9-24-1999

Section 7: Criminal Law and Procedure

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

Last Term:

City of CHICAGO, petitioner,
v.
Jesus MORALES, *et al.*

No. 97-1121

Supreme Court of the United States

Decided June 10, 1999

ANTI-GANG ORDINANCE IS STRUCK DOWN
31 States Urged High Court to Uphold Chicago Loitering Law

***The San Diego* Union-Tribune**

Friday, June 11, 1999

Aaron Epstein

WASHINGTON – Rejecting pleas from officials in all levels of government, the Supreme Court struck down a sweeping Chicago anti-gang law aimed at breaking up sidewalk gatherings that intimidate residents in crime-infested neighborhoods.

By a 6-3 vote yesterday, the justices ruled unconstitutional an ordinance that allowed a police officer to order loiterers to disperse or be arrested if they stood or sat around in one place "with no apparent purpose" in the presence of a suspected gang member.

Although the 1992 ordinance was unique to Chicago – where it had been used to arrest 43,000 people over a three-year period – public officials elsewhere had hoped it would survive constitutional scrutiny so they could press for similar laws in their communities.

Chicago public officials, filing a joint legal brief, had hailed the ordinance as a method of "breaking the gangs' stranglehold on the streets and destroying their aura of invincibility."

In all, 31 states – including California – and various organizations of cities, counties, mayors, district attorneys and police chiefs, all facing gang problems of their own, supported the Chicago ordinance in the Supreme Court. So did the Clinton administration, which has awarded $11 million to help cities develop anti-gang strategies.

But Justice John Paul Stevens concluded for the majority that the Chicago law was so vaguely worded that it gave police officers too much discretion and converted "a substantial amount of innocent conduct" into crimes punishable by a maximum $500 fine and six months in jail.

The ordinance allowed the police to order people to move on without inquiring into their reasons for remaining in one place, Stevens said.

"It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark," wrote Stevens, the court's most liberal member, a native of Chicago and a former student, lawyer and appellate judge there.

"Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member."

In fact, Cook County Public Defender Rita Fry said, the ordinance enabled the Chicago police to arrest thousands of innocent people, mostly African Americans and Latinos, leaving them with "a record that can make it more difficult to seek employment, to obtain credit or to access certain benefits."

"Worst of all, the enforcement policy . . . enhanced the sense of hostility and mistrust between police and young men of color," Fry said.

Chicago Mayor Richard Daley said the city will draft a new ordinance. Ohio State Solicitor Edward B. "Ned" Foley, who helped write a friend-of-court brief, pointed out that the opinion "laid out a blueprint" that would allow a different version of the law to be found constitutional.

"They want loitering laws to be more defined, and that's a whole different ballgame than saying they shouldn't exist," Foley said.

The court said a better definition for the term "loiter" might be lingering in one spot "with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities."

The city of Chicago defined loitering as "remaining in any one place with no apparent purpose."

Justice Antonin Scalia, who taught at the University of Chicago Law School, delivered a stinging rebuttal from the bench, calling the court decision "a regrettable incursion on the people's right to govern themselves."

Unless some constitutional right, such as freedom of speech or religion, is involved, it is up to the citizens to decide for themselves whether they are willing to exchange some personal liberty for community safety, Scalia said.

"I would gladly trade my ability to hang out with a gang member in exchange for the liberation of my neighborhood in an instant," Scalia said.

The three dissenters were the court's most conservative members: Chief Justice William H. Rehnquist, Clarence Thomas and Scalia.

None of the justices disputed the gravity of the rapid growth of youth gangs and gang-related crimes.

In 1975, according to government estimates, there were 55,000 gang members in the United States. In 1996, the U.S. Justice Department estimated there were more than 665,000 gang members and counted 31,000 street gangs, in all 50 states.

In Chicago, where the 125 street gangs include the notorious Gangster Disciples, Vice Lords and Latin Kings, the City Council enacted the anti- loitering ordinance in an effort to deter drug dealing, drive-by shootings, turf wars,

vandalism and intimidation of law-abiding citizens.

Officials described the law as an outgrowth of what has become known as the "broken windows" thesis: the idea that neighborhoods can be saved by cracking down on such signs of visible disorder as panhandling, public drinking, graffiti, vandalism, prostitution, rowdyism, littering and loitering.

Thomas chided the court majority for focusing on "the 'rights' of gang members and their companions," rather than "good, decent people" like 88-year- old Susan Mary Jackson, who told the City Council: "We used to have a nice neighborhood. We don't have it anymore. . . . I am scared to go out in the daytime . . . you can't pass because they are standing. . . ."

The Chicago anti-loitering ordinance was enforced for about three years before Illinois courts declared it unconstitutional in 1995. During that period, Chicago police officials said, gang-related shootings and homicides declined dramatically.

JUSTICES FOUND CHICAGO LOITERING LAW TEMPTING BUT TOO VAGUE

Legal Times

Monday, July 12, 1999

Paul Butler

In Chicago v. Morales, 119 S. Ct. 1849, the Supreme Court ruled that a Chicago law designed to get gangs off the streets was unconstitutionally vague. The June 10 result occasioned an emotional dissent from Justice Clarence Thomas, who suggested that "any fool would know" that the ordinance was not vague.

Justice Antonin Scalia also dissented, but his opinion was more, well, Broadway. It burst into show tunes to mock the "lively imagination" of the six fools in the majority. Not every term do Leonard Bernstein and Stephen Sondheim find their work cited by the high court for the proposition, "Gee, Officer Krupke, krup you."

Justices John Paul Stevens and Sandra Day O'Connor must have made a deliberate decision not to go there, because an obvious response to Scalia-- and Thomas, whose dissent was joined by Chief Justice William Rehnquist-- comes from the same show. "I like to be in America," O'Connor might have sung. "Everything free in America." Swing the spotlight to Stevens, who adds, "For a small fee in America."

Because freedom in America is not always free. That's the not-so-subtle subtext of the Morales decision. Indeed, sometimes freedom turns out to be more expensive for the poor. But in Morales, the Supreme Court says that it's still a required purchase--no returns, no exchanges.

In response to citizen complaints about gangbangers intimidating law-abiding citizens on city streets, the Chicago city council had enacted the Gang Congregation Ordinance in 1992. The law authorized the police to order people to disperse when they were "loitering" in a public place with anyone an officer "reasonably believes to be a criminal street gang member."

Loitering was defined as remaining in a place "with no apparent purpose." Any person who refused a police request to move from a public place was subject to six-months imprisonment and a $500 fine. During the three years that the law was enforced, more than 42, 000 Chicagoans were arrested. Most of them were African-American or Hispanic.

The anti-gang law was controversial from the beginning, in large part because several provisions seemed to depend too much on the judgment of individual police officers. When does an officer have a "reasonable" belief that someone is a gang member? How far did one have to move when so ordered by an officer? Down the block or out of the neighborhood? What does it mean to remain in a public place "with no apparent purpose"?

In anticipation of these concerns, the Chicago police department established guidelines that it claimed prevented the ordinance from being enforced in an arbitrary or discriminatory way. The primary group of officers who made

arrests under the statute were members of a squad who had received special training in recognizing gang members. Police commanders were supposed to designate the city neighborhoods that suffered from gang problems, and the law was supposed to be enforced only within those areas. The identity of these neighborhoods was kept secret from the public.

The law was challenged (like the famous exhortation about when to vote in Chicago) early and often. In individual cases it seldom survived. Eleven trial judges ruled it unconstitutional; only two found it constitutional. Ultimately, the Illinois Supreme Court held that the law violated due process because it was too vague.

The state of Illinois, supported by the Justice Department and 31 of its sister states, appealed to the U.S. Supreme Court. Amicus briefs defending the law were also filed by citizens groups in Chicago, including those purporting to represent the interests of poor and minority communities in having safer streets.

Justice Stevens announced the judgment of the Court (although three of his concurring colleagues opined separately as well). The majority agreed with Illinois' highest court that the anti-gang ordinance violated due process because it was too vague.

A criminal law can be unconstitutionally vague for two reasons. First, a statute might not give adequate notice as to what one has to do to comply, so that citizens might find themselves locked up without realizing that they had broken any law. Second, a statute might allow for arbitrary and discriminatory enforcement.

According to Justice Stevens, the Chicago law failed both these tests. To make this point, Stevens, like Scalia, cited popular culture--but not any highfalutin musical theater. A Chicago native, Stevens knows how to market his opinions, even the potentially unpopular ones, to his audience. Thus, to prove just how much power the law gave police, he wrote: "It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police office, she may--indeed, she shall'-- order them to disperse."

Da Cubs! Nice play, Your Honor. Stevens' strongest argument, however, was that the law made virtually anyone a potential criminal: "Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member."

Stevens noted that the police department's internal guidelines could not truly limit discretion because they were not actually provisions of the law. For example, a person arrested in a part of the city not designated in the guidelines could not then use the guidelines as a legal defense.

If Only . . .

Justice O'Connor, joined by Justice Stephen Breyer, reluctantly concurred in the holding that the law was too vague. But she was careful to emphasize the "narrow scope" of the decision and to note that "there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence."

