Limiting searches during traffic stops to only when there is an eventual arrest would significantly increase the risk of harm to law enforcement officers in Iowa, whenever they issue a citation instead. The distinction between a search incident to an arrest and a search incident to a citation is meaningless in the context of officer exposure to significant danger.

Accordingly, searches incident to a citation instead of an arrest advance a significant public interest in protecting officer safety and are reasonable under the Fourth Amendment. Thus, any weapon seized or evidence of crime uncovered during such searches is properly admissible in a criminal case, as was the evidence of criminality discovered in defendant's vehicle in this case.

Furthermore, issuing a traffic citation is significantly less intrusive on the public than an arrest. A requirement that an actual arrest must occur before a search for weapons or concealed evidence can take place would deter law enforcement officers from proceeding in this less intrusive manner and result in more arrests for traffic offenses. The Iowa statute follows a more reasonable approach by giving officers needed flexibility, and thus benefits the citizens of Iowa.

In the brief's conclusion, amicus curiae National Association of Police Organizations, Inc. urged the Supreme Court to apply the doctrine of searches incident to arrests to issuances of citations in lieu of arrests during traffic stops, given the substantial public interest in officer safety, and to thereby affirm the judgment in this case of the Iowa Supreme Court.

The National Association of Police Organizations (NAPO) is a coalition of police unions and associations from across the United States that serves in Washington, D.C. to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action and education. Founded in 1978, NAPO now represents more than 4,000 police unions and associations, over 220,000 sworn law enforcement officers, 3,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

SEAT-BELT CRACKDOWN: MORE POLICE SEARCHES?

The De Moines Register

June 25, 1998

The June 10 article on the future police crackdown on seat-belt use failed to mention that this "crackdown" will also involve police searches of people and their cars merely for the heinous act of failing to wear a seat belt. It is a little known fact that in Iowa every traffic stop can result in a comprehensive search of both the vehicle and the driver. No other state allows this.

According to a series of recent Iowa rulings, during a routine traffic stop the police can search the driver and the entire interior of the vehicle. They can do this without the driver's consent and need not suspect the driver of doing anything threatening or illegal. As the Iowa Supreme Court sees it, the simple allegation that the driver did not buckle up is reason enough to allow his or her body to be searched and the car ransacked.

This comes as no surprise to the thousands of Iowans, particularly those who are poor or of color, who have suffered this degrading police tactic.

Many will find news of such "police state" methods unsettling. They are not alone. The Iowa Civil Liberties Union condemned the practice as an unreasonable search under the Fourth Amendment in an amicus curiae (friend-of-the-court) brief filed in an Iowa case (State vs. Knowles) that the U.S. Supreme Court has agreed to hear. If the high court fails to strike down this outrageous affront to liberty, then people in the rest of the nation will suffer the personal degradations Iowans are now enduring, and it might as well be declared that the Constitution does not apply to persons when they are in automobiles.

-R. Ben Stone, executive director, Iowa Civil Liberties Union,
446 Insurance Exchange Bldg., Des Moines.

BEYOND PRIVACY, BEYOND PROBABLE CAUSE, BEYOND THE FOURTH AMENDMENT: NEW STRATEGIES FOR FIGHTING PRETEXT ARRESTS

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Timothy P. O'Neill

Introduction

Consider the number of minor traffic violations that the typical driver makes each time he or she gets into a car. After following and observing a motorist for a short distance, a police officer is likely to witness at least a trivial violation by nearly every driver on the road. Failure to signal for the appropriate length of time before turning; failure to signal before every lane change; failure to come to a complete stop at a stop sign; driving too fast, too slowly, or driving too fast for the conditions in the opinion of the officer--all could justify pulling a car over and issuing a citation. Perhaps this is fair; society certainly has an interest is ensuring safety on our roads. But what if such violations would justify not only a minor fine but also the removal of the driver from his or her vehicle and a search of the entire passenger compartment including all of the driver's belongings? What if the police officer was allowed the discretion to engage in such a search based on factors such as the neighborhood in which the driver was traveling, or the driver's clothes, or the color of the driver's skin? Such a practice would be an affront to our sense of justice. One might hope that these types of searches could never be tolerated under our Bill of Rights. But these practices appear to be precisely in line with the present United States Supreme Court jurisprudence on the subject.

On June 10, 1996, the Supreme Court decided Whren v. United States, which dealt with the issue of "pretext arrests." Whren and Brown were convicted of possession of illegal drugs recovered during a police stop of their automobile. They asserted that the ostensible reasons their car was stopped by the District of Columbia Metropolitan Police Department- failure to signal for a turn; not giving full attention to the operation of a vehicle; unreasonable speed-- were merely "pretextual." That is, the police had no actual interest in enforcing these minor traffic code violations, but were merely stopping the car because Whren and Brown were young African-American men driving in a "high drug area" of Washington, D.C. This "pretext" enabled the police to engage in a legal "fishing expedition" in which illegal drugs were found. The traffic offense "pretext" thus allowed the police to search for drugs without having probable cause to believe any drugs were present.

During the past decade, the issue of "pretext arrests" has produced a wave of academic writing as well as disagreement among state and federal courts. Yet the Whren decision displayed complete consensus among the Justices of the Supreme Court. In an opinion by Justice Scalia, the Court held that the stop was proper simply because there was probable cause to believe the defendants committed the civil traffic

offenses. The Court went on to hold that any subjective reasons the police had for making the stop--that is, any "pretexts" they may have had--were irrelevant under the Fourth Amendment.

The result of Whren certainly was no surprise. After all, in cases decided by the Burger and Rehnquist Courts, the government usually has prevailed on key Fourth Amendment issues. What was surprising, however, was the unanimity in the decision. Not only was there no dissent; there was not even a concurring opinion. Moreover, the unanimous opinion in Whren was written by Justice Scalia, whose Fourth Amendment jurisprudence has occasionally placed him at odds with the rest of the Court. How could an issue which had created such controversy throughout academia and the lower courts be resolved through a unanimous opinion?

Perhaps Whren is a watershed Fourth Amendment case. The unanimous rejection of the defense position in Whren indicates the need to develop a new paradigm for analyzing issues involving law enforcement behavior in the area of searches and seizures. As this Article will illustrate, the defense bar, through its emphasis on "privacy" and on defining a "reasonable" search almost exclusively in terms of "warrants" and "probable cause," has deprived itself of the vocabulary for expressing what is constitutionally wrong with a pretextual arrest. The defense bar's crabbed view of the Fourth Amendment--which has been the focus of important new scholarship by commentators such as William Stuntz, Scott Sundby, and Akhil Amar--has placed many issues of police behavior outside the scope of the Fourth Amendment.

This article argues that the defense bar needs to be more receptive to recent scholarship which challenges traditional defense views of the meaning of the Fourth Amendment. As Whren illustrates, defense attorneys need to think beyond "privacy," "warrants," and "probable cause" in arguing which searches and seizures are "reasonable" under the Fourth Amendment. Indeed, defense lawyers need to go beyond the Fourth Amendment itself. It is time to rethink the traditional defense paradigm in search and seizure situations.

* * *

III. That was Whren, This Is Now: Two Approaches For Continuing the Fight Against Pretext Arrests.

A. Violation of a Law Does Not Necessarily Justify Police Seizure

The petitioners in Whren argued that the issue was whether a reasonable officer in the same circumstances would have made a stop for the reasons given. Yet the petitioners never made the argument that there might be some laws which, although concededly valid, may nevertheless fail to justify a seizure of a person under the Fourth Amendment. The offenses in Whren were three civil ordinances, each of which was punishable by a fine of $25. Can something be a valid, legal offense and yet not important enough to justify a seizure of a person under the Fourth Amendment?

The genesis of such an argument can be found in Justice Stewart's provocative concurrence in Gustafson v. Florida. Justice Stewart noted that Gustafson confined his argument to the proposition that the search was improper following a custodial arrest performed pursuant to police discretion. However,

nowhere did Gustafson challenge the constitutionality per se of a custodial arrest for a minor traffic offense. Thus, although that issue was not before the Court, Stewart wrote "that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments."

Can the police have "probable cause" to take certain action and yet this action would nevertheless be considered unreasonable under the Fourth Amendment? This was suggested by Judge Frank Easterbrook of the Seventh Circuit in Gramenos v. Jewel Co. Judge Easterbrook noted that under common law, an arrest for a misdemeanor could be made only if the misdemeanor was committed in the presence of the arresting officer. He noted that the Supreme Court had "bypassed opportunities" to decide if this aspect of the common law was part of the Fourth Amendment. Although the issue did not have to be resolved in Gramenos, Judge Easterbrook noted that "[i]t is important to understand that 'probable cause' is not always the same thing as 'reasonable' conduct by the police."

The concept of an offense which would not justify an arrest by the police may appear paradoxical. But there currently is a striking example of this found in the law of many states. Forty-nine states have laws requiring the use of seat belts in automobiles; yet thirty-six of these states forbid the police from stopping an automobile for commission of this offense. In other words, if the seat belt offense is discovered by the police pursuant to an otherwise proper stop, the defendant may be charged, but observation of the offense alone will not justify a stop. Thus, applying the language of Judge Easterbrook's observation, merely having "probable cause" for an action might not--at least under these state laws--make an action "reasonable."

Whren does not foreclose an argument that it may be constitutionally unreasonable under the Fourth Amendment--or at least under an individual state's version of the Fourth Amendment--to initially make a stop based on trivial traffic offenses. Analogizing to the seat belt rules in many states, an argument could be made that while there is nothing constitutionally improper with punishing people for a variety of trivial mistakes, it is a separate constitutional issue whether it is reasonable to seize and detain a person solely on the basis of such behavior.

B. Limiting Pretexts by Applying the "Void-for-Vagueness" Doctrine

As discussed above, one criticism of current Fourth Amendment jurisprudence is that it has superseded the use of other constitutional provisions which may also impact on search and seizure issues. One example is the Due Process Clause. In the wake of Whren, one theory which merits careful consideration is the "void-for-vagueness" doctrine derived from the Due Process Clause. It may provide an effective vehicle for challenging pretext arrests on both the state and federal level.

The basic concept behind the "void-for-vagueness" doctrine is that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Or, in the words of another Supreme Court decision, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Although the traditional black-letter interpretation of "void-for- vagueness" stressed lack of notice to the public as the basic due process value being vindicated, the Supreme Court has held that this is no longer true. In Kolender v. Lawson, the Court noted:

Although the [void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." When such guidelines are not provided, the result is a statute which provides a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Such a statute furnishes "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure.'" The doctrine seeks to prevent law enforcement officers from exercising a "virtually unrestrained power to arrest and charge persons with a violation."

How does this apply to Whren? Certainly the offense of failure to signal for a turn is precise enough to cabin the discretion of police officers. Also the offense of driving at an unreasonable speed is one a society might want the police to exercise according to their discretion. But consider the offense of not giving "full attention to the operation of a vehicle." This type of an offense is ripe for a "void-for-vagueness" attack.

The advantages of the void-for-vagueness doctrine over the Fourth Amendment should be obvious. One of the reasons for the stop was the existence of the $25 civil violation for failing to "give full time and attention" to the operation of the vehicle. Consequently, the Whren Court refused to look at the racial realities of the case, saying only that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."

Yet the void-for-vagueness doctrine meets the realities of discrimination head-on. The quotations from the Kolender case discussed above show the doctrine's focus on fighting arbitrary, discriminatory enforcement of laws. The California statute in Kolender punished any person wandering about the streets who refused to identify himself to a peace officer; the California Supreme Court interpreted the statute to mean that an individual must provide "credible and reliable" identification. The Court was well aware that the defendant in Kolender was an African-American man. The Court's opinion prominently notes that Mr. Lawson--who otherwise had no trouble with law enforcement authorities--had been stopped for this offense fifteen times during a two-year period. It was clear that Mr. Lawson's race, habits, and appearance made him a frequent target of police attention. In striking the statute down on void-for-vagueness grounds, the Court focused on the apparent fact that this statute allowed for arbitrary, discriminatory enforcement. It placed enormous discretion in the hands of the individual police officer to determine who came under the ambit of the statute. Kolender-- unlike Whren--looked at the realities of law enforcement.

* * *

97-7597 *KNOWLES v. IOWA*

Ruling below (Iowa SupCt, 569 N.W.2d 601):

As held in State v. Doran, 563 N.W.2d 620, 61 CrL 1295 (Iowa SupCt 1997), Iowa statute that confers authority on police to search vehicle involved in traffic violation that would constitute grounds for arrest does not violate Fourth Amendment prohibition against unreasonable searches and seizures, even when no custodial arrest is made.

Question presented: Can state, consistently with Fourth Amendment, enact statute conferring on police blanket authorization to conduct full-blown search of motor vehicle upon issuance of traffic or equipment citation?

STATE of Iowa, Appellee,
v.
Patrick KNOWLES, Appellant.
No. 96-1584.

Supreme Court of Iowa.
Oct. 22, 1997.

Considered en banc.

CARTER, Judge.

Defendant, Patrick Knowles, was convicted of possession of a Schedule I controlled substance (marijuana) in violation of Iowa Code section 124.401(3) (1995) and keeping a controlled substance in an automobile in violation of Iowa Code section 124.402(1)(e). He appeals and challenges evidentiary rulings that allowed evidence of marijuana that had been obtained by a search of his person and automobile incident to the issuance of a traffic citation. Defendant divides his grounds for reversal into four contentions: (1) the lack of probable cause to search under the Fourth Amendment to the federal constitution, (2) the invalidity of a purported statutory grant of authority to search based on the issuance of a traffic citation, (3) the invalidity of a purported authorization for custodial arrest for a speeding violation under the seizure restrictions of the Fourth Amendment to the federal constitution, and (4) that it was unreasonable to detain the defendant after the issuance of the citation had been completed. Because we find the controlling issues of law have been determined adversely to defendant in State v. Doran, 563 N.W.2d 620 (Iowa 1997), we affirm the judgment of the district court.

We need not consider defendant's first contention as existing separate and distinct from the second. The State does not contend that there was probable cause to search under the warrant standards of the Fourth Amendment. Defendant was stopped by police for driving at an excessive speed. There were no circumstances indicating that evidence of crime existed on his person or in his automobile. The officer's election to search his person and his car was based solely on the perceived authority to search conferred by Iowa Code section 805.1(4). We thus proceed to the consideration of defendant's contention that this statute is unconstitutional.

We have consistently interpreted section 805.1(4) as providing authority to search when a traffic violation has occurred that would constitute grounds for an arrest. State v. Meyer, 543 N.W.2d 876, 879 (Iowa 1996); State v. Becker, 458 N.W.2d 604, 607 (Iowa 1990). Defendant does not contest the fact that he was speeding or that there was a statutory basis for arrest. See Iowa Code section 805.7. In Doran we upheld the authority to search conferred by section 805.1(4) in the face of challenges based on the Fourth Amendment and article I, section 8 of the Iowa Constitution.

Defendant urges us to reconsider our Doran holding. He asserts that, because the "search incident to an arrest" exception to the Fourth Amendment is the only constitutional predicate on which the State seeks to support the authority to search his person and automobile, there must have in fact been a custodial arrest to satisfy the limitations on searches imposed by the Fourth Amendment.

He urges that our holding in Doran that the constitutional basis for the "search incident to an arrest" exception is satisfied by the presence of grounds for arrest rather than the making of a custodial arrest is misguided. We disagree. The suggestion that the constitutional basis for the "search incident to an arrest" exception is an actual arrest is belied by those decisions that hold that the timing of the arrest need not precede the search. See State v. Peterson, 515 N.W.2d 23, 25 (Iowa 1994); State v. Beatty, 305 N.W.2d 496, 498 (Iowa 1981). And, when the search produces an independent ground for an arrest on a more serious charge, the foregoing of an arrest for the traffic violation does not defeat the authority to search. See People v. Rossi, 102 Ill.App.3d 1069, 1073, 430 N.E.2d 233, 236 (1981).

We are satisfied that our decision in Doran properly identified the public policy reasons that support the "search incident to an arrest" exception when grounds for a legal arrest are present. When an officer has a legal basis to make a custodial arrest and thereby acquires grounds for searching a suspect's person or automobile in the absence of probable cause, an election by the
officer to pursue a lesser intrusion, such as issuing a citation, may be conditioned on certain aspects of detention and search that are conducive to the officer's safety. Based on those considerations, the legislature's grant of the authority to search provided in section 805.1(4) does not offend against the Fourth Amendment.

Defendant's third point, which suggests that the statutory authorization for a custodial arrest on a speeding charge is an unlawful authorization of an illegal seizure of the person under the Fourth Amendment, was not raised in the motion to suppress before the district court and thus may not be considered by us. His argument that he was unreasonably detained following the issuance of the citation must be rejected because the further detention was for purposes of making a search that has now been determined to be lawful. We have considered all issues presented and conclude that the judgment of the district court should be affirmed.

AFFIRMED.

All justices concur except NEUMAN, LAVORATO, SNELL, and TERNUS, JJ., who dissent.

NEUMAN, Justice (dissenting).

For the reasons expressed in my dissent to State v. Doran, 563 N.W.2d 620, 623 (Iowa 1997) (Neuman, J., dissenting), I cannot join the majority opinion. The constitutional reasonableness of a statute that purports to authorize a search that is neither pursuant to warrant, incident to custodial arrest, or based on probable cause simply cannot be decided in the abstract. The validity of such a search is "pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." Sibron v. New York, 392 U.S. 40, 59, 88 S.Ct. 1889, 1901. The United States Supreme Court has never departed from this principle and neither, I respectfully suggest, should we.

MINNESOTA v. CARTER

By Darren Welch

When the blinds are drawn, does one have a legitimate expectation of privacy? Does it matter who is inside and what they are doing, even if one is conducting an illegal activity? The Supreme Court must now decide these fundamental questions on privacy within a residence.

On May 15, 1994, an anonymous informer tipped off an Eagan, Minnesota police officer that as he walked by an apartment, he observed people bagging a white powder in the apartment. Checking out the tip, the officer approached the ground floor window of the apartment, left the common sidewalk that led to the apartment's entrance, and stepped onto a common grassy area closer to the window. The officer then walked behind some short bushes and stood 12-18 inches from the window, from where he observed, though gaps in the closed blinds, defendants Wayne Carter and Melvin Jones bagging a white substance.

Defendant Carter was tried on stipulated facts in Minnesota District Court and was convicted of conspiracy to commit a controlled-substance crime and aiding and abetting the same. Carter appealed his conviction, challenging the legality of the police officer's observation through the apartment window. The Minnesota Court of Appeals held that Carter did not have standing to object to the visual search because he was not a resident or a social guest, only an acquaintance for business purposes.

The Supreme Court of Minnesota affirmed. Justice Tomljanovich, writing for the majority, ruled that Carter had a legitimate expectation of privacy and thus had standing to challenge the search. The court reversed the conviction, ruling that the observation through the window was an unreasonable search in violation of the Fourth Amendment.

The Supreme Court granted certiorari to decide: 1) If an invitee whose sole purpose is to assist in illegal activity has a legitimate expectation of privacy; and 2) Whether the non-enhanced use of an officer's senses to observe criminal activity in a residence from a public area outside the curtilage of the residence is an unreasonable search in violation of the Fourth Amendment.

CONNECTICUT SEARCH & SEIZURE LAW: THE CONNECTICUT SUPREME COURT SHOULD ADOPT A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE TO ARTICLE FIRST, SECTION 7, OF THE CONNECTICUT CONSTITUTION

Bridgeport Law Review

Winter, 1993

Bruce R. Lockwood

* * *

II. BACKGROUND

A. Federal Search & Seizure Law

A search or seizure under the Fourth Amendment occurs when the police intrude upon an area where individuals have a reasonable expectation of privacy. There is a two-fold requirement for Fourth Amendment protection. First, the person must "have exhibited an actual (subjective) expectation of privacy . . . . " Second, that the "expectation [of privacy] be one that society is prepared to recognize as 'reasonable'." A police search of a suspect's home, for example, will invoke the suspect's Fourth Amendment rights. The fact that the suspect intends to keep his home private by locking his doors and closing his window blinds indicates an actual subjective expectation of privacy. Furthermore, society has always recognized the sanctity of the home. Thus, Justice Harlan's two-part test to determine whether a reasonable expectation of privacy exists is satisfied. Therefore, the police would need to obtain a search and seizure warrant to enter the home legally.

Courts favor search warrants over warrantless searches because the warrant process interposes a neutral judicial official into the probable cause determination. In the warrantless context, the police officer determines whether probable cause exists and acts without a judicial imprimatur. Judges or magistrates may issue a search and seizure warrant based upon an affidavit or sworn oral testimony. The affidavit needs to establish probable cause to search a particular location. In particular, this requires a showing that the specific items sought are connected with criminal activity and that the items will be found in the particular location.

Moreover, a police officer attempting to secure a valid search warrant based on information obtained from an informant should establish the informant's veracity and his basis of knowledge. Indeed, prior to the Court's 1983 decision in Illinois v. Gates, the United States Supreme Court required police officers to satisfy this two-part test known as the Aguilar-Spinelli test. However, Gates held that the measure of probable cause in a search warrant should be based on the totality of the circumstances, rather than the rigid two-part Aguilar-Spinelli test. Thus, the probable cause standard is an amorphous one. Nevertheless, a magistrate must be convinced that the police officer's affidavit establishes probable cause before he signs and issues the search warrant. But what remedy is available if the police search the

suspect's home without a warrant or probable cause and seize incriminating evidence? The most commonly invoked remedy is the exclusionary rule.

1. Exclusionary Rule--Federal Level

The exclusionary rule prohibits prosecutors from using evidence in their case-in-chief that the police obtained in violation of the Fourth Amendment. Thus, the incriminating evidence seized by the police in the suspect's home would be inadmissible in a prosecution against him. The effect of the exclusionary rule is apparent--guilty criminals may escape prosecution. However, the rationale behind the exclusionary rule is that it deters the police from violating the Fourth Amendment.

Debate concerning the validity of the exclusionary rule has prevailed for most of the twentieth century. The United States Supreme Court first enunciated the Federal Fourth Amendment exclusionary rule in Weeks v. United States in 1914. Furthermore, in 1949, the United States Supreme Court, in Wolf v. Colorado incorporated the Fourth Amendment into the Fourteenth Amendment and applied it to the states. However, the Court held that the Fourteenth Amendment did not require states to exclude evidence obtained by an unconstitutional search. The lack of vertical uniformity between the federal courts and those state courts that did not apply the exclusionary rule produced the anomalous "silver platter" doctrine. Evidence illegally seized by state police officers independent of federal agents was admissible in federal courts. It was not until 1960 that the Supreme Court overruled this doctrine. However, state courts still admitted evidence illegally seized by federal agents. Thus, the need for vertical uniformity was one rationale cited by the Supreme Court in its 1961 landmark decision in Mapp v. Ohio.

In Mapp, the Supreme Court overruled Wolf, holding that evidence seized in violation of the Fourth Amendment was inadmissible not only in federal courts, but also in state courts. Justice Clarke writing for the 6-3 majority further held that the Fourth Amendment incorporated the exclusionary rule. The Court based its reasoning primarily on deterrence, in addition to judicial integrity, practical considerations and due process concerns. Thus, the exclusionary rule was and still is the law of the land, but in a much diluted sense. For example, in 1976, Justice White's dissent in Stone v. Powell stated that the Fourth Amendment exclusionary rule "should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law " Justice White's dissent in Stone, a mere acorn in 1976, took root and matured into a formidable oak tree in the form of the United States Supreme Court's 1984 decision in Leon.

* * *

GLIMPSE OF DRUGS HELD TO JUSTIFY WARRANTLESS SEARCH

New York Law Journal

May 14, 1997

Deborah Pines

POLICE officers were authorized to search a New Haven, Conn., apartment after an informant's tip led them to a yard where they saw drug activity through a window's partially open blinds, a federal appeals panel in Manhattan has ruled.

Because the men arrested, James Fields and Christopher Crawley, conducted their activities "in plain view of an area where others were free to come and go," they failed to demonstrate the 1994 search violated their privacy rights, declared the panel of the U.S. Court of Appeals for the Second Circuit in United States v. Fields, 96-1168.

The decision, written by Second Circuit Judge Richard J. Cardamone, affirmed the cocaine- trafficking convictions of Messrs. Fields, 27, and Crawley, 24, both of New Haven. It also construed recent precedents on such issues as who has standing to challenge police searches and what circumstances permit police to enter homes without warrants and without knocking and announcing their presence.

Filed on Monday, the ruling was joined in by Second Circuit Judge James L. Oakes. A third panel member, Second Circuit Judge J. Daniel Mahoney, died in October 1996, so the case was decided by just two members.

Messrs. Fields and Crawley were arrested at around 9 p.m. on Dec. 15, 1994, after an informant told police the men were bagging crack cocaine in a woman's ground-floor apartment at 381 Edgewood Ave. in New Haven.

Following the tip, the police entered a fenced-in side yard for the building which has three apartments. From the yard, they said, they saw the drug activity in a well-lit bedroom through a window with venetian blinds raised five or six inches.

Police then raided the apartment, using a battering ram to break down a door, without a warrant and without knocking and announcing their presence. Justifying their haste, they said, were many factors including the fact that the informant said the men would be leaving soon. They also cited fear of potential violence and destruction of the evidence - $40,000 worth of crack cocaine.

After a trial, Mr. Fields was convicted on two drug counts and sentenced by Connecticut Chief District Judge Peter C. Dorsey to 20 years in prison and a $25,000 fine. Mr. Crawley, who entered a conditional guilty plea to one count, reserving his right to challenge his arrest, was sentenced by Judge Dorsey to six years in prison.

Privacy Rights

On appeal, both men argued the evidence seized should have been suppressed for many reasons. They claimed the search, based on peering through the window of a private residence, violated their Fourth

Amendment privacy rights. They also argued the case circumstances did not justify the officers' warrantless entry and failure to knock and announce themselves.

Judge Cardamone disagreed.

After finding the men, who had permission from the rental tenant to use the apartment more than 40 time prior to their arrest, have standing to challenge the search, Judge Cardamone found the search did not violate their privacy rights.

He distinguished this case from a 1996 decision from the U.S. Court of Appeals for the Fifth Circuit, United States v. Blount, 98 F.3d 1489, which invalidated a police search following an officer's peering from a private yard through a boarded up window after leaning against the building.

Judge Cardamone noted Blount involved police entering a private yard of a single-family residence unlike this case which involved police entering a yard shared by residents of a multi-family building. He also noted police in Blount peered through a narrow gap in plywood, where here police looked through a five-to-six-inch opening beneath the window blinds.

"By exposing their illicit cocaine activities to the side yard, a place where they should have anticipated that other persons might have a right to be, defendants failed to exhibit a subjective expectation that they intended their dealings in the bedroom to be private," Judge Cardamone wrote.

97-1147 ***Minnesota* v. *Carter***

Ruling below as to respondent Carter (State v. Carter, Minn SupCt, 569 N.W.2d 169, 66 LW 1207, 61 CrL 1548):

Defendant who was in apartment with permission of leaseholder and, while there, collaborated with leaseholder on shared, albeit illegal, task while there for some two and one-half hours had standing to challenge legality of search of apartment; officer's act of peeking through cracks in closed window blind, from vantage point accessed only through extraordinary measures of leaving sidewalk, traversing grassy area, and climbing over bushes, to spot where neither neighbors nor general public would be expected to be, qualified as search and violated state and federal constitutions.

Ruling below as to respondent Johns (State v. Johns, Minn SupCt, 569 N.W.2d 180):

Lower court opinion upholding defendant's convictions is reversed on basis of reasoning in State v. Carter, 569 N.W.2d 169, 66 LW 1207, 61 CrL 1548 (Minn SupCt 1997).

Questions presented: (1) Does invitee into residence, whose sole purpose for being present is to assist resident in illegal activity, have legitimate expectation of privacy under Fourth Amendment while within residence? (2) Under Fourth Amendment, does police officer's non-enhanced use of his natural senses to observe criminal activity in residence from public area outside curtilage of residence constitute search?

STATE of Minnesota, Respondent
v.
Wayne Thomas CARTER, petitioner, Appellant

Supreme Court of Minnesota.
Sept. 11, 1997.

TOMLJANOVICH, Justice.

By looking through the gaps in the closed blinds covering a window, a police officer observed the appellant, Wayne Thomas Carter, as he engaged in a drug- packaging operation with two other persons, one of whom was the leaseholder of the apartment. The district court held that Carter, who was an out-of-state visitor, did not present any evidence to establish his standing to contest the legality of the observation. The court also concluded that the officer did not conduct a search because he made the observations from an area where Carter did not have a reasonable expectation of privacy. The court of appeals affirmed the district court, but based its holding only on the finding that Carter did not have standing to bring a motion to suppress any evidence obtained from the officer's observations. We reverse, and hold that the evidence was sufficient to establish that Carter had standing to challenge the legality of the observation. We further hold that the officer's observation rose to the level of a search, and that the officer's lack of probable cause and a warrant rendered the search unreasonable under the Fourth Amendment of the United States Constitution, and Article I, Section 10 of the Minnesota Constitution.