Indeed, O'Connor offered a short tutorial to the city on how it might draft a

constitutional anti-gang statute: "If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued."

If only the law had been limited to gangbangers, and not anyone who happened to be in a gangbanger's company. If only loitering meant remaining in one place with the intent to intimidate others from entering that area or to conceal illegal activities. The only problem with Justice O'Connor's if- only's is that most of the conduct she describes is already illegal in Chicago. The statute was valuable, and unconstitutional, precisely because it penalized people for totally innocent behavior.

The three dissenting justices did not understand all the fuss about vagueness. Thomas was especially grumpy: "There is nothing 'vague' about an order to disperse," especially after one has been loitering, which has been "disfavored throughout American history."

Scalia agreed, invoking the characters of "West Side Story" to show how gang members who willfully disobey police orders to disperse would know "they had it coming." As for non-gang members? Well, opined Scalia, the "minor limitation upon the free state of nature . . . imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets."

Scalia repeated that point in announcing his opinion from the bench: "I would trade my right to loiter in the vicinity of a gang member in return for the liberation of my neighborhood in an instant." For better or worse, however, neither the justice nor the residents of Chicago get to make that choice. The Constitution already has made it, in favor of the loiterers.

The not-so-small fee paid by residents of crime-infested neighborhoods is that they still have to live with gangbangers, at least until those gangbangers commit some crime for which they may constitutionally be arrested. However, we have a consolation prize for the beleaguered law-abiding citizens: their own liberty.

Morales is one of those unfortunate cases that posits scared senior citizens and little kids trying to walk to school on one side, and gangbangers and their best friends at the American Civil Liberties Union on the other. To read even the dour majority opinions is to be left with the impression that the forces of evil-cum-liberty won. Past are the upbeat '60s-era decisions, like Papachristou v. Jacksonville (1972), in which the Supreme Court said that loitering and loafing are "historically part of the amenities of life as we have known them."

Past also are the simpler issues in those cases, which often represented last-ditch efforts by the South to hang on to white supremacist law enforcement. That is not the case in Chicago. Many African-American and Hispanic citizens actually supported the law, and many minority cops actually enforced it.

The fact is that residents of high crime areas usually know exactly who the bad guys are. The Chicago statute forced many of those guys to crawl into a hole. In theory, that's an eminently good idea, and you don't have to be a conservative Supreme Court justice to recognize it.

The traditional liberal rejoinder is: Today the police arrest the bad guys; tomorrow the police arrest you. I don't think that risk is underestimated, including by many supporters of the law. Poor

blacks and Hispanics are the last people who need to be warned against overzealous law enforcement.

Rather, Scalia is right. There are a lot of citizens who would gladly obey a police officer's order to move along--even when they're doing nothing wrong-- in exchange for a feeling of security when they leave their homes. In Morales, the Court essentially ruled that people are entitled to due process – indeed, they have to pay for due process – whether they want it or not.

In reality, however, there is no need for regret, even for enthusiasts of law and order. The Chicago law was not particularly intelligent or effective. In the first place, as Stevens pointed out, if a gang member were standing in public with some illegal intent, like selling drugs or protecting his turf, he would not be subject to arrest under the statute because he would have an "apparent purpose."

More important, there is compelling evidence that the law did not succeed even on its own terms. It is true, as Thomas noted, that during the years the law was enforced, there was a substantial reduction in the homicide rate, and that the first year after the law was struck down, the homicide rate rose.

But in 1997, two years after the ordinance was declared invalid, gang homicides dropped, by 19 percent. Effective crime control requires more than just arresting tens of thousands of people.

So, despite Justice O'Connor's broad hint, Chicago should not simply rewrite the anti-gang ordinance and have another go at Court review. It might make for an interesting lesson in constitutional law, but it would not much improve the lives of the poor. Chicago has a much more important responsibility to its low-income citizens--building a community in which bartering constitutional rights for safe streets will not seem as reasonable as it does today.

Paul Butler is an associate professor at George Washington University Law School. His column "The Home Front" appears monthly in Legal Times.

Last Term:

Patrick KNOWLES, petitioner,
v.
IOWA

No. 97-7597

Supreme Court of the United States

Decided Dec. 8, 1998

DEFENSE BAR HAILS RULING

***New Jersey* Lawyer**

Monday, December 14, 1998

Scott Goldstein

New Jersey defense lawyers see it as a no-brainer, but they're still rejoicing that the U.S. Supreme Court departed from its hardline law-and-order approach by unanimously ruling police in most instances cannot search a vehicle or its occupants following a routine traffic stop.

"Finally, one for the defense," said Atlantic City attorney Edwin J. Jacobs Jr. about last week's decision. "The last couple of decades haven't been so good for the defense, but this one was quite obvious."

The Iowa case has been closely watched because the high court in recent years has rolled off a spate of search-and-seizure rulings tilting toward law enforcement.

Police in various parts of the nation have been hoping the justices would sanction Iowa's law allowing searches as part of routine traffic stops. Had the court given that statute the green light, it probably would have jump-started initiatives for such measures in much of the nation. "I think it's a terrific decision for civil liberties and the right of privacy because what the court has done is created boundaries of where police cannot go in terms of privacy," said Weehawken lawyer Joseph A. Hayden Jr.

"Obviously, the court is sending a message that protecting officers can only go so far as invading the privacy of motorists."

For years, the New Jersey and U.S. high courts have taken different roads on key search-and-seizure issues with the state court generally leaning more toward individual rights.

"I know automatically a judge in New Jersey is not going to let stand a search of a vehicle after a traffic violation if there is nothing suspicious," noted New Brunswick defense attorney Steven D. Altman.

He said he considers it obvious for the nation's high court to rule against a law that "permits cops to stop me or you for going 46 in a 35 and search the car."

But Chatham attorney Alan L. Zegas said even police in New Jersey have used motor vehicle stops to execute illegal searches and "this is one of the few cases in the past decade where the (federal) court has refused to go along with the common police practice."

Before a search, said Zegas, president of the Association of Criminal Defense Lawyers of New Jersey, police "will usually ask and usually the driver will give consent, but there are many instances where a car has been searched on the sole suspicion of a police officer who stopped a car for a traffic violation and the suspicion is not enough to justify the level of intrusion that occurs."

In its Knowles v. Iowa ruling, the justices said the state law there violates the Fourth Amendment.

Chief Justice William Rehnquist noted the court in the past has allowed searches after a suspect's arrest because of a concern for officer safety and because of the need to discover and preserve evidence. These two conditions do not apply to traffic citations, he wrote.

"While concern for officer safety . . . may justify the 'minimal' additional intrusion of ordering a driver and passengers out of a car, it does not by itself justify the often considerably greater intrusions attending a full . . . search," Rehnquist said.

He noted officers have other ways to search for weapons and protect themselves from danger, including ordering motorists out of the car.

In this case, a driver in Iowa was arrested for drug possession after his car was searched without consent following a motor vehicle stop for speeding.

The driver sought to suppress the evidence on the grounds that it was an illegal search.

Jacobs, the Atlantic City lawyer, said if the Supreme Court had validated the Iowa statute, the law effectively would have rewritten search-and-seizure law.

"Any time an American motorist got in his car, he could be subjected to a body and car search at the will of a police officer who chooses to issue a summons for a failure to use an indicator."

COURT BARS FULL CAR SEARCH IN TRAFFIC VIOLATION CASE

The Washington Post

Wednesday, December 9, 1998

Joan Biskupic, Washington Post *Staff Writer*

Police may not conduct a full-blown search of motorists and their vehicles after pulling them over and ticketing them for speeding or other minor traffic violations, the Supreme Court ruled unanimously yesterday.

In an opinion by Chief Justice William H. Rehnquist, the justices overturned a lower court ruling that would have extended the long-standing authority that police have had to search through cars when a motorist is arrested to include nonarrest situations involving only traffic citations.

The decision was a rare victory for a defendant claiming police had illegally rummaged through his car. In recent decades, the justices have narrowly interpreted the breadth of the Fourth Amendment protection against unreasonable searches and seizures, particularly in regard to motorists, to give police broad authority to look through vehicles without first obtaining a warrant.

But the fact that yesterday's ruling was unanimous shows how far the police practice at issue in the case went.

The state of Iowa permitted police to conduct a full search after writing up a traffic citation. A handful of other states had begun the practice but the policy in most states has been to allow such searches only when the driver has been arrested and in custody.

The case, which was closely followed by police organizations and civil libertarians, began when a police officer in a town near Des Moines stopped Patrick Knowles for driving 43 miles per hour in a 25 mph zone. The officer issued a citation and then did a full search of Knowles's car, finding some marijuana and a "pot pipe." Knowles was later charged with marijuana possession.

Knowles tried to keep the evidence out of trial, contending that the officer violated his Fourth Amendment rights. The Supreme Court ruled in 1973 that police can extensively search when a driver is arrested, but Knowles maintained that because he was not actually arrested, there was no reason for a full-blown search. The police officer had conceded that he was not suspicious that Knowles was involved in any criminal activity, which might have given him grounds for the search.

Lower courts ruled against Knowles, reasoning that because Iowa law allowed police to arrest someone for speeding, rather than simply ticketing him, police were allowed an extensive search.

But in reversing that ruling yesterday, the Supreme Court pointed to the distinct rationales for permitting a warrantless search when a motorist is arrested: the need to disarm the suspect so he can be taken into custody and the need to preserve evidence for a trial.

Rehnquist said neither of these rationales could justify the search in Knowles's case: "While the concern for

officer safety in [a traffic stop] may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search."

The chief justice added that a routine speeding violation is unlikely to create the need for preserving evidence. "Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained," Rehnquist wrote in Knowles v. Iowa. "No further evidence of excessive speed was going to be found."

Last Term:

WYOMING, Petitioner,
v.
Sandra HOUGHTON

No. 98-184

Supreme Court of the United States

Decided April 5, 1999

TOP COURT LIMITS CAR PASSENGER RIGHTS

Police Searches Can Include Others in Vehicle, Ruling Says

***The Fort Worth* Star-Telegram**

Tuesday, April 6, 1999

***Lyle Denniston, The Baltimore* Sun**

WASHINGTON – Police can search the belongings of passengers in cars stopped for traffic violations under some circumstances, even if the passengers are not suspected of wrongdoing, the Supreme Court ruled yesterday.

If officers have reason to believe that the driver may have drugs or other illegal items in the car, that allows them to search purses or other personal property of all passengers - even if no passenger is suspected of a crime, the court decided by a 6-3 vote.

Any container in the car that might contain illegal items, the court said, may be searched.

That authority, however, does not extend to searching the clothing or body of the passengers, the court stressed. It said the Constitution draws a distinction between searching persons and property, but not between driver and passengers.

The dissenters complained that the decision expands police search power over passengers, based solely on the driver's actual or suspected misconduct.

The ruling was the latest in a long series of Supreme Court cases testing police authority to search or conduct questioning after they have made legal traffic stops.

This time, the court overturned a Wyoming Supreme Court decision saying that it is unconstitutional for police to search belongings of passengers in stopped cars, when officers have no suspicions about passengers themselves.

Justice Antonin Scalia, who wrote the opinion, said, "Effective law enforcement would be appreciably impaired without the ability to search a passenger's personal

belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car."

The case involved the police search of a female passenger's purse after the driver - stopped for speeding and for a burned-out brake light - was found to have a drug syringe in his pocket. The driver admitted that he had used it for drugs. The passenger's purse was in the back seat.

After officers found illegal drugs and drug paraphernalia in her purse, Sandra Houghton was convicted for illegal possession of drugs and sentenced to two to three years in prison.

Joining Scalia in the decision were Chief Justice William H. Rehnquist and Justices Stephen G. Breyer, Anthony M. Kennedy, Sandra Day O'Connor and Clarence Thomas. Dissenting were Justices John Paul Stevens, Ruth Bader Ginsburg and David H. Souter.

SUPREME COURT STEERS TWISTING ROUTE THROUGH FOURTH AMENDMENT LAW

Legal Times

Monday, June 7, 1999

Jeffrey Standen

The U.S. Supreme Court has tried again to wriggle out of a problem it created for itself more than 30 years ago. It was in 1967 that the Court, in its famous decisions in Katz v. United States and Warden v. Hayden, obliterated the "property" analysis that had regulated Fourth Amendment jurisprudence for more than a century.

Despite its quaintness, the property principle had rather neatly cabined police activity, permitting the seizure of only those items in which the government could claim a property interest, usually via the ancient doctrine of the deodand, which held that the instrumentalities or fruits of a crime belonged to the state, not the perpetrator. Police could search for and seize that which the government owned, even if ownership were a fiction of ancient law, and no more.

Few changes in law have done more to alter the fundamental relations between the government and the governed than that produced by the new guiding principle the Court announced in 1967. Privacy, stated the Court, not the stodgy old notion of property, would henceforth govern Fourth Amendment law, and by extension, shape the contours of relations between the police and the citizenry.

Privacy is an unusually malleable term. What was to be the definition of this privacy? Would the Supreme Court embark on a series of Roe v. Wade-like cases, finding this particular interest or that area of private discourse constitutionally immune from government snooping? The body politic probably could not have accepted another such strand of judicial activism.

Instead, the Court came to treat its privacy notion not as the beginning of analysis, but as its end, finding that privacy is what's left after the government is done regulating its subjects. Privacy means a "reasonable expectation" of privacy, and one's expectation of privacy can't be reasonable if there's a federal statute that mandates public disclosure, now can it?

The circular phrase "reasonable expectations of privacy" has come to mean a definition of privacy few would have expected. One's person is private, for sure, as is one's house, and to search them police must have a judicial warrant. A car, however, is not a private place, or at least not as private as a house, and so police do not need a warrant to search it. A car's trunk is more private than the glove compartment, but less private than a handbag, unless that handbag is in the car, whereupon it's just a car. A mobile home is a car unless it is hooked up to a sewer, whereupon it's a house. You can put barbed wire, guard dogs, and "Private, No Trespassing" signs around your barn, but it's not private--whereas your unmown front lawn, bordering a busy street in plain view, is.

The privacy rationale has for decades kept the Court busily constructing silly distinctions between the various ways

Americans live and transport themselves. Now the justices appear to have had enough of this game.

WHEN IS A BAG NOT A HOUSE?

Here's the vexing intellectual problem that has tried the Court's patience: We know houses are more private than cars, except for the trunk, which is closer to a house but not quite, and that handbags, like persons, are like a house. But what is the rule of law when the unthinkable happens, and a citizen takes that handbag (a house) and puts it in a car (a car)? Is the bag still a house? Or is it now a car? It's not hooked up to a sewer, so the issue has puzzled our brightest judicial minds.

Believe it or not, the Court has struggled through five full opinions in the past 20 years trying to figure this one out.

First, the Court said that bags are "repositories of personal effects," and thus are really houses, even when they are inside a car. United States v. Chadwick, 433 U.S. 1 (1977).

Then the Court said that if the bag is in the car and the officer is searching the car, but not really looking for the bag, the officer may search the bag. (Don't ask, can't make it clearer.) United States v. Ross, 456 U.S. 798 (1982).

But if the officer is searching the car for the bag and finds the bag, he can't search it, at least not unless he gets a warrant, as he would need with a house. Arkansas v. Sanders, 442 U.S. 753 (1979).

Confused? Everyone was. Who knows how many law school graduates have failed the bar on this problem alone.

Finally, in what it thought was the last word, the Court threw up its hands and, in effect, just said "Search the stupid bag if you're searching the car." A bag is a house until it's put in the car, and then it's a car. California v. Acevedo, 500 U.S. 565 (1991).

But all that changed April 5. It turns out that some crafty Midwesterner, in a case styled Wyoming v. Houghton, found a secret loophole deep in the interstices of constitutional law: He invited someone else to travel in his car with him! And this person cleverly subverted the Supreme Court's entire criminal procedural system by bringing a bag into that car! The police, of course, being police, dutifully searched the passenger's bag in the course of searching the car.

THE HUMAN FACTOR

A car is not a house, and a bag, which was a house, becomes a car when it's placed in the car. But a person, some still think, remains a person no matter where that person happens to be. The Court long ago even made clear, after careful interpretation of constitutional text, that a person who gets in the car is still a human person. And police may not (yet) search a person's bag, because the bag is so much a part of the person that it's a house, unless the bag is put into a car.

So here's the question: What is the bag if it's in the car but also on the person?

When police search a car, we know they can search bags, but we also know they can't search a person. What is a bag? In the trunk, it's a car. But what if it's in the tight clutches of its owner in the back seat? May the police wrest it away and paw through it? If they do so, are they searching a car or a house?

Or better, imagine that the passenger/owner of the bag is ordered from the car, as is typical practice to give police unfettered access in auto searches. May the passenger take her bag with her?

And if she does, has she converted a car into a house? May the police nevertheless search it? Or may they order her to return it to the backseat, reconverting it from a house to a car, so they can rummage through it?

In Houghton, the passenger left her purse in the back seat, making it easy for the Court to treat the bag as part of the car, even though the searching officers admittedly knew that the bag belonged to a person other than the driver. But criminals, especially in the drug trade, seem able to manipulate legal doctrine with greater facility than third-year law students. The passenger in the next case will know enough to take her drug-filled purse with her, making it part of her person, and thus opening a whole new chapter in the Court's ongoing problem with privacy.

Indeed, the smartest passenger will take out as many bags as she can hold. Suspects will hold a figurative house in their hands. And unless the Supreme Court wishes to put a premium on very muscular drug mules, it will have little choice but to say that bags, at least bags that were recently in cars, are not houses after all, but are still cars, and so police may go ahead and search them without a warrant when they have sufficient cause.

This step is both predictable and yet a small step away from saying that bags are just cars after all, and that police can search citizens' bags on the street without a warrant. Soon, we will have to worry about bags, boxes, and other containers inside houses--real houses, that is. In any event, we will have arrived at a notion of privacy that few would recognize, and fewer would love.

Jeffrey Standen is a professor at Willamette University College of Law in Salem, Ore. This article originally appeared on Open Court, the commentary section of the Law News Network (www.lawnewsnetwork.com), a Web site affiliated with *Legal Times*.