At approximately 8 p.m. on the evening of May 15, 1994, an anonymous informant approached Eagan police officer Jim Thielen. The informant, whom Thielen never had seen before, told Thielen that he/she had walked by apartment 103 at 3943 South Valley View Drive and observed people sitting around a table inside the apartment "bagging" a white powder. The informant also told Thielen that he/she believed the occupants of the apartment had used a blue four-door Cadillac located in the parking lot adjacent to the apartment complex. The informant also told Thielen that the car had an Illinois license plate that read SGD 896. In response to this information, Thielen went to the complex and approached the ground floor window of apartment 103. Thielen then walked toward the window of the apartment by leaving the common sidewalk that led to the apartment building's entrance and stepping on a grassy common area closer to the window. Thielen then walked behind some short bushes located in front of the apartment window and stood approximately 12 to 18 inches from the window. The window's blinds were drawn closed, but gaps in the blinds allowed Thielen to observe activity in the apartment. While looking through the gaps in the blinds, Thielen observed two males and one female sitting at a kitchen table. One of the males appeared to be placing a white powdery substance onto the kitchen table. This person then would pass the white substance to the second male who then would place the powder into a plastic bag. The second male, who was wearing bedroom slippers, would in turn give the plastic bag to the female who would cut off the ends of the bag and place it on the table.

After observing this activity for approximately 15 minutes, Thielen left the apartment complex and went to a nearby fire station where he had another conversation with the informant and another Eagan police officer. At this time the informant told the officers that the people inside the apartment might be in possession of a gun. Thielen then returned to the apartment complex where he located a Cadillac matching the description given by the informant. He then returned to the fire station, telephoned Officer Kevin Kallestad of the South Metro Drug Task Force, and reported what he had seen. Kallestad instructed Thielen to stop and secure the suspect vehicle should anyone attempt to drive it away. Police also began to prepare affidavits as part of a request for warrants to search both the apartment and the Cadillac.

At approximately 10:30 p.m., an Eagan police officer observed two males putting items into the suspect Cadillac. The two males then entered the vehicle and started to drive it out of the parking lot. As per instructions, Eagan police stopped the vehicle at the intersection of Rahn Road and Beau de Rue Drive. The police found Carter in the driver's seat and Melvin Johns in the passenger's seat. The police ordered both men out of the car. As the police opened the door to let Johns out of the car, they observed a black zippered pouch and a handgun, later determined to be loaded, on the floor of the vehicle. The police then placed Carter and Johns under arrest. The police subsequently towed the Cadillac to the Eagan Police Department, and after receiving the signed search warrant at approximately 1:30 a.m. on May 16, the police searched the vehicle. When the officers opened the black zippered pouch, they discovered a white mixture in plastic baggies, Johns' identification, pagers, and a scale. Tests later determined that the white mixture was 47.1 grams of cocaine.

Late in the evening of May 15, after the arrests of Carter and Johns, Eagan police returned to apartment 103 and arrested its occupant, Kimberly Thompson. At approximately 3 a.m. on May 16, police executed a search warrant on the apartment and located cocaine residue on the kitchen table and plastic baggies consistent with those found in the automobile driven by Carter. Thielen subsequently identified Carter, Johns and Thompson as the individuals he had observed in the apartment packaging the white mixture. He identified Carter as the individual he had seen putting the white mixture on the table and dividing it into piles, Johns as the man who wore slippers and placed the piles into baggies, and Thompson as the individual who cut the ends off the baggies and placed the baggies in piles. Police ultimately learned that Carter and Johns were residents of Chicago, Illinois, and that Thompson was the sole lessee of apartment 103. Subsequent to his arrest, Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine. Johns made a statement to the police admitting he had accepted a proposal to transport cocaine from Illinois to Minnesota for money, and that he, Carter and Thompson had packaged the cocaine at Thompson's apartment. He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle.

Carter, Johns and Thompson made motions through joint counsel to suppress their statements and all evidence seized from both the apartment and the Cadillac. They argued, among other things, that Thielen's initial observation through the window of Thompson's apartment was an unreasonable search under the Fourth Amendment and that all evidence

obtained as a result of those observations should be excluded as fruit of the poisonous tree. After a two-day omnibus hearing, the district court denied the motions to suppress of Carter and Johns. The court held that the two defendants did not have standing to challenge Thielen's observations through Thompson's window because both defendants failed to present evidence that their expectations of privacy in the apartment were based upon "understandings that are recognized and permitted by society." See Rakas v. Illinois, 439 U.S. 128, 143-44 n. 12, 99 S.Ct. 421, 430 n. 12 (1978). In particular, the court noted that the only evidence presented by the defense showed that the two defendants were out- of-state residents who had been at the apartment for a period of time on May 15, 1994. The district court also concluded that Thielen's observation was not a search within the meaning of the Fourth Amendment because the officer made his observation from an area in which the defendants had no reasonable expectation of privacy.

Following the district court's denial of their motions to suppress, Carter and Johns proceeded with separate counsel. The district court tried Carter on stipulated facts and found him guilty of conspiracy to commit a controlled-substance crime in the first degree and aiding and abetting a controlled- substance crime in the first degree. Minn.Stat. s 152.021, subd. 1(1), subd. 3(a) (1996); Minn.Stat. s 609.05 (1996). The district court denied Carter's request for a downward departure and sentenced him to 86 months. Carter appealed his conviction, challenging the legality of Thielen's observations through Thompson's apartment window. The court of appeals held that Carter did not have standing to object to Thielen's actions because Carter's claim that he was predominantly a social guest was "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs." State v. Carter, 545 N.W.2d 695, 698 (Minn.App.1996).

Because the facts of this case are not in dispute, we will review de novo the district court's denial of Carter's motion to suppress. State v. Othoudt, 482 N.W.2d 218, 221 (Minn.1992). Before a criminal defendant can bring a motion to suppress evidence on the basis that it was obtained in violation of the Fourth Amendment, the defendant must show that he or she is a proper party to assert the claim of illegality and to seek the remedy of exclusion. To establish such a showing, a party must demonstrate two things: First, that he or she has an adversary interest in the outcome. Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 702, 7 L.Ed.2d 663 (1962). And second, that the adverse interest is based upon an alleged violation of the rights of the individual, rather than the violation of the rights of some third party. Jones v. United States, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960)(overruled on other grounds). As far as the first factor is concerned, a criminal defendant against whom the allegedly illegally obtained evidence is being offered surely qualifies as one who has an adversary interest. See 5 Wayne R. LaFave, Search and Seizure s 11.3, at 117 (3d ed.1996) (hereinafter LaFave). Consequently we hold that Carter had an adversarial interest in the outcome. The

We therefore begin our analysis by addressing the question of standing, and only if we determine that Carter had standing to bring a motion to suppress evidence recovered as a result of Thielen's observation of the apartment, will we address the legality of Thielen's actions--whether his observation qualified as a search, and if it did, whether it was reasonable.

I. Standing

analysis of the second factor is not so easily decided, however. As the United States Supreme Court has told us, the question turns on a "determination of whether the disputed search has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Rakas, 439 U.S. at 140, 99 S.Ct. at 429. Such an interest exists when "the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Id. at 143, 99 S.Ct. at 430. The question before us, therefore, is whether Carter had a legitimate expectation of privacy in Thompson's apartment.

A defendant has a legitimate expectation of privacy when his or her subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.' " Id. at 143-44 n. 12, 99 S.Ct. at 430 n. 12 (quoting Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)(Harlan, J., concurring)). In other words, a criminal defendant must make two showings to establish that he or she based the motion to suppress upon an alleged violation of his or her individual Fourth Amendment right. First, he or she must show a subjective expectation of privacy, and second, he or she must show that this expectation was reasonable in light of "longstanding social customs that serve functions recognized as valuable by society." Olson, 495 U.S. at 98, 110 S.Ct. at 1689.

In the case at bar, it is clear that Carter had a subjective expectation of privacy. He was inside the apartment of an acquaintance with the doors shut and the blinds drawn. The more difficult question is whether Carter's expectation was legitimate, that is, whether the expectation was the type that society is prepared to recognize as reasonable. Both the district court and court of appeals concluded that Carter failed to establish that his subjective expectation was legitimate. The district court based its conclusion on the fact that Carter offered no evidence that his status in relation to the apartment was similar to the status of the defendant in Olson, or that his status was such that it provided a legitimate expectation of privacy in the apartment. Likewise, the court of appeals based its conclusion on the fact that Carter's claim that he was a social guest was inconsistent with the "only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose " Carter, 545 N.W.2d at 698. In both cases, the courts focused on the facts of Olson, a case in which there was no dispute that the criminal defendant was an overnight guest of the person who had the possessory interest of the searched residence.

By comparison, it is undisputed that Carter failed to produce any evidence that he was a "guest" of Thompson's, let alone an "overnight guest." But a closer reading of Olson reveals that the Supreme Court does not require a person to establish his or her status as either a guest or overnight guest before that person can prove a legitimate expectation of privacy in a location that is searched. Instead, the person must establish only that under the totality of the circumstances, the person's subjective expectation was the type of expectation that "society is prepared to recognize as 'reasonable.'"

Admittedly, such a test is a difficult one to define, let alone apply. But the Supreme Court's own words offer guidance. "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." Olson, 495 U.S. at 98,

110 S.Ct. at 1689. In other words, the Court in Olson did not recognize the expectation of privacy as legitimate merely because the criminal defendant was a guest. Rather, it recognized the defendant's expectation of privacy as legitimate because the criminal defendant's status as a guest was the type of longstanding social custom that serves functions recognized as valuable by society. As the Court went on to state: "The point is that hosts will more likely than not respect the privacy interest of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." Olson, 495 U.S. at 99, 110 S.Ct. at 1689. Consequently, if Carter had established that his status is the type that serves functions recognized as valuable by society, his expectation of privacy would have been legitimate.

The stipulated facts show that the apartment's leaseholder allowed Carter and Johns into her apartment for the purpose of packaging cocaine in exchange for one-eighth ounce of cocaine; that Thielen observed all three persons inside the apartment as they collaborated to divide and package the cocaine; that Carter and Johns remained inside the apartment for at least 2 1/2 hours, and that Johns was wearing bedroom slippers while inside the apartment. Although we recognize that these facts probably fail to establish Carter as a "guest" of the apartment's leaseholder, we conclude that they were sufficient to prove that Carter was the type of person who possessed a legitimate expectation of privacy in the apartment. After all, Carter had the leaseholder's permission to be inside the apartment. He remained inside the apartment for at least 2 1/2 hours, during which time he worked in concert with the leaseholder on a common task. Whether these facts establish Carter as a visitor, invitee or business partner does not matter. As the Court has carefully noted, arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like do not control. Jones, 362 U.S. at 266, 80 S.Ct. at 734. What does control, however, is the nature of the relationship between the property possessor and the person alleging the privacy interest in the property. If the relationship is the type that society recognizes as valuable, then we will find standing. If it is not, then we will not. Although society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity. We, therefore, hold that Carter had standing to bring his motion to suppress the evidence gathered as a result of Thielen's observations.

II. The Search

Having determined that Carter had standing to assert a violation of the Fourth Amendment, we now turn to the question of whether Thielen's observation constituted a search. A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation of privacy. California v. Ciraolo, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986) (citing Katz, 389 U.S. at 360, 88 S.Ct. at 516 (Harlan, J. concurring)). The state argues Thielen's observations did not rise to the level of a search because he was not inside the leaseholder's "curtilage" when he made his observation. As support for its argument, the state offers State v. Krech, 403 N.W.2d 634 (Minn.1987) for the proposition that the common grounds of multi-unit apartment complexes are not entitled to Fourth Amendment protection. In Krech, we stated: "it

is a fair generalization that the lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single family residence" because "the privacy expectation as to such an area is often diminished because it is not subject to the exclusive control of one tenant and is utilized by tenants generally and the numerous visitors attracted to a multiple occupancy building."403 N.W.2d at 637. The state's argument misses the point of Krech, however.

In developing the concept of "curtilage," the Supreme Court actually extended Fourth Amendment protection to those areas so intimately tied to the home itself that an individual reasonably could have expected persons to treat those areas as part of the home. United States v. Dunn, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139 (1987). The curtilage cases, therefore, necessarily involve factual scenarios in which police search areas spatially removed from the home itself. See, e.g., Dunn, 480 U.S. at 297, 107 S.Ct. at 1137 (agents entered area surrounding barns, 50 feet from house); Krech, 403 N.W.2d at 637-38 (police entered yard of duplex where garbage cans were kept). The key question in a curtilage case is not where the police officer was standing when he made his observation, although police officers must establish that they had a legal right to be where they were at the time of the observation, rather it is the area that was observed. Although it is plausible that Thielen's presence just outside the apartment window was legitimate, the state cannot rely on Thielen's position alone to justify his subsequent observation into the apartment. The fact that a police officer was situated outside a residence's curtilage does not necessarily eliminate the occupant's expectation of privacy within the interior of the dwelling. 1 LaFave, supra, s 2.3(d), at 495-96.

The fundamental question under Katz is whether the looking intruded upon the justified expectation of privacy of the occupant.

This, in turn, ordinarily requires consideration of two factors: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view was achieved.Id. at 497.

This, of course, does not mean that all instances in which a police officer looks into a house or apartment will be a search under the Fourth Amendment. "What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection." Katz, 389 U.S. at 351, 88 S.Ct. at 511. We, therefore, have held that police did not violate a homeowner's expectation of privacy by walking onto the homeowner's driveway and observing stolen property that was in plain sight from the driveway. State v. Crea, 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975). Other courts similarly have found no Fourth Amendment protection for activities that are easily observable by the general public. People v. Wright, 41 Ill.2d 170, 242 N.E.2d 180 (1968) (finding no search where officer standing on transit authority right-of-way was able to see through a crack in the window curtain into defendant's apartment).

People who close their doors and window blinds, however, do not knowingly expose their activities to the public. Consequently, we conclude that Carter, Johns, and Thompson took sufficient precautions to keep their activities private. It was only after Thielen left the sidewalk, walked across the grass, climbed over some bushes, crouched down and placed his face 12 to 18 inches from the window that their activities became observable. As one noted commentator has stated:

[W]hen police surveillance takes place at a position which cannot be called a "public vantage point," i.e., when the police--though not trespassing on the defendant's curtilage--resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would be expected to be, the observation or overhearing of what is occurring within a dwelling constitutes a Fourth Amendment search. This is really what Katz is all about.