Last Term:

Charles H. WILSON, *et ux.*, *et al.*, Petitioners
v.
Harry LAYNE, Deputy United States Marshal, etc., *et al.*

No. 98-83

Supreme Court of the United States

Decided May 24, 1999

POLICE CAN BE SUED FOR LETTING MEDIA SEE RAIDS

***The Washington* Post**

Tuesday, May 25, 1999

Joan Biskupic; Howard Kurtz, Washington* Post *Staff Writers

The Supreme Court ruled unanimously yesterday that police can be sued for letting reporters and photographers accompany them on raids of private homes, a decision that could curtail a widespread practice of media "ride-alongs" with law enforcement.

The justices said that police violate the constitutional guarantee against unreasonable searches and seizures when they allow reporters and camera crews to enter homes to observe law enforcement first-hand and, in some cases, obtain the dramatic footage that is now a staple of television news and cop shows.

"[I]t is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when [their] presence . . . was not in aid of the execution of the warrant," Rehnquist wrote regarding the case, which began when a Washington Post reporter and photographer burst into a Rockville couple's home with police early one morning in 1992.

The photographer took pictures of resident Charles Wilson, who was dressed only in undershorts, as an officer wrestled him to the ground and put a gun to his head, and his wife, Geraldine, who was wearing a negligee. The deputies from the Montgomery County sheriff's department and the U.S. Marshal's office had been looking for the Wilsons' son, Dominic, who was a fugitive and who, it turned out, was not in the home. The Wilsons sued the officers under federal civil rights law.

Under the ruling, police could be forced to pay damages if they bring members of the media into private homes. But the court said that in the Maryland dispute and in a companion case from Montana involving CNN, police would be protected from liability because the law

was not yet clear when the incidents took place.

Rehnquist noted that government officials, including law enforcement officers, can have "qualified immunity" from liability for civil damages if they could not have known at the time that what they were doing was wrong. Rehnquist said that these cases met that standard, with only Justice John Paul Stevens dissenting from that part of the ruling.

Although the legal question in yesterday's case regarded only the officers' liability for inviting the media along and not the media's responsibility for taking part in the action, the case had drawn widespread press attention. Ride-alongs involve a common collaboration: the government wants publicity for its law enforcement efforts, the press wants a first-hand view of an arrest.

Lee Levine, who filed a friend-of-the-court brief for 24 media organizations, said "police and law enforcement will be very reluctant to invite the media to come along, whether we're talking about a home or an open area or riding along in a police car . . . and that will have an unfortunate effect on news reporting."

John Langley, executive producer of the Fox program "COPS," said that "as a so-called ride-along program, we are unaffected by the decision because we obtain releases from everyone involved in our program. Moreover, we do not, under any circumstances, violate rights of privacy." But the releases could become a moot point if police decide to bar cameras from their raids.

"These shows are in that gray area between entertainment and journalism," said Tom Rosenstiel of the Project for Excellence in Journalism. "They're not actually providing news. It's more voyeurism with a tinge of moralism. . . . what it's like to ride with a cop, to be a cop."

At The Post, which did not publish the pictures taken during the Rockville raid, Deputy Managing Editor Milton Coleman said news-gathering practices would be largely unaffected. "When we ride along with the police, in most of those circumstances we're observing the police in public places," he said. But the paper understands "that the individual house is a threshold that you don't cross" on police raids.

A CNN spokesman said the network is studying the ruling.

Attorney Richard K. Willard, who represents the Wilsons, said he was pleased with the ruling because "it protects people from the indignity of having their homes invaded by reporters." Although the Wilsons' civil rights claim has been shut down, Willard noted that a separate federal tort claim was still pending.

The Supreme Court agreed to hear the two cases in part because federal courts had produced contradictory rulings.

In the Maryland case, Wilson v. Layne, the 4th U.S. Circuit Court of Appeals ruled that police did not violate the Wilsons' rights because past court cases did not plainly forbid police from taking reporters with them to witness an arrest.

But in the Montana case, Hanlon v. Berger, which arose after federal agents brought along a CNN crew while searching the ranch of a man suspected of poisoning protected eagles, the 9th Circuit said "no reasonable officer would have thought it permissible" to allow the press to be present.

In yesterday's cases, the Supreme Court made clear that the Fourth

Amendment does not permit police to bring along the press or any third party who is not part of the law enforcement mission. Rehnquist emphasized the sanctity of the home and the residential privacy at the core of the Fourth Amendment, dismissing the argument that ride-alongs serve a public relations function and help ensure against police misconduct.

Montgomery County Sheriff Ray Kight, who was named in the Wilsons' suit along with three of his deputies, said he was relieved by the court's finding that Montgomery sheriff's officials have immunity from the lawsuit.

"It gives law enforcement throughout the country new guidelines where we didn't have any before," he said. But he added, "I think it will definitely have a chilling effect on press coverage" of law enforcement.

Staff writers Sharon Waxman and Katherine Shaver contributed to this report.

COURT'S REJECTION OF POLICE-MEDIA RIDE-ALONGS WILL HINDER LEGITIMATE REPORTING

Legal Times

Monday, July 12, 1999

Richard M. Knoth

The reggae beat pulses. "Bad boys, bad boys, whatcha gonna do? Whatcha gonna do when they come for you?" Some unidentified ne'er-do-well is led away in handcuffs, his face mottled by a computerized mosaic. Local Officer Friendly confidently explains where this particular culprit went wrong.

Another day, another airing of "Cops."

And what a sigh of relief devoted "Cops" fans breathed when they learned that their beloved show would not be yanked off the air by the caprice of the U.S. Supreme Court's decision in Wilson v. Layne, 119 S. Ct. 1692 (1999), the so-called media ride-along case.

Under Wilson, police officers are no longer supposed to let reporters, photographers, or videographers go with them when they execute a search warrant at someone's home. "Cops" is not affected because the show's producers get permission from everyone involved before airing an episode. Even the bad guys consent to the production.

But what about the less dramatic news gathering by beat reporters and investigators from both print and electronic oulets? Does Wilson intend to attack the hype often seen in "real life" television police dramas or quash the media's legitimate role of oversight?

Because the media's presence during a valid search violates the Fourth Amendment, according to Wilson, "arresting" entertainment will continue unabated, while beneficial mainstream news gathering will not.

The facts of Wilson are fairly well-known. In 1992, a Rockville, Md., couple awoke early one morning to find police officers in their home. The police had a valid warrant to search the Wilsons' home for their adult son, who was wanted for probation violations. Mr. Wilson, clad only in his underwear, was pinned on the floor while Mrs. Wilson stood by, wearing a sheer nightgown. The Wilsons' son wasn't there, so the couple was let go.

Observing all of this were a reporter and a photographer from The Washington Post. The reporter took notes while the photographer clicked away, but the Post did not publish any of the pictures.

The Wilsons sued the police officers for civil rights violations under 42 U.S. C. Section 1983 and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), both of which allow for recovery of damages from government actors.

Government actors have qualified immunity from Bivens or Section 1983 suits. The plaintiff must allege that he or she was deprived of an actual constitutional right and that the right was clearly established at the time of the violation. If neither condition is met, the government actors are entitled to judgment.

The Wilsons claimed that their Fourth Amendment rights were violated. There

was no question that the search warrant itself was valid. The claim of wrongdoing was based on the fact that the police had brought the media along, and their presence made the search unreasonable, and thus invalid, under the Constitution.

Unanswered Questions

Much has been made about the Court's recitation of a quote from a 1604 English decision that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." Backers of Wilson embrace the quote to ridicule the press for voraciously invading personal privacy in the name of the First Amendment.

Meanwhile, the press--unhappy with the Supreme Court's ruling--nevertheless embraces the quote, too, as proof that Wilson applies only to ride-alongs that go into people's homes. In the media's view, a ride-along for other police work is still viable.

Is it?

The hoary quote is powerful. And throughout the opinion--indeed in the holding itself--the Court uses the word "home" to limit the reach of its rule: "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."

But the Court devotes considerable ink to discuss generally the legitimate presence of third parties whenever a search warrant is carried out. Other portions of the opinion downplay the public and/or police interest in having a media representative present during the execution of police business.

In deciding whether the police had violated an actual constitutional right, the Court correctly states that the Fourth Amendment protects the homeowners from entry without a warrant. There was a warrant in this case, so next the Court asks if the warrant was properly limited in scope. The justices conclude, "no," because the media's presence, by definition, exceeded the warrant's scope.

That raises some interesting propositions. Take, for example, the instance where police officers bring in one of their own photographers, videographers, or sketch artists. Or maybe the police department contracts with freelance photographers to record certain police maneuvers. The Court says it would be OK for these people to be present, even if they were not listed on the search warrant, if it is part of a " 'quality control' effort to ensure that the rights of homeowners are being respected, or even to preserve evidence." But the Court also asserts that the presence of these authorized third parties is "significantly different from the media presence in this case."

The difference is illusory.

In both situations, the interest is in documenting the proper execution of police business. In both cases, a permanent record is created. In neither case is the third party actually carrying out the search warrant.