1 LaFave, supra, s 2.3(d), at 482. Several courts have agreed that it is a search whenever police take extraordinary measures to enable themselves to view the inside of a private structure. The question before us, therefore, is whether Thielen took extraordinary measures to enable him to view the inside of the apartment. Although it is a close question whether Thielen's location at the time of his observation was legitimate, the totality of his acts makes such a determination unnecessary. For even if we concluded that the area just outside the apartment window was a common area, the fact that Thielen left the sidewalk, walked across the grass, climbed over the bushes, placed his face within 12 to 18 inches of the window and peered through a small gap between the blinds makes it clear that he took extraordinary measures to enable himself to view the inside of a private dwelling. If we conclude that his actions constituted anything other than a search, it is difficult to imagine when we would be able to say that any activity short of an actual physical intrusion of a dwelling would violate a person's expectation of privacy. We therefore hold that Thielen's conduct constituted a search under the Fourth Amendment.

III. Reasonableness of the Search

The Fourth Amendment protects persons from, among other things, unreasonable searches. U.S. const., amend. IV In order for a search to be reasonable, the police must have both probable cause and a search warrant. Id.; In re Welfare of G. (NMN) M., 560 N.W.2d 687, 692 (Minn.1997). In the case at bar, the state conceded that, prior to his observations through Thompson's window, Thielen did not have probable cause to obtain a search warrant. The facts also show that Thielen did not have a search warrant at the time of the observation. Despite these facts, the state now asserts that Thielen's search was reasonable because he had a reasonable basis for believing the occupants of Thompson's apartment were engaged in drug activity and because his search was minimally intrusive. As the Supreme Court made clear in Katz, however, conduct that would constitute an illegal search does not become something less merely because the police had reasonable suspicion and embarked on a search of limited intrusiveness. As such, we once again reject the notion that a little bit of information justifies a little bit of a search.

Reversed.

MITCHELL v. U.S.

By Darren Welch

The Fifth Amendment gives a criminal defendant the right not to testify and to not have that refusal held against her. If that privilege does not exist during the sentencing phase, the defendant is opening herself up to a stiffer sentence for refusing to testify, thus perhaps contravening the spirit of the Fifth Amendment. The Supreme Court will now decide if a defendant has the right to remain silent at the sentencing phase of the trial.

Defendant Amanda Mitchell, a former factory worker in her mid-forties, was indicted with 22 other defendants in a cocaine conspiracy. Mitchell entered an open plea of guilty (not induced by a plea bargain) to all charges but reserved the right to contest the amount of drugs that she distributed. U.S. District Court judge Edward Cahn recognized the reservation and at the sentencing hearing other members of the drug conspiracy testified that Mitchell had distributed over five kilograms of cocaine. Mitchell refused to testify on her own behalf as to the amount of cocaine she distributed. The judge made a finding that Mitchell had distributed over five kilograms of cocaine and sentenced her to the mandatory 120-month minimum sentence. The judge said he based his factual finding that Mitchell had sold over five kilograms of cocaine at least partly on the fact that she did not testify in her own behalf.

On appeal, Mitchell argued that the Fifth Amendment should apply to sentencing. Mitchell's attorney stressed that Mitchell invoked her Fifth Amendment privilege for fear that her own testimony would make her look more culpable that she really was and would raise her sentence.

The Third Circuit affirmed the sentence. Writing for the majority, Chief Judge Sloviter stated that the defendant no longer retained the right to invoke the Fifth Amendment at a sentencing hearing. Although Mitchell did face a potentially stiffer penalty for what her testimony may have produced, it did not expose her to implication in other crimes. The judge argued that so long as the testimony can not further incriminate her, the Fifth Amendment's protection does not apply at sentencing. Sloviter also relied on hornbook law which states that upon conviction, "criminality ceases; and with criminality, the privilege."

The Supreme Court granted certiorari on the question whether a criminal defendant has a right to remain silent at sentencing. The Supreme Court ruled in *Estelle v. Smith* (1981) that a convicted criminal in a capital case retains her Fifth Amendment right against self-incrimination during sentencing, but apparently the Court has not addressed the issue in non-capital cases.

All other circuits to consider the issue have ruled that the Fifth Amendment does apply if the testimony could be used to increase the sentence.

The National Association of Criminal Defense Lawyers urged the Supreme Court to take the appeal and rule in favor of Mitchell. The association argues that the Third Circuit's ruling confronts defendant's with a "cruel trilemma" of self-accusation, contempt, or perjury.

TOP COURT TO REVIEW RIGHT TO REMAIN SILENT; DRUG SENTENCING HEARING AT ISSUE

Chicago Tribune

June 16, 1998

Glen Elsasser, Washington Bureau.

The Supreme Court on Monday agreed to review the case of a Pennsylvania woman, a recovered drug addict serving a 10-year prison term for refusing to tell a judge how much cocaine she might have distributed.

"I am thankful to be alive today, (for) getting away from drugs," Amanda Mitchell told the judge at her 1996 sentencing. Mitchell added that she was so addicted to drugs that she could not have been involved in a large-scale operation to sell them.

As a result of her refusal to say more, U.S. District Judge Edward Cahn relied on conflicting testimony about Mitchell's activities from members of an Allentown drug ring and gave her the mandatory minimum sentence.

The U.S. Court of Appeals in Philadelphia last year upheld the sentence.

At issue in the case is a defendant's right to remain silent at sentencing without being penalized.

Mitchell's lawyer, Steven Morley of Philadelphia, on Monday explained the issue raised by her appeal: "The significant thing here is that she invoked her 5th Amendment privilege for fear that her own testimony would make her look more culpable than she was and drive her sentence higher and higher."

He stressed that Mitchell, a former factory worker in her mid-40s, "got involved with people in the conspiracy primarily as a user" and has no "reliable measure" of the drugs she might have handled in the few drug transactions she was involved in.

According to Morley, Mitchell had no prior criminal record when she started using cocaine in the early 1990s. At one point, he said, she had to sell her furniture to maintain her habit.

The National Association of Criminal Defense Lawyers had urged the court to hear Mitchell's appeal and to rule that a defendant can remain silent without penalty at sentencing.

"A criminal defendant who has pleaded guilty retains the right to assert the 5th Amendment privilege against being compelled to be a witness against herself at sentencing," the association told the court.

Furthermore, the association said, the increased sentence "was expressly predicated on drawing an adverse inference" from Mitchell's silence.

The friend of the court brief cited Justice Department statistics showing that 90 percent of federal criminal defendants whose cases are not dismissed plead guilty as Mitchell did.

"In the vast majority of federal cases, sentencing is the most important issue," the brief said. "Conduct for which the defendant has not been convicted can add years to her punishment in the most routine cases."

CRIMINAL PROCEDURE--FIFTH AMENDMENT--THIRD CIRCUIT DENIES SELF-INCRIMINATION PRIVILEGE AT SENTENCING HEARING.--UNITED STATES v. MITCHELL, 122 F.3D 185 (3D CIR. 1997).

Harvard Law Review

February, 1998

In Estelle v. Smith, the Supreme Court ruled that a convicted criminal defendant in a capital case retained her Fifth Amendment right against self- incrimination through sentencing. Several circuit courts have extended this Fifth Amendment protection to convicted defendants facing noncapital sentencing. In United States v. Mitchell, the Third Circuit split from the other circuit courts of appeal by holding that a criminal defendant who pleads guilty waives her Fifth Amendment right against self-incrimination regarding that offense at her sentencing hearing.

In 1995, the U.S. Attorney's Office charged Amanda Mitchell and twenty-two other defendants with participation in a cocaine-trafficking conspiracy between 1989 and 1994. Mitchell entered an open plea of guilty to all charges, but specifically reserved the right to contest the amount of cocaine at issue. The district judge acknowledged her reservation and agreed that the quantity of cocaine would be determined at the sentencing hearing. Before accepting Mitchell's guilty plea, the judge instructed her that, by pleading guilty, she would be waiving her rights, including her Fifth Amendment right against self-incrimination.

Testimony at Mitchell's sentencing hearing suggested that Mitchell had distributed over five kilograms of cocaine, the threshold for a ten- year minimum sentence under federal law. Mitchell's attorney disputed this evidence, but Mitchell invoked her Fifth Amendment right to remain silent and did not testify on her own behalf. Before announcing Mitchell's sentence, the district judge specifically told her that he held it against her that she declined to testify. The judge then made a finding of fact that Mitchell had sold almost thirteen kilograms of cocaine, and sentenced her to ten years imprisonment. Mitchell appealed, claiming that the district court erred in denying her Fifth Amendment privilege at sentencing.

The Third Circuit affirmed. Chief Judge Sloviter held that, once a defendant pleads guilty to an offense, she cannot invoke her Fifth Amendment privilege regarding that offense at sentencing. The court asserted that a guilty plea constituted a waiver of the Fifth Amendment privilege with respect to that offense, when the plea is made knowingly and intelligently.

The court distinguished cases from other circuits that seemed to extend Fifth Amendment protection through sentencing, and argued that "in most instances the courts have explained that the witness would have been at risk of prosecution on other offenses." The Third Circuit concluded that "the Fifth Amendment privilege is not implicated when a defendant is asked to talk about the crime to which he has pled guilty . . Nor is the privilege implicated if the sentence imposed is more harsh because of the defendant's response to that interrogation." Arguing that the quantity of cocaine was not "an issue of

independent criminality," the court asserted that allowing Mitchell's exercise of the Fifth Amendment privilege in this context would impermissibly "fragment the sentencing process."

The Third Circuit's decision marked a dramatic departure from the overwhelming weight of case law. Every other circuit that has ruled on this issue has decided that a defendant retains her Fifth Amendment privilege if her testimony could be used to increase her sentence. To reach its broad Fifth Amendment decision, the Third Circuit improvidently stepped over a more narrow issue that should have been decisive: Mitchell's express reservation of the right to contest the quantity of drugs, which arguably included an expectation that her Fifth Amendment right would remain effective on that issue. Thus, the Mitchell court not only refused to recognize a general Fifth Amendment privilege at sentencing, but also cut more deeply by abrogating a condition on which Mitchell relied when she entered her guilty plea.

Although it rejected a well-settled rule, the Third Circuit provided no authority in support of its holding except a footnote from one of its own prior opinions. Given the apparent applicability of Estelle v. Smith, the court should have been loathe to split from the other federal courts absent a compelling justification. Chief Judge Sloviter offered only one possible justification: "one cannot logically fragment the sentencing process for this purpose." However, there is no perspicuous basis for the conclusion that asserting the privilege at sentencing attempts to divide issues that are not conceptually severable. Obviously, it would have been procedurally feasible to abstain from drawing any negative inference from Mitchell's refusal to testify. And the Third Circuit suggested no principled reason why the court must treat each "issue of independent criminality" as an indivisible block. Indeed, in Mitchell's case, the dispute over quantity at a separate sentencing hearing effectively fractured the distribution charge regardless of her Fifth Amendment status. The Third Circuit thus gave no principled rationale for why Mitchell's privilege did not extend to sentencing.

Even if the Third Circuit had articulated a convincing justification for denying the privilege generally at sentencing, the court disregarded the very real possibility that Mitchell had reasonably relied on a contrary expectation when she entered her guilty plea. Mitchell and her attorney made a point of emphasizing the reservation when she entered her plea, and the judge specifically acknowledged that the plea contained no admission regarding the quantity of drugs. Because she wanted to avoid testifying, and yet maintain an effective defense, it seems unlikely that Mitchell would have intentionally placed herself in a position in which her silence would render her defense ineffectual. Mitchell must have believed that her reservation had a more protective effect.

* * *

Amanda Mitchell entered a plea of guilty under the reasonable expectation that she would have the opportunity at sentencing to contest effectively the quantity of cocaine at issue in her case. Thus, Mitchell's trial was adversarial only up to a point. As long as the government is not required to meet its evidentiary burden independently at sentencing hearings, the crucial Fifth Amendment privilege also exists only up to a point--a point far short of the need to provide what is not only "a shelter to the guilty," but also "a protection to the innocent."

* * *

THIRD CIRCUIT REFUSES TO APPLY FIFTH AMENDMENT TO SENTENCING PROCEEDINGS

Champion

January/February, 1998

David S. Rudolf and Thomas K. Maher

The Third Circuit's decision in United States v. Mitchell stands in stark contrast to Balsys. While Balsys involved a rare fact pattern, Mitchell was a set of facts all too common. Mitchell plead guilty to a charge of conspiracy to distribute cocaine, and the battle at sentencing was over the amount of drugs for which she was accountable. While the court in Balsys showed an understanding of and appreciation for the Fifth Amendment, the Mitchell court showed neither. In fact, the court came to the startling conclusion that the Fifth Amendment has no application at sentencing, at least for a defendant who has plead guilty.

Mitchell's legal odyssey began with an indictment that named her and many other defendants with conspiring to distribute cocaine. Mitchell was charged with several substantive counts. Both the application of a mandatory minimum sentence, and the determination of the sentencing range under the Federal Sentencing Guidelines, depended heavily upon the amount of drugs for which a given defendant was responsible. Mitchell plead guilty to all counts, without any plea agreement. During the plea, Mitchell's counsel made clear that Mitchell would contest the amount of drugs for which she was responsible. The court informed Mitchell that she was waiving her trial rights, including her Fifth Amendment right not to testify against herself. Mitchell then stated that she was in fact guilty, and her plea was accepted.

At sentencing the government presented several witnesses who testified to Mitchell's activities and drug amounts. At the close of the testimony, the district attorney said that he believed Mitchell no longer retained the right not to testify because she had plead guilty to the offense and thereby waived her Fifth Amendment privilege. The court then relied upon Mitchell's failure to testify in finding that the government had established the amount of drugs for which Mitchell was responsible.

The Third Circuit affirmed, finding that a convicted defendant has no Fifth Amendment right not to testify at sentencing.

Although the court discussed the issue in terms of waiver, it also explicitly equated Mitchell's position with that of a defendant convicted by a jury: "[b]y voluntarily and knowingly pleading guilty to the offense Mitchell waived her Fifth Amendment privilege and stood before the court in the same position as if she had been convicted by a jury." The court then went on to hold--as a matter of first impression--that a convicted defendant has no Fifth Amendment right to refuse to give testimony that

may adversely affect their sentence. Rather, the court held that the Fifth Amendment protects only against testimony that may lead to conviction for a crime.