Ironically, there is as much of a chance--if not more--that the public would see photos taken by the police photographer than they would those taken by the press. The pictures, videos, or notes taken by police would likely be governed by a state open records statute once any investigation connected to the records was closed or the investigation record is otherwise published by the police or government agency (e.g., the

Federal Bureau of Investigation, Drug Enforcement Administration, or a local prosecutor). That means that every photo could be obtained, copied, and distributed by any citizen in that state without restriction. The press photos and notes may admittedly have greater dissemination, but they may not be used at all, and much of what is recorded will be thrown out.

In the wake of Wilson, there is scant assurance that the police can rely on qualified immunity in future situations where the press seeks to observe police business. We can expect that many police chiefs around the country will decide that the media's presence at police functions is not worth the potential liability.

Crime scenes or disaster areas could be cordoned off to the press. Access to such sites has typically been proscribed by law enforcement officers, balancing the public's need to know against the police's need to preserve evidence and public safety. The Court's opinion suddenly turns reporters and photographers into villains. Their presence, whether in a home or at an accident scene, will be seen by police as a nuisance that invites liability instead of inspiring confidence.

The police (and, in a sense, the public) have long relied on the media. The police carry out the public's business, while the media confirm to the public that the business is being done and shows the public how. The police benefit because citizens want to know that their men in blue are keeping their streets safe. The greater sense of safety, in turn, builds the common weal.

On the other hand, the media's presence often provides the unstated check on potential brutality. The camera lens undoubtedly thwarts thoughts of overzealous police action.

The Court in Wilson, however, stubbornly ignores that interrelationship by hammering at the fact that "The Washington Post reporters in the Wilsons' home were working on a story for their own purposes. They were not present for the purpose of protecting the officers, much less the Wilsons." The Court makes it sound as if the Post, or any other member of the media, collects information for the sole purpose of compiling dossiers on the general citizenry. Such an implication is as insulting to the press as it would be to government officials.

Perhaps with visions of popular television re-creations of crime scenes in mind, the Court appears hostile to the fact that media outlets are also businesses--that while they collect information to pass onto the public, they are also striving to keep revenue flowing. By describing stories on police activities as being for "private purposes, " the Court undermines the very function of a free press.

The decision also suggests a hostility toward traditional press functions. The fact that the justices accepted this case for review in the first place is suspect. Wilson does not break any new ground in civil rights jurisprudence. It merely takes a set of facts and determines if they fit the definition of clearly defined rights. Such determinations are usually left up to the lower courts.

The facts of the Wilson case are not particularly egregious, either. The reporter and photographer did not participate in the warrant's execution. Perhaps most important, the photos of the wrongly suspected Mr. Wilson were never published. Compare those facts to those of Hanlon v. Berger, a companion case, but on which the Court issued no substantive opinion. In Hanlon, CNN

contracted with federal agents to ride along on an investigation of a Montana rancher suspected of poisoning golden eagles. The agents wore hidden recording devices supplied by CNN; the network crew was not identified as being with the press; CNN broadcast portions of both the audio and the video recordings, yet the rancher was acquitted of the poisoning charges.

By choosing Wilson instead of Hanlon on which to rest its ruling, the Court painted with a broad brush all media as irresponsible mercenaries.

People are to be free from unjustified governmental invasions into their home. The bottom line in the Wilson case is that the governmental invasion was justified--the warrant was unquestionably valid. The fact that media representatives--at police invitation--were there to observe in no way alters the propriety of a police action under current civil rights law.

Instead, the mainstream press has been unnecessarily scapegoated, while "Cops" beams nightly into homes without context, commentary, or possible criticism of government activities. While the Court through Wilson may have tried to pull the plug on glorified "real life" police dramas, the decision will only undermine legitimate and beneficial news gathering.

Richard M. Knoth is a partner in the Cleveland office of Arter & Hadden. He specializes in unfair business practice litigation and has handled numerous trials and appeals addressing constitutional issues.

Last Term:

MINNESOTA, Petitioner
v.
Wayne Thomas CARTER

No. 97-1147

Supreme Court of the United States

Decided December 1, 1998

TOP COURT OFFERS SHORT-TERM GUESTS LITTLE HOSPITALITY

***Chicago* Daily Law Bulletin**

Wednesday, December 9, 1998

David W. Gleicher

The U.S. Supreme Court is good for about one controversial search and seizure decision each term, and this year is no exception.

Last week, the court held in Minnesota v. Carter, No. 97-1147 (Dec. 1), that the ability to claim Fourth Amendment privacy rights depends on how long one stays as a guest in the host's home.

It all started in a Minneapolis suburb when police officer James Thielen received a tip that people in a ground-floor apartment were bagging a white powder. Thielen went to investigate and looked through the apartment window. (A gap in the blinds enabled Thielen to see the bagging operation the tipster had described.)

Then two men, later identified as defendants Wayne Carter and Melvin Johns, left the apartment in a Cadillac. Police stopped the car and ordered the two out of it. At that point, the cops saw a gun on the floor. A more thorough search revealed cocaine, pagers and a scale. The cops also searched the apartment, where they found Kimberly Thompson, the occupant, as well as more coke.

Police later learned that while Thompson rented the apartment, Carter and Johns, who lived in Chicago, had never been there before that day and had been in the apartment for only about 21/2 hours bagging the drugs. In return for the use of the apartment, the two had given Thompson an "eight ball" (one-eighth of an ounce) of coke.

Carter and Johns moved to suppress the evidence obtained from the Caddy and apartment. They argued that Thielen's initial observation of their drug activities was an unreasonable search in violation of

the Fourth Amendment and that all evidence obtained as a result of that search should be ruled inadmissible as "fruit of the poisonous tree."

The Minnesota trial court didn't buy that argument, holding that Carter and Johns, as temporary visitors, were not entitled to claim a Fourth Amendment right to home privacy. The Minnesota Supreme Court disagreed, holding that Carter and Johns had standing to claim the protection of the Fourth Amendment because they were invited guests in Thompson's home. The court ruled that Thielen's observation constituted a search of the apartment, and that such a search was unreasonable. The State of Minnesota appealed to the U.S. Supreme Court.

Chief Justice William H. Rehnquist wrote the court's majority opinion, beginning with the following proposition: To claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.

Rehnquist then noted that the language of the Fourth Amendment guarantees the rights of the people to be secure in their persons, houses, papers and effects. "Their" indicates that the Fourth Amendment is a personal right that must be invoked by the individual claiming it. However, he said, whether an individual can claim a Fourth Amendment right -- a legitimate expectation of privacy in the invaded space -- depends on where that person is.

The chief justice wrote that while the text of the amendment could imply that its protections extend to only people claiming those protections in their own homes, the case of Minnesota v. Olson, 495 U.S. 91 (1990), was more generous. Olson held that an overnight guest in a house had the expectation of privacy protected by the Fourth Amendment. However, here were two men who were not sleeping over but were merely using the apartment as a spot to bag drugs.

Do they have the same privacy rights as overnight guests? No, the court held.

An overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not, Rehnquist declared. A guest who is sleeping over is using the apartment as a dwelling place, albeit temporarily; Carter and Johns were using the apartment merely for business purposes. The expectation of privacy in property used for business, Rehnquist wrote, is less than the expectation of privacy in a home.

So, was Officer Thielen's search though the blinds unreasonable? Because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide that issue. The Minnesota Supreme Court ruling was reversed, and the case remanded for further proceedings.

Justice Antonin Scalia and his partner, Justice Clarence Thomas, wrote a concurring opinion filled with obscure and vague historical references, finally asserting that it is up to the legislatures to determine the extent of privacy.

Justice Anthony M. Kennedy concurred, holding that if Kimberly Thompson would have objected to the search being unreasonable (she was not a respondent here), she would have had a good argument. Carter and Johns, however, do not have standing to object to the search.

Justice Stephen G. Breyer, a voice of logic here, seems to hold the opposite of Kennedy. In his concurrence, Breyer says

Carter and Johns do have the right to claim Fourth Amendment privacy rights, despite being only temporary visitors to the apartment. However, Breyer concurred in the judgment because Thielen's peeping through the blinds was not an unreasonable search. If you want privacy through a window facing a public way, close your blinds all the way, Breyer wrote in a helpful hint.

Justice Ruth Bader Ginsburg dissented, joined by Justices David H. Souter and John Paul Stevens. Ginsburg wrote that part of the definition of privacy in a home is the right to exclude some people and include others. If Thompson invites Carter and Johns into her apartment, she is extending her expectation of privacy to her guests, whether those guests are overnighters or transient.

Ginsburg expressed worries that police may be tempted by the court's majority opinion to enter homes without warrants, hoping that some of the people inside will prove to be temporary visitors like Carter and Johns.

And if they're not, the police will say, "Oops, we made a mistake."

While the court's decision was on a 6-3 vote, Breyer's tempered concurrence really makes it a narrower 5-4 split against giving temporary guests Fourth Amendment rights of privacy.

Will Ginsburg's fears of increased warrantless home entries come true? That is uncertain, but the prospects of such a result was enough to lead the usually staid Chicago Tribune to rip this decision in a Dec. 7 editorial. Criminal Defense By David W. Gleicher Gleicher practices criminal defense and general civil litigation. He is a graduate of the University of Chicago Law School, a member of the Federal Defender Panel of Attorneys, and author of "Louis Brandeis Slept Here." For information on ordering the book from Gefen Publishing, call (800) 477-5257. An overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not.'