We see nothing in the Fifth Amendment ("No person ... shall be compelled in any criminal case to be a witness against himself ...") or in the Supreme Court's cases construing it that provides any basis for holding that the self-incrimination that it precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction. The sentence is the penalty for the very crime of conviction, and if one could refuse to testify regarding the sentence then that would contravene the established principle that upon conviction, "criminality ceases, and with criminality the privilege." 8 Wigmore, Evidence s 2279 (McNaughton rev. 1961).

This conclusion is startling. To say that nothing in Fifth Amendment jurisprudence suggests that the protection of the Fifth Amendment extends to sentencing is to ignore the precedent that led the Second Circuit to apply the privilege to potential foreign prosecutions. If the Fifth Amendment privilege is intended to protect citizens against the "cruel trilemma" of self- accusation, contempt or perjury and prevent government overreaching, how can one justify placing defendants in the position of being forced to provide testimony that may significantly increase a prison sentence.

In fact, under the Third Circuit's reasoning, a defendant could be forced to provide testimony that would justify a life sentence under the guidelines. Indeed, one could justify forcing a defendant convicted of murder, and facing a capital sentencing proceeding, to testify on the glib assertion that "criminality" had ceased upon conviction, and the privilege therefore disappeared. All of the principles identified by the Second Circuit support extending the Fifth Amendment to sentencing proceedings.

If the Third Circuit really meant what it said, the decision bodes ill for the principles behind the Fifth Amendment.

97-7541 ***MITCHELL* v. *U.S.***

Ruling below (CA 3, 61 CrL 1552):

Defendant who pleads guilty to distributing cocaine but reserves right to contest amount of cocaine for which she should be held responsible does not have Fifth Amendment right to refuse to testify during sentencing in absence of claim that her testimony would expose her to future federal or state prosecution.

Question presented: Does criminal defendant have Fifth Amendment right to remain silent at sentencing?

UNITED STATES, Appellees
v.
Amanda MITCHELL, Appellant

United States Court of Appeals,
Third Circuit

September 9, 1997

Digest of Opinion: Defendant Amanda Mitchell and 22 other defendants were indicted for their roles in a cocain conspiracy. Mitchell entered an open plea of guilty- that is, her plea was not premised on a plea agreement- to all four counts with which she was charged, but she reserved the right to contest the quantity of cocaine which she distributed. During the plea colloquy, the court explained that Mitchell would be waiving her rights by pleading guilty, including specifically her Fifth Amendment right not to testify.

At sentencing, the defendant's co-defendants testified for the government that the defendant personally engaged in cocaine sales of amounts totaling over five kilograms of cocaine. Mitchell argued that the co-defendant's testimony was unreliable; however, she provided no evidence and did not testify to rebut the government's evidence about drug quantity.

At the close of testimony at the sentencing hearing, the district judge stated that he believe Mitchell no longer retained a right not to testify because she had pleaded guilty to the underlying offense and thereby waived her Fifth Amendment privilege. He explained that he found that the defendant sold over five kilograms on the basis of the defendant's failure to come forward with evidence explaining her involvement in the sales. The district judge then sentenced Mithchell to the 120-month mandatory minimum.

The Fifth Amendment precludes the government or the court from penalizing a defendant in any way for the use of the privilege against self-incrimination. On the other hand, if a defendant's testimony cannot incriminate her, she cannot claim a Fifth Amendment privilege. Once a defendant has been convicted by a jury or pleaded guilty, the privilege is lost because the defendant can no longer be incriminated by her testimony about the crime. Thus a defendant who has pleaded guilty to an offense waives his privilege as to the acts constituting it.

In U.S. v. Frierson, 945 F.2d 650 (CA 3 1991), we recognized that a defendant's plea of guilty to one offense does not by its own force waive a privilege with respect to other alleged transgressions. We have not previously addressed the question whether a defendant retains a Fifth Amendment right after a guilty plea or conviction with respect to testimony that might negatively affect her sentence.

SLOVITER, C.J.,

We see nothing in the Fifth Amendment ("No person shall be compelled in any criminal case to be a witness against himself") or in the Supreme Court's cases construing it that provides any basis for holding that the self-incrimination that is precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction.

The sentence is the penalty for the very crime of conviction, and if one could refuse to testify regarding the sentence then that would contravene the established principle that upon conviction, "criminality ceases; and with criminality the privilege." 8 Wigmore, Evidence sec. 2279 (McNaughton rev. 1961). Similarly, although there may be many components to be considered in computing the sentence in the new era of Sentencing Guidelines and statutory sentencing directives, one cannot logically fragment the sentencing process for this purpose and retain the privilege against self-incrimination as to one or more of the components. Whether the defendant used a gun or had responsibility for more than five kilograms of cocaine is not an issue of independent criminality to which the Fifth Amendment applies in sentencing. Thus, we agree with the suggestion in Frierson that t he privilege against self incrimination is not implicated by testimony affecting the level of sentence. See Frierson, 945 F.2d at 656 n.2.

Mitchell would have us find that Frierson is inapplicable to a situation where a defendant pled guilty but reserved the right to contest at sentencing the amount of cocaine attributable to her. We find that argument unpersuasive. Mitchell opened herself up to the full range of sentences for distributing cocaine when she was told during her plea colloquy that the penalty for conspiring to distribute cocaine had a maximum of life imprisonment. While her reservation may have put the government to its proof as to the amount of the drugs, her declination to testify on that issue could properly be held against her.

Unlike the witnesses who were still open to prosecution in the series of cases referred to above where the courts sustained the invocation of the Fifth Amendment, Mitchell does not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense, see 18 Pa. S.C.A. sec. 111. As the government notes, Mitchell "was not asked to testify about offenses outside the scope of her guilty plea," appellee's brief at 33, and we thus agree that once she pled guilty to the substantive offense she lost her Fifth Amendment privilege as to that offense.

We thus conclude that although Mitchell faced the possibility of a harsher sentence for this drug offense because of her failure to testify at the sentencing hearing to counter the credibility of [the witnesses at sentencing], in light of the fact that she does not claim that she exposed herself to future federal or state prosecution, the Fifth Amendment privilege no longer was available to her.

JONES v. U.S.

By Darren Welch

35,000 carjackings occur every year in the United States. The increasing rate of carjackings and the inherently dangerous nature of the crime prompted Congress to pass a federal carjacking statute. The constitutionality and scope of that statute is now at issue and the Court must rule on the fate of Congress' main weapon against the national carjacking problem.

The Anti-Car Theft Act of 1992 (18 U.S.C. 2119) made it a federal crime to steal a vehicle involving a firearm, popularly known as carjacking. A 1994 amendment to the act eliminated the firearm requirement and added provisions dealing with intent of causing death or serious bodily injury. The relevant part of the statute reads:

> Whoever, possessing a firearm . . . takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence or another by force and violence or by intimidation or attempts to do so, shall-
> (1) be fined under this title or imprisoned not more than 15 years, or both,
> (2) if serious bodily injury . . . results, be fined not more than 25 years, or both, and
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

On December 7, 1992, defendants Donovan Oliver, Darryl McMillan, and Nathaniel Jones drove to a liquor store in Bakersfield, California, where they encountered victims Ali Mutanna and Abdullah Mardaie in a parked car. At gunpoint, the defendants ordered the victims out of the car and Oliver stuck the gun barrel into Mutanna's ear, causing severe bleeding, numbness, and some hearing loss. Jones drove away with Mutanna in Mutanna's car and was caught by police shortly thereafter.

Defendants were indicted in Federal District Court with, among other things, one count of carjacking under 18 U.S.C. 2119. They were convicted by a jury and sentenced to the 25 year maximum. Defendants appealed their convictions and sentences.

Defendants appealed a handful of issues, most importantly that "seriously bodily injury" is an element of the carjacking offense which must be plead and proven beyond a reasonable doubt. The United States Court of Appeals, Ninth Circuit affirmed in part (the large part), vacated and remanded in part. The Circuit court relied on plain language of the statute, legislative history, and federal statutory interpretation precedent of similar sentencing provisions to reach its conclusion that subsection (1)-(3) are merely sentencing provisions. The Ninth Circuit then affirmed the maximum sentence that the district court imposed upon remand.

Defendants argue that it was not until the sentencing phase that they became aware that there would be a contention that the case involved serious bodily injury. If serious bodily injury is, as defendant's

argue, an element of the crime, and was not raised until the sentencing phase, the conviction could not stand. Apparently, the argument is that the language of 18 U.S.C. 2119 (1)-(3), enacted in 1994, replaced the 1992 firearm requirement as a necessary element of the crime. The District Court and Circuit Court both ruled that serious bodily injury is only a factor which it was free to consider in sentencing defendants, not an actual element of the crime.

The Supreme Court granted certiorari and later limited its review to the questions: 1) Does 18 U.S.C. 2119 (1)-(3) describe sentencing factors or elements of the offense?; 2) If 18 U.S.C. 2119 (1)-(3) sets forth sentencing factors, is the statute constitutional?

COURT TO HEAR CARJACKING ARGUMENTS

The Legal Intelligencer

March 31, 1998

The court also agreed yesterday to study a sweeping constitutional challenge to the federal law against carjacking.

The justices, tackling a case from Bakersfield, Calif., said they will decide whether Nathaniel Jones' 1993 federal conviction must be thrown out. His lawyer, federal defender Quin Denver, is arguing that the conviction cannot stand because, among other things, Jones' crime was not one Congress has authority over.

Denvir, based in Fresno, Calif., was one of the lawyers who represented Theodore Kaczynski in the Unabomber prosecution.

Jones and two other men were convicted of a violent carjacking in Bakersfield. The stolen car's owner was threatened by having a gun jammed into his ear hard enough to cause bleeding and permanently affect his hearing.

Jones was arrested by police after he drove the stolen car into a telephone pole.

He was convicted and sentenced to 25 years in prison for the federal crimes of carjacking and using a gun during a violent crime. Prosecutors said one of Jones' accomplices actually wielded the gun.

The 9th U.S. Circuit Court of Appeals upheld Jones' conviction and sentence last year.

In the appeal acted on yesterday, Denvir relied heavily on a 1995 Supreme Court ruling that trimmed Congress' power to attack crime through its authority over interstate commerce.

In that 1995 decision, the court said Congress lacked the authority to pass a law banning possession of a gun within 1,000 feet of a school.

States have the primary authority to enact and enforce criminal laws, the court said then. Congress can enact laws under its power to regulate interstate commerce only to regulate activity that "substantially" affects such commerce, it added.

Federal prosecutors in Jones' case relied on the fact that the carjacked vehicle had been transported in interstate commerce after being manufactured and before being sold.

"It is hard to understand how driving a car less than a mile which has previously been shipped over a state line has any effect on interstate commerce, let alone a substantial effect," Denvir said.

"This court should require a finding of a substantial effect on interstate commerce before a conviction of carjacking will be sustained," the appeal said.

The case is Jones v. U.S., 97-6203.

PUTTING THE BRAKES ON CARJACKING OR ACCELERATING IT? THE ANTI CAR THEFT ACT OF 1992

University of Richmond Law Review
April, 1994

F Georgann Wing

* * *

A. Title I

1. Carjacking and Other Theft Crimes

The Act makes it a federal offense to take a motor vehicle, or attempt to take a motor vehicle, "from the person or presence of another by force or violence or by intimidation." Federal jurisdiction lies where the carjacker had possession of a firearm and took a motor vehicle that had "been transported, shipped, or received in interstate or foreign commerce" prior to the theft.

These requirements will limit federal jurisdiction. Even though the gun may be the carjacker's weapon of choice, not all carjackers will have a gun in their possession. The carjacker will escape federal prosecution if, instead of a gun, he had a knife or other deadly weapon, or if he was not armed.

Jurisdiction is also limited because the vehicle had to have been "transported, shipped, or received in interstate or foreign commerce." In other words, the vehicle had to have crossed state lines before it was carjacked. Furthermore, since Congress used the term "motor vehicle," the argument may be precluded that jurisdiction is established if the vehicle's parts had crossed state lines. Therefore, carjackers who steal motor vehicles manufactured and sold in the same state, like those manufactured and sold in Detroit, Michigan, may avoid federal prosecution--a result that some courts will label unfair discrimination. And would federal jurisdiction lie if the owner himself drove the car across state lines before the carjacking?

Because of these gaps and the anticipated constitutional challenges, the states may choose to enact their own carjacking statutes. The statutes could be broad enough to make carjacking a specific offense where a knife or other deadly weapon was used, or where the carjacker was not armed.

The Attorney General "is urged to work with State and local officials to investigate" and prosecute criminals for carjacking. To that end, the states may call in the FBI and have the advantage of the Bureau's special investigational expertise. Because the states can prosecute for the crime under their own laws--whether the crime is labeled robbery, murder, assault, or something else--the U.S. Attorney will undoubtedly defer most carjacking prosecutions to them. In determining which jurisdiction will prosecute, several factors may be considered, including the severity of the crime, the maximum

punishment available in the competing jurisdictions, the sentencing guidelines, the deterrent effect, and prison overcrowding.

For example, the U.S. Attorney may defer to the state in situations where the victim was not seriously injured, where the carjacker is a juvenile, where the death penalty is available, and where the federal punishment guidelines would provide no more punishment than would the state. However, the U.S. Attorney may decide to take jurisdiction in cases where the FBI has investigated, where there are assets that may be seized in forfeiture, where gangs are involved, and where (because of the deterrent effect) the U.S. Attorney is asked to prosecute or the crime has received extensive media coverage.

If sufficiently provided, federal investigation, prosecution, and incarceration of carjackers will give the states some badly needed relief. It may also mean that carjackers will serve more time. And when the word gets around that carjacking is now a federal offense, thieves may pause and take their crimes elsewhere.

The final legislation extended the maximum imprisonment of 15 years for armed carjacking to 25 years if serious injury occurs, and "up to life" in prison if death results. The Act doubles the maximum imprisonment for other theft crimes, from five years to ten years, and it provides civil and criminal forfeiture sanctions for enumerated violations, including armed robbery of motor vehicles. The Act defines the term "chop shop" and imposes a maximum 15-year sentence for the first conviction of "knowingly" owning, operating, maintaining, or controlling a chop shop or conducting "operations in a chop shop."