COURT LIMITS GUESTS' RIGHT TO PRIVACY

Dissent Warns That Ruling Allows Police to Pry Into Homes

The Washington Post

Wednesday, December 2, 1998

Joan Biskupic, Washington Post *Staff Writer*

The Supreme Court yesterday limited the privacy rights of guests invited over to someone's home, rejecting the idea that visitors share their host's constitutional protection from unreasonable police searches.

The 5-4 ruling, in which the conservative justices seized the majority, provoked a strong warning from dissenting justices who contend that the ruling represents a new threat to personal security and will tempt police to pry into private homes.

The majority's narrow reading of the Fourth Amendment safeguard against police intrusions is consistent with the law-and-order bent of the high court in recent years, but it nonetheless marks a shift from a 1990 ruling in which the justices said a guest who spends the night at someone's home has a legitimate expectation of privacy.

Chief Justice William H. Rehnquist, who had dissented in 1990, wrote yesterday for the court, "[A]n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not."

The decision reinstated the drug conspiracy convictions of two Minnesota men who were seen bagging cocaine by a police officer peeking through drawn window blinds.

Yesterday's decision is significant both in an era of stepped-up police vigilance and increased national concern for government intrusions on privacy, whether through modern techniques such as electronic eavesdropping or old-fashioned window snooping.

In a forcefully worded dissent, Justice Ruth Bader Ginsburg said the decision "undermines not only the security of short-term guests, but also the security of the home resident herself."

When someone "personally invites a guest into her home . . . whether it be for conversation, to engage in leisure activities, or for business purposes licit or illicit, that guest should share his host's shelter against unreasonable searches and seizures," Ginsburg wrote in a dissenting opinion, signed by Justices John Paul Stevens and David H. Souter and endorsed by Justice Stephen G. Breyer.

The Fourth Amendment prohibits unreasonable searches, and courts have long required individuals who want to protest a police search -- typically to stop seized evidence from being introduced at trial -- to show that they had a reasonable expectation of privacy in the place that was searched. Yesterday's case was important in addressing the privacy rights of a short-term guest, as opposed to the homeowner or someone who stays overnight.

The dispute began when a police officer in the Twin Cities suburb of Eagan, Minn., investigated a tip from an informant who reported drug activities in

a ground-floor apartment. Without obtaining a search warrant, the officer looked through a gap in the closed blinds and saw Wayne Thomas Carter and Melvin Jones bagging a white substance with a woman, who (it turned out) lived in the apartment. After the men left the apartment and got into their car, police arrested them and seized 47 grams of cocaine.

At their trial, Carter and Johns sought to have the evidence suppressed on the grounds that the police officer's initial observation of their drug activity amounted to an unconstitutional search.

The trial judge disagreed, and Carter and Johns were convicted. But the Minnesota Supreme Court reversed that decision, ruling that even though "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."

In overturning that decision, the Supreme Court emphasized that Carter and Johns were in the apartment for only about 2 1/2 hours and that they were engaged in a commercial endeavor.

Joining Rehnquist in the ruling that the short-term visitors had no legitimate privacy expectations were Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas. Kennedy wrote separately, saying that "social guests have a legitimate expectation of privacy" and suggesting that a person who claimed that he was a purely social visitor might be able to claim protection from a police search.

Separately, Justice Breyer agreed with the dissenters that the defendants had a privacy right, but voted to reinstate the cocaine convictions, saying the police officer acted reasonably in looking in the window after getting a tip.

Attorney James Backstrom, who represented Minnesota in the case against Carter and Johns, said the ruling would give police greater leeway in investigating drug dealers. But Boston University law professor Tracey Maclin, who wrote a brief for the American Civil Liberties Union in Minnesota v. Carter, said the ruling is an invitation to police to pry into homes.

ILLINOIS v. WARDLOW

Does Running From the Police Give Cause to Stop and Search?

Matthew Curtis *

Sam Wardlow, a convicted felon, was standing on the sidewalk along West Van Buren, in Chicago – a neighborhood plagued by drug trafficking. Wardlow carried a bulky white envelope that contained a .38 cal. revolver, loaded with five rounds. As a caravan of four police vehicles (possibly unmarked) approached, Wardlow looked at one of the uniformed officers in the rear car and bolted down the sidewalk, running into an alley. The police immediately gave pursuit and eventually caught Wardlow at which time they frisked him and discovered the handgun. Wardlow was subsequently convicted for being a felon in possession of a handgun.

The Illinois Supreme Court, however, threw out the conviction after ruling that the revolver was inadmissible as evidence due to an illegal search. The Illinois court applied the standard provided by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), in ruling that simply fleeing from the police was not sufficient, in and of itself, to justify an investigatory stop.

In *Terry v. Ohio*, Terry was arrested as he and two other men stood talking on the sidewalk. After observing two of the men for more than ten minutes, a detective approached the men, identified himself, and asked them their names. When they mumbled their responses, the detective immediately frisked them, finding revolvers on Terry and one of the other men. The two armed men were then arrested for carrying concealed weapons. During the time that the detective had observed the two men, they repeatedly took turns walking down the sidewalk and peering into the window of a store. The detective later stated that he suspected they were "casing" the store in order to rob it.

The Supreme Court upheld Terry's conviction. Chief Justice Warren concluded "that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own and others' safety," the police officer may conduct a cursory search of the suspect's clothing for weapons. Thus, the Warren Court provided a standard that must be applied based on the specific circumstances of each case.

Having agreed to hear *Illinois v. Wardlow*, the current Court must compare the case to *Terry* and determine if the circumstances in *Wardlow* are sufficiently similar to warrant the police officer's stopping and frisking of Wardlow. Specifically, they must decide whether a "person's sudden and unprovoked flight from [a] clearly identifiable police officer, who is patrolling [a] high crime area, [is] sufficiently suspicious to justify [a] temporary investigatory stop."

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* College of William and Mary School of Law, Class of 2001; Co-Director, Student Division of the Institute of Bill of Rights Law.

Because *Terry* requires that the Court second-guess the judgment of police officers, it is impossible to guess how the Court might decide *Wardlow.* However, the Court may follow the Illinois Supreme Court's reasoning and decide that running from police does not constitute "reasonable suspicion." Alternatively, the Court could rule that running presumptively establishes the requisite "reasonable suspicion."

98-1036 Illinois v. Wardlow

Ruling below (Ill., 183 Ill.2d 306, 701 N.E.2d 484, 64 Crim. L. Rep. 32):

Individual's flight upon approach of police officers is, by itself, insufficient to create reasonable suspicion of involvement in criminal conduct so as to justify stop under *Terry v. Ohio*, 392 U.S. 1 (1968), regardless of whether person is in high-crime area.

Question presented: Is person's sudden and unprovoked flight from clearly identifiable police officer, who is patrolling high crime area, sufficiently suspicious to justify temporary investigatory stop pursuant to *Terry v. Ohio*?

The People of the State of ILLINOIS, Appellee,
v.
Sam WARDLOW, Appellant

Supreme Court of Illinois

Decided September 24, 1998

Justice HARRISON delivered the opinion of the court:

Defendant, Sam Wardlow, was convicted of unlawful use of a weapon by a felon (citation omitted) following a stipulated bench trial in Cook County and was sentenced to a term of two years' imprisonment. On appeal, the appellate court reversed defendant's conviction, finding that defendant's motion to suppress evidence should have been granted because the revolver seized from him was discovered as a result of an improper investigatory stop. 287 Ill.App.3d 367. We allowed the State's petition for leave to appeal. (citation omitted)

At the hearing on defendant's motion to suppress, Officer Timothy Nolan testified that on September 9, 1995, he and his partner, Officer Harvey, were assigned to the special operations section of the Chicago police department. On that date, Nolan and Harvey were among eight officers in four cars travelling eastbound on West Van Buren Street with the purpose of investigating narcotics sales in that area. Nolan stated that he was working in uniform, but did not recall whether the police car he drove, the last in the "caravan," was marked or unmarked.

Nolan testified that as he was driving, he observed defendant standing in front of 4035 West Van Buren. Defendant, who did not appear to be violating any laws, looked in the officers' direction and then fled. Nolan turned his vehicle southbound toward Congress Avenue, continuing to observe defendant, who ran southbound through a gangway and then through an alley. Nolan stated that defendant, who was carrying a white opaque bag under his arm, was cornered in the vicinity of 4036 West Congress when he "ran right towards us."

Nolan exited his car and stopped defendant. Without announcing his office or asking any questions, he conducted a protective pat-down search of defendant. Nolan testified that he could not see inside the bag defendant was carrying so he "squeezed" the bag and felt a very heavy, hard object "that had a similar shape to a revolver or a gun." Believing the object to be a weapon, Nolan opened the bag and found a .38-caliber handgun containing five live rounds of ammunition. Nolan then placed defendant under arrest. (footnote omitted)

Responding to the State's question as to why he "went to that location on that date and time," Nolan answered that it was "one of the areas in the 11th District

that's high narcotics traffic." Nolan further testified that, based upon his experience in investigating areas in which narcotics were sold, it was common for there to be weapons "in the near vicinity" and he considered that fact as he approached "that specific scene." After hearing arguments by the parties, the trial court denied defendant's motion to suppress.