* * *

THE FEDERAL CARJACKING STATUTE: TO BE OR NOT TO BE? AN ANALYSIS OF THE PROPRIETY OF 18 U.S.C. S 2119

Saint Louis University Law Journal

Spring 1995

Mary C. Michenfelder

I. Introduction

ON September 8, 1992, Pamela Basu, a thirty-four-year old Maryland woman, was dragged to her death after two men forced her from her car and drove off with her twenty-two-month old daughter. Ms. Basu was caught in the safety belt of her BMW and was dragged for a mile and a half before she was dislodged from the car. The child, still strapped in her car seat, was thrown from the car shortly after the carjacking but was unhurt. Although carjackings occur at a rate of 35,000 per year, it was this particularly heinous crime which prompted Congress to federalize armed carjacking as part of the Anti Car Theft Act of 1992.

The federal offense of carjacking requires the taking of a motor vehicle from another while in possession of a firearm. When prosecuting these cases, United States Attorneys across the country charge defendants with the offense of carjacking as well as the offense of using or carrying a firearm in relation to a crime of violence. When convicted of these offenses, defendants face terms of imprisonment under both the carjacking statute and the gun statute. These double punishments raise the question of double jeopardy, that is, that a defendant is being punished twice for the same conduct. Various federal district courts have found these double punishments to violate the Double Jeopardy Clause of the Constitution, while other district courts have determined that Congress intended there to be double punishment, which is permissible provided there is a clear congressional statement to that effect. A number of federal circuit courts have found a clear intent by Congress to twice punish this conduct. However, a close examination of the statutes and their legislative history reveals no such clear intent.

In May 1993, Congress began various debates relating to the carjacking statute, none of which involved the double jeopardy question raised by the conflicting court decisions throughout the country. The congressional debates revolved around two questions: 1) should carjackers be subject to the death penalty when their crime results in death and 2) should the firearm requirement be eliminated from the statute. Although one would assume the second question was raised in response to the double jeopardy problem, such is not the case. Congress acknowledged that violent robberies of automobiles can occur without a firearm, but concerns were raised that taking the firearm completely out of carjacking would dilute the already attenuated nexus between carjacking and interstate commerce, Congress' authority to enact the statute. The legislative history points to a compromise to eliminate the firearm element from

the statute at least as it relates to carjacking resulting in death. The question of double jeopardy was never raised.

The year-long debates culminated in a one-line amendment to the carjacking statute, which was enacted into law in September 1994 as part of the Violent Crime Control and Law Enforcement Act. While it is undisputed that the statute now provides for the death penalty when carjacking results in death, the remainder of the statute, as amended, is subject to various interpretations. One may read the amendment to have taken the firearm out of the crime completely and to require the carjacker to intend to cause death or do serious bodily injury, regardless of the outcome of the crime. A more plausible reading, however, both deletes the firearm element and requires the intent element only when the carjacking results in death. This reading is consistent with the legislative history and with the literal reading of the amendment. The question of double jeopardy remains intact, however, for the offense still requires possession of a firearm when the carjacking does not result in death.

In addition to its ambiguity and the constitutional challenges it faces, the carjacking statute violates the ever-decreasing notion of federalism. Carjacking is predominantly a state crime and states have proven successful in its prosecution and punishment. An examination of the crime of carjacking and its impact upon federal courts reveals no clear need for federal presence to combat this state crime.

* * *

97-6203 ***JONES* v. *U.S.***

First ruling below (U.S. v. Oliver, CA 9, 60 F.3d 547, 64 LW 2052, 57 CrL 1334):

U.S. v. Martinez, 49 F.3d 1398 (CA9 1995), forecloses defendant's contention that Double Jeopardy Clause bars his convictions, stemming from his use of gun in carjacking, under both 18 USC 2119, which prohibits forcible taking of car that has been transported, shipped, or received in interstate or foreign commerce, and 18 USC 924(c), which forbids use of firearm during crime of violence; Section 2119 is within Congress' power under Commerce Clause; in order to sustain carjacking conviction under aiding and abetting theory, prosecution need not prove that defendant actually possessed firearm, but must instead prove only that defendant knew that co-defendant had and intended to use firearm during carjacking, and that defendant intended to aid in that endeavor, for which there was ample evidence in this case.

Second ruling below (U.S. v. Oliver, CA 9, 6/27/97, unpublished):

Resentencing upon remand to maximum sentence allowed by remand order is affirmed.

Questions presented: (1) Did Ninth Circuit violate petitioner's right to due process by sentencing him to maximum term when he had no notice that he was facing such term? (2) Was conduct attributed to petitioner in trial sufficient evidence of substantial effect on interstate commerce such that it would invoke Congress' authority under Commerce Clause? (3) Did petitioner's conviction violate Fifth Amendment prohibition against double jeopardy?

UNITED STATES of America, Plaintiff-Appellee
v.
Donovan Dwayne OLIVER, et all., Defendants-Appellants

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 12, 1994.
Decided July 6, 1995.

MICHAEL DALY HAWKINS, Circuit Judge:
Defendants Donovan Dwayne Oliver, Darryl Lee McMillan, and Nathaniel Jones appeal their convictions and sentences for carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and using a firearm during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, and vacate and remand in part.

I.
Background

The evidence at trial disclosed the following facts: On December 7, 1992, Oliver, Jones and McMillan drove to a liquor store in Bakersfield, California. In the liquor store parking lot, they approached Ali Nassar Mutanna and Abdullah Mardaie, who were in Mardaie's parked car. After ordering Mutanna and Mardaie out of the car, Oliver held them at gunpoint. Oliver stuck the barrel of his firearm into Mutanna's left ear and held it there to ensure that Mutanna would not move, causing Mutanna's ear to bleed profusely. Meanwhile, Jones and McMillan searched Mutanna's and Mardaie's pockets. Oliver then forced Mutanna behind the liquor store, ordered him to lie on the ground, and struck him in the head while he was lying there. Oliver told Mutanna that Oliver would kill him if he moved. Oliver then got into Jones' car, which was being driven by McMillan, and fired a shot as they drove away.

Jones had forced Mardaie into Mutanna's car, and Jones followed Oliver and McMillan as they left the scene. After they travelled a short distance, Jones ordered Mardaie out of the car. After defendants left, Mutanna flagged down a police car. Police officers located Mutanna's car a few blocks away from the liquor store. Jones fled in Mutanna's car when he noticed the police car approaching. After a short car chase, Jones crashed Mutanna's car and was apprehended. Jones' car was also located nearby, with the gun used by Oliver in the back seat. Oliver and McMillan were arrested shortly thereafter.

Defendants were indicted on December 30, 1992, with one count of carjacking/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2119, and one count of using a firearm during a crime of violence/aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c). On July 29, 1993, defendants were convicted by a jury on all counts. Defendants were sentenced under the 25-year (300 months) statutory maximum set forth in § 2119(2), because Mutanna suffered serious bodily injury during the crime. Defendants were each sentenced to a total of 300 months on the carjacking count and a consecutive 60 months for the use of a weapon.

Defendants timely appealed their sentences and convictions on December 17, 1993.

* * *

III.
Commerce Clause

Defendants contend that Congress exceeded its power under the Commerce Clause in enacting the carjacking statute, because carjacking is not sufficiently related to interstate commerce. We recently rejected this argument in United States v. Martinez, 49 F.3d 1398, 1400-01 (9th Cir.1995). In so ruling, we joined with every other circuit court that had addressed the question.

The Supreme Court's recent decision in United States v. Lopez, 115 S.Ct. 1624, (1995), does not alter our view. In Lopez, the Supreme Court held that Congress exceeded its power under the Commerce Clause when it made it a federal offense for a person to possess a firearm within 1000 feet of a school. See 18 U.S.C. § 924(q). The Court noted that "§ 922(q) contains no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id. at 1631. It also explained that the statute does not seek to protect "an instrumentality of interstate commerce." Id. at 1630. Finally, the Court pointed out that there was no showing of a substantial effect of the prohibited activity on interstate commerce, and Congress had made no findings that there was such an effect. Id. at 1631-32.

The carjacking statute has a very different background. First, it applies only to the forcible taking of a car "that has been transported, shipped, or received in interstate or foreign commerce." 18 U.S.C. § 2119. Second, cars are themselves instrumentalities of commerce, which Congress may protect. See United States v. Watson, 815 F.Supp. 827, 831 (E.D.Pa.1993).

Lastly, we note that Congress was not silent regarding the effect of carjacking on interstate commerce. As we stated in Martinez, Congress relied on, among other things, "the emergence of carjacking as a 'high-growth industry' that involves taking stolen vehicles to different states to retitle, exporting vehicles abroad, or selling cars to 'chop shops' to distribute various auto parts for sale." Martinez, 49 F.3d at 1400 n. 2 (citing legislative history). That Congress was addressing economic evils of an interstate nature differentiates the carjacking statute from the firearms statute invalidated in Lopez. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." Lopez, --- U.S. at ----, 115 S.Ct. at 1634. Carjacking, on the other hand, is exactly that sort of economic activity, as Congress clearly concluded. We accept that conclusion, and accordingly reject the defendants' contention.

* * *

V.
Double Jeopardy

Defendants contend that their convictions under § 2119 and § 924(c) violate the Double Jeopardy Clause because both statutes punish the same conduct. This argument is also foreclosed by our recent opinion in United States v. Martinez, 49 F 3d at 1402.

VI.
Sufficiency of Evidence

Defendant Jones argues that there was insufficient evidence to support his carjacking

conviction under the aiding and abetting theory. Although Jones moved for judgment of acquittal at the close of the government's case, he did not renew the motion at the close of all evidence. We therefore review for plain error. United States v. Ramirez, 880 F.2d 236, 238 (9th Cir.1989).

Relying on United States v. Dinkane, 17 F.3d 1192 (9th Cir.1992), Jones contends that he was not properly convicted of carjacking because there was no evidence that he possessed a firearm. Dinkane involved a conviction for armed bank robbery under 18 U.S.C. § 2113(d), an aggravated form of bank robbery under 18 U.S.C. § 2113(a). We noted that to sustain a § 2113(d) conviction for an aider and abettor, the government must show not only that the defendant knowingly and intentionally aided the act of bank robbery, but also the commission of the aggravating element. Id. at 1197. We therefore concluded that the defendant get-away driver could not be convicted of armed bank robbery under an aiding and abetting theory where there was no evidence that he knew--before or during the bank robbery--that the robbers had and intended to use weapons. Id. at 1198.

Contrary to Jones' contention, Dinkane does not require that the government prove that he actually possessed the firearm. Dinkane only requires proof that Jones knew that a co-defendant had and intended to use the firearm during a carjacking, and intended to aid in that endeavor. There was ample evidence of this. The evidence demonstrated that, on the evening of the carjacking, Jones, Oliver and McMillan drove to a liquor store in Jones' car. Oliver testified that when he got into Jones' car, he noticed a gun on the floor of the back seat. Mutanna testified that when defendants approached him in the liquor store parking lot, he could see that Oliver was carrying a gun. Oliver held Mutanna and Mardaie at gunpoint, while Jones and McMillan rifled their pockets. Oliver also used his gun to keep Mutanna behind the store, and fired a shot from Jones' car, as Jones escaped in the Mutanna's car. A reasonable jury could have easily concluded from these facts that Jones knew Oliver had a firearm, that Jones knew Oliver intended to use the firearm during the carjacking, and that Jones intended to and did aid in that endeavor. Jones' conviction was not plain error.

VIII.
Serious Bodily Injury

Defendants also argue that "serious bodily injury" as set forth in § 2119(2) is an element of the carjacking offense which must be pleaded in the indictment and proved beyond a reasonable doubt at trial. Defendants point out that it was not until the sentencing phase that they became aware that there would be a contention that the case involved serious bodily injury for purposes of § 2119(2). The district court concluded that serious bodily injury is a factor which it was free to consider in sentencing defendants. We agree with the district court.

The Supreme Court has emphasized that the key to distinguishing between elements of an offense and sentencing factors is the legislature's definition of the elements of the offense. McMillan v. Pennsylvania, 477 U.S. 79, 85, 106 S.Ct. 2411, 2415-16 (1986). We therefore must look to the plain language and structure of the statute. United States v. Young, 936 F.2d 1050, 1054 (9th Cir.1991). The carjacking statute, 18 U.S.C. § 2119, reads as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the

person or presence of another by force and violence or by intimidation or attempts to do so, shall--

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

In United States v. Williams, 51 F.3d 1004, 1011 (11th Cir.1995), the Eleventh Circuit concluded that "Congress[ ] inten[ded] that subparagraphs (2) and (3) be treated as sentencing enhancement features, and not elements of the offense." According to the Eleventh Circuit, the natural reading of the text--in which the crime of carjacking is defined in the first paragraph and the subparagraphs simply set forth different degrees of sentencing--suggests that the subparagraphs are sentencing provisions. Id. We agree with the Eleventh Circuit and conclude that the serious bodily injury and death language in § 2119 exist for sentence enhancement purposes. The plain text of the statute establishes one offense, as defined in the first main paragraph. That definition of the offense is set apart by a comma, followed by the word "shall" and then three sentencing possibilities. This does not establish three separate, substantive offenses.

Our decision in United States v. Young, 936 F.2d 1050 (9th Cir.1991), is instructive. In that case, we determined that the weapon provision of 18 U.S.C. § 111 is a sentencing factor, rather than an element of the crime of assaulting a federal officer. The statute under which the defendant was convicted read as follows:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three (3) years, or both.

Whoever, in the commission of such acts uses a deadly or dangerous weapon shall be fined not more than ten (10) years, or both.

18 U.S.C. § 111 (amended 1988). In concluding that Congress intended the weapon provision to be a sentencing factor, we noted that it was not "structurally separated from the rest of the section, indicating that the section contains only one substantive offense." Young, 936 F.2d at 1054. Moreover, the "weapon provision [was] not drafted as a stand-alone offense; it incorporate[d] the predicate acts by reference rather than affirmatively setting forth any specific elements." Id.; Similarly, Congress did not enact § 2119 and its subparts in "structurally separate" provisions. It did not redefine the essential elements of carjacking in subparagraphs (1), (2) or (3), and those provisions could not stand alone, independent of the main paragraph. These factors lead to the conclusion that § 2119 sets forth one offense, with several possible penalties.

Defendants argue that Young is distinguishable because, in a subsequent amendment, the weapon provision of § 111 was specifically labeled "Enhanced Penalty," and therefore Congressional intent is clear. It is true that in Young we found this subsequent amendment to have "persuasive value." Young, 936 F.2d at 1054. But we have similar persuasive evidence of congressional intent in this case. Section 2119 was adopted as part of the overall "Anti-Car Theft Act of 1992" (the "Act"), enacted at a time when carjacking crimes were increasing at an alarming rate. See Public Law 102-519, 102nd Congress, 106 STAT 3384 (1992). In

the Act, § 2119 and its subparagraphs come directly under the title, "Tougher Law Enforcement Against Auto Theft," and the subtitle, "Enhanced Penalties for Auto Theft." Id. (emphasis added). Clearly the title, and undoubtedly the subtitle, suggest an intent that § 2119 set forth enhanced penalties. Other portions of the legislative history suggest the same conclusion. In fact, nothing in our review of the Act or its legislative history even remotely indicates that Congress intended that serious bodily injury and death be additional carjacking elements which must be proved beyond a reasonable doubt at trial.

* * *

While defendants were not informed through the indictment or at arraignment that they were facing the 25-year maximum, this omission does not amount to a due process violation. See, e.g., Young, 936 F.2d at 1053 (indictment need not plead sentencing factor); LaMere v. Risley, 827 F.2d 622, 624 (9th Cir.1987) (notice in the information that government will seek sentence enhancement not necessary); United States v. Dunn, 946 F.2d 615, 619 (9th Cir.) (prior violent felonies used for sentence enhancement need not be charged in indictment or proved at trial), cert. denied, 502 U.S. 950, 112 S.Ct. 401 (1991). The evidence at trial suggested that Mutanna suffered injury. The probation department reported in the presentence report that Mutanna suffered a perforated eardrum, causing numbness and some hearing loss, and defendants were given medical reports on the condition. Defendants concede that they were given an opportunity to contest the issue at sentencing. We note that defendants have never demonstrated that the information in the presentence report was inaccurate, or that the district court erred in determining that Mutanna suffered serious bodily injury. Having concluded that serious bodily injury is not an element of the offense, we are compelled to find that defendants received sufficient process for purposes of the Fifth Amendment.

AFFIRMED in part, and VACATED and REMANDED in part.

HOLLOWAY v. U.S.

By Darren Welch

This challenge raises the issue of whether the federal carjacking statute requires specific intent to seriously injure the victim or conditional intent to injure the victim only if she refuses to give up her vehicle. If this challenge is successful, all carjackers that are willing to let compliant victims go unharmed will be beyond the reach of the statute.

The Anti-Car Theft Act of 1992 (18 U.S.C.A. 2119) made it a federal crime to steal a vehicle involving a firearm, popularly known as carjacking. A 1994 amendment to the act eliminated the firearm provision and added provisions dealing with the intent of causing death or serious bodily injury. The exact implications of the 1994 amendment (whether the changes make a new element of the crime or just a sentencing factor) is the subject of another case to be heard by the Supreme Court this term, Jones v. U.S. 97-6203.

Defendant Francois Holloway and his partner-in-crime Vernon Lennon, son of chop-shop owner and co-defendant Teddy Arnold, were prosecuted for three carjacking incidents in which Holloway and Lennon stole cars at gunpoint to give to Arnold to supply his chop-shop. During each of the three incidents, Vernon, accompanied by Holloway, pointed his gun at the victims and demanded the keys to their vehicle. Vernon used threats of violence, such as "Get out of the car or I'll shoot" and one victim was punched in the face after hesitating to give the keys over to the carjackers. At trial, Lennon testified that, even though no shots were fired during any of the incidents, he would have used the gun if one of the victims had given him a "hard time." Lennon insisted, however, that he did not intend to seriously injure the victims. He claimed he only wanted their vehicles. The Eastern District Court of New York convicted Holloway of, among other things, three counts of violating statute 18 U.S.C.A. 2119. District Court Judge Gleeson noted that the purpose of the 1994 amendment to the statute was to broaden its reach and to rule that only a specific intent to cause bodily injury satisfies the statute would be inconsistent with Congress' intent. Gleeson, citing hornbook law, also asserted that conditional intent satisfies a particular required intention "unless the condition negatives the evil sought to be prevented by the statute." Defendant unsuccessfully moved for a new trial and for reconsideration of his denied motion to set aside the verdict.

Holloway raised on appeal that the intent element of the statute was not satisfied by Lennon's threats to shoot if the victims did not give up their vehicle. Holloway contends that the language of the statute ("with the intent to cause death or serious bodily harm") is satisfied only by specific intent to cause death or serious bodily harm. Holloway contends his intent to cause death or serious bodily harm was conditioned upon the victim not giving up the vehicle, and conditional intent, which Holloway argues is lesser than specific intent, is insufficient to satisfy the statute.

The United States Court of Appeals for the Second Circuit affirmed. The Circuit Court held that intent to kill conditioned on the victim's refusal to surrender their vehicle satisfied the intent element of

the statute. Writing for the majority, Judge Scullin argued that to literally apply the text of the statute would cause a result that is contrary to what Congress intended, namely, prosecuting all armed carjackers. Scullin noted that the Third Circuit has speculated that Congress probably intended the statute to apply only to cases where death resulted. Despite this, the Holloway court ruled that since death is clearly foreseeable and planned for in case the carjacking goes badly, the defendants exhibited a sufficiently culpable mental state to satisfy the statute.

Holloway v. U.S. is significant because a Supreme Court reversal would mean a large number of carjackers (all but those those who intend to seriously injure or kill their victims regardless of the outcome of the carjacking) would not be subject to federal prosecution. Given the serious nature of the crime, a reversal would be a major setback to deterring and punishing carjackers.

Clinton administration attorneys had urged the Supreme Court to reject Holloway's appeal.

HIGH COURT TO WEIGH STATUTE ON INTENT TO HARM IN CARJACKINGS

The Buffalo News

April 28, 1998, NIAGARA EDITION

Richard Carelli; Associated Press

The Supreme Court said Monday that it will decide whether people who steal vehicles at gunpoint can avoid prosecution under a federal carjacking law by insisting that they never intended to seriously injure anyone.

Attorneys for Francois Holloway, sentenced to more than 50 years in prison for a series of carjackings, contend that the law used to prosecute him has a loophole big enough to drive a truck through.

They argue that lower courts misread the federal law by concluding that it covers crimes committed with "conditional intent" to harm victims who refuse to comply with the robber's demands.

The law makes it a crime to take a motor vehicle by force "with the intent to cause death or serious bodily harm."

The federal judge who presided over Holloway's trial told jurors that they could find such intent if they thought that Holloway would have seriously hurt victims who did not surrender their cars. The jury then convicted him.

The 2nd U.S. Circuit Court of Appeals upheld the conviction, ruling that such a common-sense interpretation was valid despite the law's ambiguous language.

Holloway's appeal, which should yield a ruling by the nation's highest court sometime next year, contends that the appeals court ruling violated "fundamental principles of statutory construction" and, as a result, his due-process rights.

Holloway was convicted for his part in a carjacking ring that sold parts from stolen vehicles dismantled in a New York City "chop shop."

Prosecutors said Holloway, on several occasions in the fall of 1994, confronted motorists with a gun and demanded that they surrender their car keys.

Clinton administration attorneys had urged the justices to reject the appeal.

JUDGE DEFINES INTENT ELEMENT IN CARJACK LAW: CONGRESS'S 'CARELESSNESS' IN REDRAFTING CRITICIZED

New York Law Journal

April 16, 1996

Bill Alden

REFUSING TO limit the scope of the federal carjacking statute, a Brooklyn federal judge has ruled that a defendant need not have an "unconditional" intent to kill or seriously injure in order to be subject to prosecution under the law.

In rejecting a Queens man's argument that his carjacking convictions should be set aside since his accomplice only planned to shoot their victims if they gave the men a "hard time," Eastern District Judge John Gleeson declared that such a reading of the law would produce the "odd result" of "no longer prohibiting the very crime it was enacted to address."

When Congress originally enacted the Anti Car Theft Act in 1992, possession of a firearm was included as a necessary element. Two years later, in an attempt to broaden the reach of the law, Judge Gleeson noted, Congress deleted the firearm requirement and replaced it with language providing that the law applied to those having the "intent to cause death or serious injury."

Although he ultimately rebuffed the proposed literal interpretation, Judge Gleeson faulted Congress for creating the anomoly in the statute which the defendant, Francois Holloway (also known as Abdu Ali), seized upon.

"Carelessness in the legislative process has produced a criminal statute that says something fundamentally different than what Congress obviously meant to say," wrote Judge Gleeson in his 15-page ruling in U.S. v. Holloway.

"As a result, Ali advances a colorable claim that his conduct here - using a gun to terrorize motorists into giving up their cars - is no longer prohibited by the carjacking statute. Indeed, it is likely that a 1994 amendment to the statute, which was explicitly intended to broaden the available penalties, in fact placed a large number of 'carjackers' beyond its reach."

Vernon Lennon, whose father ran a Queens "chop shop," recruited Mr. Ali to help him steal cars to supply to the shop. Mr. Ali was to receive a fixed fee for each car stolen.

The two men stole cars from three people at gunpoint in mid-October 1994. Mr. Lennon pulled the gun in each of the incidents. Although no shots were fired during the thefts, Mr. Ali admitted that he knew that Mr. Lennon planned to shoot any victim who put up resistance.

In addition, Mr. Ali acknowledged punching one of the motorists in the face when he was slow to cooperate.

After being convicted of three counts of carjacking by a Brooklyn federal jury last December, Mr. Ali moved for a new trial on the grounds that the law should not apply to him since his true intent was not to kill or injure people, but to just to steal cars.

While conceding that this reading of the statute had some validity and could actually set some carjackers free, Judge Gleeson concluded that Mr. Ali was "not among them."

Invoking hornbook law and the Model Penal Code, Judge Gleeson found that Mr. Ali's intent to aid and abet Mr. Lennon's potential use of the firearm was enough to satisfy the intent element of the law.

"Where a crime is defined to require a particular intention, that element is satisfied even if the requisite intent is conditional, unless the condition negatives the evil sought to be prevented by the statute," wrote Judge Gleeson, citing the Handbook on Criminal Law by W.R. Lafave and A. W Scott.

Moreover, noting that this principle has been incorporated into s2.02 (6) of the Model Penal Code, Judge Gleeson asserted that "the conditional nature of Ali's intent obviously does not help him." The evil sought to be prevented by the carjacking law, he added, is not negated by the condition, "it is the condition."

In Judge Gleeson's view, there was "ample evidence" from which a jury could infer Mr. Ali's intent to seriously injure or kill pursuant to the statute notwithstanding his avowed plan only to steal cars.

"Lennon intended to shoot uncooperative victims, and threatened to do so in Ali's presence," explained Judge Gleeson. "Ali himself demonstrated a seriousness of purpose by punching one of the victims in the face simply because he hesitated in handing over his money."

The defendant, he said, "makes much of the fact that there is no direct evidence of his intent, but there rarely is such evidence. The jury could have readily inferred it from the circumstances."

Dana Hanna of Brooklyn represented Mr. Ali. Assistant Eastern District U.S. Attorney Dolan L. Garrett represented the government.

97-7164 ***HOLLOWAY*** **v.** ***U.S.***

Ruling below (U.S. v. Arnold, CA 2, 126 F.3d 82, 62 CrL 1039):

Carjacker's intent to kill or cause serious bodily harm only if carjacking victim refuses to surrender his or her car satisfies provision of federal carjacking statute, 18 USC 2119, that requires carjacker to have 'intent to cause death or serious bodily harm' in order to be culpable.

Question presented: Does court of appeals holding that conditional intent is included within legal definition of specific intent in amended carjacking statute violate both fundamental principles of statutory construction and petitioner's constitutional right to due process of law?

UNITED STATES of America, Appellee
v.
Teddy ARNOLD, et all., Defendant-Appellant
No. 1877, Docket 96-1563.

United States Court of Appeals,
Second Circuit.

Argued June 25, 1997.
Decided Sept. 16, 1997.

Defendant convicted of various offenses, including carjacking, moved for new trial and for reconsideration of unsuccessful motion to set aside verdict. The United States District Court for the Eastern District of New York, John Gleeson, J., denied motion, 921 F.Supp. 155, and defendant appealed. The Court of Appeals, Scullin, District Judge, sitting by designation, held that: (1) defendant's intent to kill victims conditioned on their failure to surrender car could satisfy specific intent to kill requirement to federal carjacking statute, and (2) defense counsel's strategy of conceding other elements of offense and raising defense that defendant lacked specific intent was reasonable and was not ineffective assistance of counsel.

Affirmed.

SCULLIN, District Judge:

Defendant-Appellant Francois Holloway appeals from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.), following a jury trial, convicting Holloway of numerous offenses connected with his participation in several carjackings in Queens, New York. Holloway was convicted of one count of conspiracy to operate a "chop shop" in violation of 18 U.S.C. § 371 (count one); one count of operating a chop shop in violation of 18 U.S.C. § 2322 (count two); three counts of carjacking in violation of 18 U.S.C. § 2119 (counts seven, nine, and eleven); and three counts of using a firearm in the commission of a crime of violence in violation of 18 U.S.C. § 924(c) (counts eight, ten, and twelve). Holloway was sentenced to 60 months on count one; 151 months on count two, to run concurrently with count one; 151 months on each of counts seven, nine, and eleven, to run concurrently with each other and counts one and two; 5 years on count eight, to run consecutively; and 20 years each on count ten and count twelve, each to run consecutively. Defendant was also sentenced to terms of supervised release and a special assessment of $400.

On appeal, Holloway contends that: (1) the district court erroneously charged the jury on the intent element of the carjacking statute; (2) his trial counsel rendered constitutionally ineffective assistance; and (3) the trial court improperly imposed consecutive sentences pursuant to Holloway's firearm convictions.

BACKGROUND

Holloway's conviction stems from his involvement in a "chop shop" operation located at 115th Drive in Queens, New York. In September 1994, Teddy Arnold recruited his son, Vernon Lennon, to begin stealing cars to be taken to the chop shop for dismantling. Lennon,

in turn, recruited two individuals, David Valentine and Holloway, to assist him in his car thefts. The co-conspirators agreed that they should use a firearm during their thefts, and Lennon showed both Valentine and Holloway a .32 caliber revolver he intended to use for that purpose.

The first charged carjacking involving Holloway and Lennon occurred in October 1994. On October 14, Holloway and Lennon followed a 1992 Nissan Maxima driven by sixty-nine year-old Stanley Metzger. When Metzger stopped and parked across from his residence, Lennon approached Metzger and pointed his revolver at him, demanding his car keys. At first, Metzger gave his house keys to Lennon, who rejected them and demanded his car keys. Metzger testified that Lennon told him, "I have a gun. I am going to shoot." Thereafter, Metzger surrendered his keys and also his money, and Lennon drove away in the Maxima.