* * *

The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. This provision applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *People v. Smithers*, 83 Ill.2d 430, 433-34 (1980). In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court held that the public's interest in effective law enforcement makes it reasonable to detain and question individuals under certain circumstances in which probable cause to arrest is lacking. However, in order to protect "the individual's right to personal security free from arbitrary interference by law officers" (*Brignoni-Ponce*, at 878), the *Terry* Court held that such limited investigatory stops are permissible only upon a reasonable suspicion based upon specific and articulable facts that the person has committed, or is about to commit, a crime. *Terry*, 392 U.S. at 21-22; *Smithers*, 83 Ill.2d at 434.

This *Terry* standard has been codified in our Code of Criminal Procedure of 1963. (citation omitted) Section 107-14 of the Code provides, in pertinent part: "A peace officer . . . may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense . . . ." (citation omitted) The same standard is applied in determining the propriety of an investigatory stop under article I, section 6, of the Illinois Constitution of 1970 (citation omitted). *See People v. Tisler*, 103 Ill.2d 226, 242-43 (1984) (the protection against unreasonable searches and seizures under the Illinois Constitution is measured by the same standards as are used in defining the protections contained in the fourth amendment to the United States Constitution).

Turning to the case before us, defendant contended on direct appeal that the trial court erred in denying his motion to suppress because his presence in a high-crime area and flight from police were insufficient to justify his investigatory stop. The appellate court agreed, but found the record "simply too vague to support the inference that defendant was in a location with a high incidence of narcotics trafficking" and limited its holding accordingly. (citation omitted) However, we believe Officer Nolan's uncontradicted and undisputed testimony, which was accepted by the trial court, was sufficient to establish that the incident occurred in a high-crime area. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996) (as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal, but reviewing court should take care both to review findings of fact only for clear error and to give due weight to inferences drawn from those facts by judges and local law enforcement officers). Thus, the issue presented by this appeal is whether an individual's flight

upon the approach of a police vehicle patrolling a high-crime area is sufficient to justify an investigative stop of the person. Defendant contends that such flight alone is insufficient to create a reasonable suspicion of involvement in criminal conduct. We agree.

A majority of jurisdictions addressing this issue have held that flight alone is insufficient to justify a *Terry* stop. (citation omitted) "Instead, courts require proof of some independently suspicious circumstance to corroborate the inference of a guilty conscience associated with flight at the sight of the police. [Citations.]" *State v. Hicks*, 241 Neb. at 362-63, 488 N.W.2d at 363; (citation omitted)

In *Hicks*, the Nebraska Supreme Court examined a number of these "location plus evasion" cases and, in a well-reasoned opinion, concluded:

> [A]llowing flight alone to justify an investigative stop would undercut the very values *Terry* sought to safeguard. *Terry* is based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable on the street as it is in the home. Thus, while a police officer does not violate the Fourth Amendment by approaching an individual in a public place and asking if the person will answer some questions, neither is the person under any obligation to answer. *Florida v. Royer*, 460 U.S. 491 (1983). The person may decline to listen to the questions at all and simply go on his or her way. *Id.* If the option to 'move on' is chosen, the person 'may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.' 460 U.S. at 498. * * * Flight upon approach of a police officer may simply reflect the exercise—'at top speed'--of the person's constitutional right to ' "move on." ' *Shabaz*, 424 Mich. at 63, 378 N.W.2d at 460. *Terry* and *Royer* stand for the proposition that exercise of this constitutional right may not itself provide the basis for more intrusive police activity.
>
> A prime concern underlying the *Terry* decision is protecting the right of law-abiding citizens to eschew interactions with the police. Authorizing the police to chase down and question all those who take flight upon their approach would undercut this important right and upset the balance struck in *Terry* between the individual's right to personal security and the public's interest in prevention of crime. We therefore join those jurisdictions holding that flight from a police officer is sufficient to justify an investigatory stop only when coupled with specific knowledge connecting the person to involvement in criminal conduct. [Citations.]

Hicks, at 363-64, 488 N.W.2d at 363-64.

Although no Illinois court has specifically considered whether sudden flight from police in a high-crime area justifies a stop, we agree with the appellate court that "[i]n Illinois, neither a person's mere presence in an area where drugs are sold (citation ommitted) nor sudden flight (citation ommitted) alone will justify a *Terry* stop." (citation ommitted); *see also People v. Fox*, 97 Ill.App.3d 58, 421 N.E.2d 1082 (1981) (driving away at approach of

marked police vehicle not a justification for stop). Moreover, this court has recently emphasized the importance of protecting the freedom to engage in such harmless activities as "loafing, loitering, and nightwalking" and other personal liberties of citizens, including the right to travel, to locomotion, to freedom of movement, and to associate with others. *City of Chicago v. Morales*, 687 N.E.2d 53 (1997), *cert. granted*, 118 S.Ct. 1510.

In *Morales*, we found that a City of Chicago ordinance which prohibited certain individuals from loitering in public places violated substantive due process because it unreasonably infringed on "the personal liberty of being able to freely walk the streets and associate with friends." *Morales*, at 460-61. We find similarly unreasonable the State's proposal, in the instant case, that every person observed in "sudden and unprovoked flight" from an officer may be stopped regardless of whether the surrounding circumstances indicate the person is involved in criminal activity. *Cf. People v. Holdman*, 73 Ill.2d 213, 22 Ill.Dec. 679, 383 N.E.2d 155 (1978) (defendants' flight following officers' shining bright light into vehicle they reasonably believed to be associated with fugitive for whom they had warrant was indication of criminal activity requiring police pursuit). As defendant suggests, "[i]f the police cannot constitutionally force otherwise law-abiding citizens to move, the police cannot force those same citizens to stand still at the appearance of an officer." Therefore, because we agree with the majority of courts that view the unequivocal flight of a suspect upon seeing police as not alone indicative of criminal activity, we now examine the record herein to determine if there are corroborating circumstances sufficient to create the reasonable suspicion necessary for the stop of defendant.

The case before us is factually similar to *People v. Mamon*, 173 Mich.App. 429, 435 N.W.2d 12 (1988), *rev'd* on other grounds,435 Mich. 1, 457 N.W.2d 623 (1990). There, two police officers were driving on routine patrol in a marked squad car through an area known for narcotics activity. As the officers approached the defendant, Mamon, standing on a corner near a public phone, he took off running. The officers pursued the defendant on foot, noticing that he removed a case from his pocket and dropped it during the chase. The officers ultimately caught the defendant and retrieved the case, which contained cocaine. The trial court quashed an information charging the defendant with possession of a controlled substance, and the State appealed.

The Michigan appeals court affirmed the trial court's decision, first addressing the circumstances existing before the defendant began to run. Though the incident occurred in a high-crime neighborhood, the court determined that a person's presence in such an area cannot, by itself, provide the basis for an investigatory stop. In so doing, the court noted that the officers were not responding to a particular complaint of wrongdoing in the area and that the defendant made no furtive gestures prior to seeing the officers. Concluding that the officers lacked an articulable basis for stopping the defendant as he stood on the corner, the court turned to the significance of his flight upon their approach. Noting the ambiguous nature of flight as an indicator of guilt, the court held that the act of running at the sight of police patrolling a high-crime area did not provide the particularized grounds necessary to support a reasonable suspicion that criminal activity was afoot. *Mamon*, 173 Mich.App. at 435-38, 435 N.W.2d at 14-16.

Here, similar to *Mamon*, Officers Nolan and Harvey were "caravaning" with several other police vehicles when the incident occurred. They were not responding to any call or report of suspicious activity in the area. Though Officer Nolan testified that that area of the 11th District is known for "high narcotics traffic," we agree with our appellate court's opinion in *Harper*, 237 Ill.App.3d at 205-06, 603 N.E.2d 115, and the numerous decisions from other jurisdictions, holding that a person's presence in such an area by itself does not warrant a suspicion that that person is involved in crime. *See Brown v. Texas*, 443 U.S. 47 (1979); (citations omitted).

It is also clear that defendant herein gave no outward indication of involvement in illicit activity prior to the approach of Officer Nolan's vehicle. Defendant was simply standing in front of a building when the officers drove by. As in *Mamon*, the officers lacked an articulable basis for suspecting defendant of involvement in criminal activity prior to the point at which he turned and ran.

In *Fox*, the Illinois case which most closely approximates the issue presented herein, the appellate court foreshadowed our concerns, stating:

> At the time of the stop, the investigating officers were aware that 'partying and littering' had recently occurred in the * * * area and also that the vehicle in which the defendant was riding as a passenger exited the area at a speed which one officer believed to be unreasonable upon the approach of a squad car. But, the officers testifying on behalf of the State did not relate that any additional suspicious or unusual activities that would have alerted the police to the possibility of criminality were carried on by the occupants of the automobile.
>
> In short, the evidence adduced in this case does not support the State's contention that the police were aware of specific and articulable facts to justify the stop here. Rather, the evidence suggests that the police officers were operating under a suspicion or hunch that the vehicle contained someone who had committed or was about to commit a crime." (Emphasis added.)