The following day, Lennon and Holloway followed a 1991 Toyota Celica driven by Donna DiFranco. When DiFranco parked, Lennon approached her, leveled his gun at her, and demanded her money and her car keys. After DiFranco disengaged the car alarm and unlocked her "club" securing the steering wheel, Lennon drove off in her car.

That same day, Holloway and Lennon followed a 1988 Mercedes-Benz driven by Ruben Rodriguez until he parked near his home at Jamaica Estates. Both Lennon and Holloway approached the driver this time. Rodriguez, sensing something was wrong, retreated to his car. Lennon produced his gun and threatened, "Get out of the car or I'll shoot." Rodriguez complied and Lennon demanded his money and car keys. When Rodriguez hesitated, Holloway punched him in the face. Rodriguez surrendered the items and fled on foot, yelling for help. Lennon drove off in the Mercedes, and Holloway followed in another car.

At trial, the Government also presented evidence of two additional uncharged carjackings involving Lennon and Holloway. One involved the theft of a 1987 Nissan Maxima which was stolen from Betty Eng as she parked in her driveway on October 12, 1994. The other uncharged carjacking occurred on October 19, 1994. On that day, Holloway and Lennon attempted to steal a 1994 Nissan Sentra from Sara Markett when she parked her car on 193rd Street in Queens. Lennon threatened Markett, telling her, "Give me your keys or I will shoot you right now." Thereafter, Markett surrendered her keys and ran screaming into a nearby hair salon. The theft was foiled by an off-duty police officer, Adam Lamboy, who happened to be in the hair salon at that time. Upon seeing Lennon in Markett's car, Lamboy yelled, "Police, don't move." Lennon made a motion toward his waist band prompting Lamboy to draw his weapon. Lennon then fled to a red Toyota driven by Holloway, and the two escaped.

On November 22, 1994, two of the carjacking victims, Ruben Rodriguez and Sara Markett, identified Holloway as one of the carjackers in a police line-up. Following his identification, Holloway confessed to the police that he had participated with Lennon in three carjackings involving a silver Mercedes-Benz, a black Nissan Maxima, and a gray Nissan. Immediately prior to trial, Lennon pled guilty to several carjacking charges and eight automatic teller machine ("ATM") robberies. Thereafter, Lennon testified at trial as a government witness. Lennon testified as to the events set forth in the above carjackings, as well as seven additional carjackings in which he participated

with Valentine. Lennon testified that his plan was to steal the victims' cars without harming the victims; however, Lennon also testified that he would have used the gun if one of the victims had given him "a hard time" or had resisted.

The Government also presented testimony at trial from Rodriguez, Metzger, DiFranco, Eng, and Lamboy. These witnesses presented factually consistent testimony depicting the various carjackings as set forth above. With the exception of Rodriguez, none of the victims was injured during the course of the carjackings, and Rodriguez did not require medical attention.

The defense declined to call any witnesses. Over the objection of defense counsel, Judge Gleeson charged the jury on the doctrine of conditional intent, as it applied to the intent element for the carjacking offenses. Judge Gleeson instructed the jury that an intent to cause death or serious bodily harm conditioned on whether the victims surrendered their cars was sufficient to satisfy the specific intent requirement of the statute. As stated, the jury found Holloway guilty on all eight counts charged in the indictment.

Following the verdict, Holloway moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or in the alternative, for reconsideration of his unsuccessful Rule 29 motion. See United States v. Holloway, 921 F.Supp. 155, 156 (E.D.N.Y.1996). Holloway argued that the Court erred in charging the jury on conditional intent in light of the carjacking statute's unambiguous specific intent requirement, which requires a carjacker to have the intent to cause death or serious bodily harm in order to be culpable.

In a decision issued on April 5, 1996, Judge Gleeson denied Holloway's post- trial motion. On August 16, 1996, Holloway was sentenced, and, on August 28, 1996, judgment of conviction was entered. This appeal followed.

DISCUSSION

I. Conditional Intent Instruction

Holloway maintains that Judge Gleeson committed reversible error by charging the jury on the doctrine of "conditional intent." Holloway contends that: (1) the federal carjacking statute clearly and unambiguously requires that a defendant possess a specific intent to cause death or serious bodily harm (hereinafter "specific intent to kill"), and (2) conditional intent, by definition, does not satisfy this requirement.

A. 1994 Amendments to the Carjacking Statute

Holloway argues that the statute, as amended, is clear and unambiguous on its face, thus preventing the trial court, or this Court for that matter, from inquiring into the intent of Congress or ascribing some alternate construction of the statute based on any perceived error in drafting. See Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701-02, 66 L.Ed.2d 633 (1981) Prior to the 1994 Amendments, the federal carjacking statute, 18 U.S.C. § 2119, read as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall--
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any

conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The Violent Crime Control and Law Enforcement Act of 1994 amended this statute in the following manner:

(14) CARJACKING.--Section 2119(3) of title 18, United States Code, is amended by striking the period after "both" and inserting ", or sentenced to death."; and by striking ", possessing a firearm as defined in section 921 of this title," and inserting ", with the intent to cause death or serious bodily harm".

Pub.L. 103-322, § 60003(a)(14). With these revisions, the statute now reads:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall--

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and

(4) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119 (1997) (emphasis added).

The amendments to the carjacking statute contained in the Violent Crime Control and Enforcement Law Act of 1994 came about as an attempt to expand the number of federal crimes subject to the death penalty. See 140 Cong. Rec. E857-03 (statement of Rep. Franks); 140 Cong. Rec. S12421-01, S12458 (statement of Sen. Nunn); 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman). The thrust of the various early versions of the amendments was to add the death penalty as a sentencing option when death resulted from a carjacking, and also, in some versions, to eliminate the firearm requirement. See H.R. 4197, 103rd Cong. § 125(h) (1994) (removed firearm requirement and added death penalty); H.R. 3355, 103rd Cong. § 203(a)(15) (1993) (version as of October 19, 1993 removed the firearm requirement and added death penalty); H.R. 3355, 103rd Cong. § 703(e) (1994) (version as of April 21, 1994 added the death penalty only). Congressional opposition to the amendments coalesced into two camps: those who opposed the death penalty in general, and those who opposed the expansion of federal criminal jurisdiction. See 140 Cong. Rec. S12309-02, S12311 (statement of Sen. Leahy contained in Conference Report on H.R. 3355); 140 Cong. Rec. H2322-02, H2325 (statement by Rep. Glickman on amendment introduced by Rep. Scott to remove the death penalty addition to the Violent Crime Control Act).

The insertion of the heightened intent requirement at issue here occurred at a relatively late stage in the legislative process--while the Act was under consideration in Conference Committee in the summer of 1994. See 140 Cong. Rec. H8772-03, H8819, H8872 (Conference Report on H.R. 3355 dated August 21, 1994). On September 13, 1994, the Act was

signed into law. There is no indication in the Congressional Record as to the purpose of the late-added heightened intent requirement. However, it is clear from a review of legislative history that Congress intended to broaden the coverage of the federal carjacking statute by the passage of the 1994 amendments, and that the application of the heightened intent requirement to all three of the carjacking categories was, in all likelihood, an unintended drafting error. See 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman) ("This amendment will broaden and strengthen that law so our U.S. attorneys have every possible tool available to them to attack the problem."); 140 Cong. Rec. E857-03, E858 (extension of remarks by Rep. Franks) ("We must send a message to the criminal that committing a violent crime will carry a severe penalty. This legislation will make an additional 22 crimes including carjacking and drive-by shootings, subject to the death penalty.").

At least two courts have speculated that Congress probably intended the heightened intent requirement to apply only to cases where the carjacking resulted in death, that is, those cases falling under § 2119(3). See United States v. Anderson, 108 F.3d 478, 482-83 (3d Cir.1997), petition for cert. filed (U.S., June 3, 1997) (No. 96-9338); Holloway, 921 F.Supp. at 158. But see United States v. Randolph, 93 F.3d 656, 660-61 (9th Cir.1996). In support of this interpretation, these courts point to the initial wording of the 1994 amendment, "Section 2119(3) of title 18, United States Code, is amended by ...," as limiting language for the two specific changes set forth within. See Anderson, 108 F.3d at 478-79 (quoting Pub.L. No. 103-322, § 60003(a)(14)) (emphasis added); see also Holloway, 921 F.Supp. at 158. Regardless of the actual intent of Congress in adding this amendment, the practical effect of adding this requirement is to severely limit the scope of conduct covered by the statute. The addition of the heightened intent requirement into the body of the carjacking statute limits federal jurisdiction over all carjacking offenses to only those in which death or serious bodily harm was intended. Notwithstanding that such a result was unintended, the Court declines any invitation to redraft the statute--that is a task better left to the legislature. Thus, the sole issue this Court must decide is whether the "specific intent to kill," as now reflected in 18 U.S.C. § 2119, encompasses a conditional intent, as defined by Judge Gleeson in his instruction to the jury.

B. Judge Gleeson's Instruction

In his instruction to the jury, Judge Gleeson charged, in relevant part:

> Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.
>
> You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.
>
> In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.
>
> In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.
>
> If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient.

You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Holloway argues that the above instruction was erroneous because it allowed the jury to convict him based on lesser mental state than is required by the carjacking statute. Holloway contends that the plain meaning of "specific intent to kill" does not include the lesser mental state of "conditional intent," because a conditional intent to kill is no more than a state of mind where death is a foreseeable event and, as such, is equivalent to a mental state of recklessness or depraved indifference. Holloway contends that such a lesser mental state plainly does not satisfy the intent requirement of the carjacking statute. The Court agrees that a conditional intent to cause death or serious bodily harm and "reckless indifference" both involve foreseeability; however, conditional intent requires a much more culpable mental state. A carjacker who plans to kill or use deadly force on a victim in the event that his victim fails to comply with his demands has engaged in willful and deliberate consideration of his actions. Under these circumstances, death is more than merely foreseeable, it is fully contemplated and planned for. Such a mental state is clearly distinguishable from the characterization of conditional intent advanced by Holloway, which only has the carjacker aware of a risk of death of which he chooses to disregard.

Holloway further argues that the Supreme Court case, Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676 (1987), forecloses the inclusion of conditional intent within the scope of an Furthermore, the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law. In his decision denying Holloway's Rule 33 motion, Judge Gleeson cited to state criminal law authority as support for his conditional intent charge. See Holloway, 921 F.Supp. at 159 (citing W.R. LaFave and A.W. Scott, Jr., Handbook on Criminal Law § 28 at 200 (1972); Model Penal Code § 2.02(6) ordinary specific intent to kill. In Tison, co-defendants Raymond and Ricky Tison planned an armed jail break to free their father, Gary Tison, and another inmate from the Arizona State Prison. After a successful escape from prison, a flat tire in their getaway car led to the stopping and theft of a family's car in the desert outside of Flagstaff, Arizona. The defendants witnessed their father brutally execute the family who had been in the car. The defendants were found guilty of aggravated felony-murder and sentenced to death. In the context of reviewing a collateral attack on the imposition of the death penalty, the Supreme Court found that under the factual circumstances presented, the defendants lacked a "specific intent to kill," and at most had a culpable mental state of reckless indifference to human life. Id. at 152, 107 S.Ct. at 1685. Holloway seizes on this language, characterizing conditional intent as an analogous mental state to that ascribed to the defendants in Tison. Holloway argues that, at best, the proof shows that he and Lennon shared a conditional intent to kill, which only meant that it was foreseeable that death could result from their various carjackings.

The facts of Tison are plainly distinguishable from the case at bar. In Tison some violence was foreseeable to the defendants in effecting the jailbreak, however, the murders for which the defendants were convicted were precipitated by a completely unplanned event, the flat tire in the desert. Thus, while it may have been foreseeable to them that death would occur in the course of the escape, the murders that flowed from their breakdown in the desert were not the result of a willful and deliberate plan.

(American Law Institute); People v. Connors, 253 Ill. 266, 97 N.E. 643 (1912); Hairston v. Mississippi, 54 Miss. 689 (1877)). Following his decision, the Third Circuit in United States v. Anderson cited to Judge Gleeson's opinion with approval, finding that "conditional intent" was included within the specific intent required by the carjacking statute. 108 F.3d at 483, 485. The Anderson court also cited to additional authority confirming this principle of criminal law, including the incorporation of the doctrine of conditional intent into some state penal codes. See Del.Code Ann. tit. 11 § 254 (1996) ("The fact that a defendant's intention was conditional is immaterial unless the condition negatives the harm or evil sought to be prevented by the statute defining the offense."); 18 Pa. Cons.Stat. Ann. 18 § 302(f) (West 1997) ("Requirement of intent satisfied if intent is conditional--When a particular intent is an element of an offense, the element is established although such intent is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."); Haw.Rev.Stat. § 702-209 (1996) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense."). This Court also finds ample persuasive authority supporting the inclusion of conditional intent within the scope of the specific intent requirement. See People v. Thompson, 93 Cal.App.2d 780, 209 P.2d 819, 820 (1949); People v. Henry, 356 Ill. 141, 190 N.E. 361, 361-62 (1934); Johnson v. State, 605 N.E.2d 762, 765 (Ind.Ct.App.1992); Gregory v. State, 628 P.2d 384, 386 (Okla.Crim.App.1981). Furthermore, and most importantly, incorporating conditional intent within the specific intent language of the carjacking statute comports with a reasonable interpretation of the legislative purpose of the statute. The alternative interpretation would have the federal carjacking statute covering only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or maim the victim. Such an interpretation would dramatically limit the reach of the carjacking statute. "It is well-established that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy.' " Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir.1995) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51, 107 S.Ct. 1549, 1554 (1987)). A statute should not be literally applied if it results in an interpretation clearly at odds with the intent of the drafters. See id. While the Court cannot and should not rewrite a poorly drafted statute, it has an obligation to interpret a statute so as to give it reasonable meaning.

After reviewing the substantial body of state law addressing this issue, and the clear legislative purpose of 18 U.S.C. § 2119, the Court finds that an intent to kill or cause serious bodily harm conditioned on whether the victim relinquishes his or her car is sufficient to fulfill the intent requirement set forth in the federal carjacking statute. As such, we accept the well-reasoned opinion of the court below, and hold that Judge Gleeson did not err when he instructed the jury on conditional intent.

CONCLUSION

Based on the foregoing, we affirm the judgment of the district court.