Fox, 97 Ill.App.3d at 63-64, 421 N.E.2d 1082. Here, as in *Fox*, in the absence of circumstances corroborating the conclusion that defendant was involved in criminal activity, Officer Nolan's testimony reveals nothing more than a hunch.

As our brethren on the Supreme Court of Colorado have so aptly stated:

> We are aware that the weighty social objective of crime prevention might well be served by permitting stops and detentions without any requirement of a reasonable suspicion that criminal activity has occurred or is about to take place. In the absence of specific and articulable facts supporting the reasonable suspicion, however, "the balance between the public interest and [defendant's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, [443 U.S.] at 52, 99 S.Ct. at 2641, 61 L.Ed.2d at 363.

Thomas, 660 P.2d at 1277.

Where, as here, the police stop is not

based upon objective criteria pointing to a reasonable suspicion of criminal activity, "the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown v. Texas*, 443 U.S. at 52.

Therefore, because Officer Nolan was not able to point to specific facts corroborating the inference of guilt gleaned from defendant's flight, his stop and subsequent arrest of defendant were constitutionally infirm. U.S. Const., amend. IV; Ill. Const.1970, art. I, § 6. The appellate court, therefore, properly reversed the trial court's denial of defendant's motion to suppress evidence. The weapon that was the basis for defendant's conviction should have been suppressed as the product of the unconstitutional seizure of his person. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

For the foregoing reasons, the judgment of the appellate court, reversing the judgment of the circuit court, is affirmed.

APPELLATE COURT JUDGMENT AFFIRMED

SUSPECT'S FLIGHT SUPPORTS SEARCH, COURT TOLD

Chicago Daily Law Bulletin

Wednesday, May 13, 1998

David Heckelman; Law Bulletin Staff Writer

A Cook County prosecutor tried convincing the Illinois Supreme Court Wednesday that a person's abrupt flight from the police is sufficient cause for officers to stop and search him.

"When a person suddenly runs from the police, any reasonable officer should be allowed to conduct an investigatory stop," Assistant Cook County State's Attorney Veronica Ximena Calderon told the justices during oral arguments.

She said that defendant Sam Wardlow's actions were more suspicious than the conduct of the defendants in two cases where such searches were upheld: *Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968);* and *People v. McGowan, 69 Ill.2d 73, 370 N.E.2d 537 (1977).*

Flight from the police is such an extreme reaction that it "lies outside the bounds of normal human conduct," Calderon said.

"Flight from the police provides the strongest indication that criminal activity is afoot," she added, citing the U.S. Supreme Court's underlying rationale for finding that the stop and search of the defendant in Terry was justified.

But Assistant Cook County Public Defender Eileen T. Pahl said that under the Terry standard, flight from the police is insufficient to create a reasonable, articulable suspicion that a person has committed, is committing or is about to commit a crime.

"It is the totality of the circumstances, and not a per se rule," that determines whether a stop is justified under Terry, Pahl said.

"Avoidance of the police is entirely ambiguous," she added, noting that Wardlow, whose conviction was reversed, might not have recognized the people he ran from as police officers because the record was unclear as to whether their vehicles were marked.

Chicago police gave chase to Wardlow after he apparently spotted a squad car and made a break. The squad car was among four police vehicles cruising through a neighborhood where police were investigating drug-trafficking.

Justice John L. Nickels asked Pahl whether the fact that the incident occurred in a high-crime area was not a significant factor in determining whether the Terry stop was reasonable.

The defense attorney responded that under Terry, the person's allegedly suspicious activity "has to be linked to a particular crime."

The 1st District Appellate Court had determined that the evidence did not support the trial judge's conclusion that the defendant actually had been in a high-crime area at the time of the incident, Pahl noted.

She said the appeals court properly reversed the Wardlow's conviction on charges of unlawful use of weapons by a felon. The 1st District concluded that the handgun found on Wardlow should have been excluded from the evidence as the product of an illegal search.

The case arose around noon on Sept. 9, 1995, when a caravan of four police cars were driving through a Chicago neighborhood where illegal drug activity had been reported, court records show.

At a hearing on the defendant's motion to suppress evidence, Officer Timothy Nolan testified that while he and his partner were in uniform at the time, he could not recall whether the other six officers were in uniform at the time or whether any of their vehicles were marked.

According to the appeals court's opinion, Nolan said he saw defendant, "who was not violating any laws," standing near a building with a white bag under his arm.

"Defendant looked in the officers' direction, then fled," the court said, noting that Nolan stopped the defendant after he ran through a gangway and an alley.

"Without announcing his office or asking any questions, [Nolan] conducted a protective pat-down search of the defendant," the court said. And that search yielded a handgun and five live rounds of ammunition, resulting in the defendant's conviction and a two-year prison sentence.

A unanimous 1st District Appellate Court, 2d Division, panel reversed defendant's conviction outright, finding that the stop and search of the defendant was improper and that the state could not prove its case after the seized evidence was suppressed.

"We emphasize the limited nature of our holding," Justice Gino L. DiVito wrote for the appeals court.

"We do not hold that the presence of a suspect in a high-crime location, together with his subsequent flight from police, is never grounds for a Terry stop," the opinion continued. "To pass constitutional muster, however, the high-crime area should be a sufficiently localized and identifiable location.

"This limitation is necessary to 'assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field,' simply because he or she happens to live in a neighborhood where crime is prevalent." *People v. Wardlow, 287 Ill.App.3d 367, 678 N.E.2d 65 (1997).*

Wednesday's oral arguments follow the high court's acceptance of the state's petition for leave to appeal under Supreme Court Rule 315. People v. Sam Wardlow, No. 83061.

JUSTICES TO HEAR CASE ON FLIGHT FROM POLICE

Issue Involves Right to Search a Person Who Runs

The Boston Globe

Tuesday, May 4, 1999

Richard Carelli, Associated Press

WASHINGTON – The Supreme Court will try to decide whether people who run away after seeing a police officer can be chased, stopped and questioned.

The justices agreed yesterday to use a case from a Chicago high-crime neighborhood to clarify on-the-street police powers vs. individual rights.

While many Americans might assume that police have the power to chase and question someone who flees at the sight of them, lower courts have been deeply divided on the issue. The justices' decision, expected sometime next year, could resolve that split.

At the heart of the dispute is the Fourth Amendment protection against unreasonable searches and seizures. Courts long have interpreted that protection to mean police without court warrants cannot stop and question someone without a "reasonable suspicion" of wrongdoing.

State courts in Alaska, California, Colorado, Maryland, Michigan, Nebraska, Nevada, New Jersey and Utah have said police generally cannot make investigative stops after pursuing someone who flees after seeing them.

But state courts in Connecticut, Indiana, Louisiana, Minnesota, North Carolina, Ohio and Wisconsin have ruled that fleeing from police can create a reasonable suspicion of criminal conduct and thus can justify a police stop.

Federal courts also have disagreed on the issue.

The Illinois Supreme Court used the Chicago case to bar police most often from making such investigative stops.

In appealing that ruling, state prosecutors said a definitive ruling is needed. "Every single day, law enforcement officers at all levels throughout our country are confronted with . . . whether to chase and temporarily stop a person in a high-crime area who runs away at the mere sight of the police," the appeal said.

The nation's highest court twice before had the opportunity to consider the issue in criminal cases, but left it undecided when in 1988 and 1991 it chose instead to focus on whether police seizures had occurred.

Sam Wardlow was convicted of a weapons violation after he was arrested on a Chicago street in 1995 while carrying a loaded handgun in a bag.

Police officers in a patrol car had seen Wardlow spot them and take off running. They pursued and eventually cornered him, and found the gun after a patdown search.

The incident occurred in the 4000 block of West Van Buren Street, described by state prosecutors as an area of "high narcotics traffic" at that time.

Wardlow challenged his conviction for unlawful use of a weapon by a felon and the two-year prison sentence it carried. He said he had been subjected to an unlawful stop. His appeal in an Illinois court raised the issue of whether his running away from police was enough to create a reasonable suspicion to justify the stop and patdown search.

A state appeals court threw out his conviction, and the Illinois Supreme Court upheld that decision last September after saying "such flight alone is insufficient to create a reasonable suspicion of involvement in criminal conduct."

Police had acted on "nothing more than a hunch," the state court said, and in so doing violated Wardlow's constitutional rights.

UNREASONABLE SUSPICION – OF COPS

Will the Supreme Court Rein in Judicial Second-Guessing?

***The New York* Post**

Sunday, May 9, 1999

Eric Fettmann

BACK in September 1995, Sam Wardlow was standing on the street in a Chicago neighborhood known for its heavy drug activity when he spotted uniformed Officer Timothy Nolan driving by in his patrol car.

Up to that point, Wardlow hadn't been doing anything unusual or suspicious. But the moment he spotted Officer Nolan, he bolted and began running down the nearest alley. Nolan and his partner, noticing Wardlow's sudden flight, gave chase.

When they caught up with Wardlow, they found a white envelope in his pocket. Inside was a fully loaded Colt .38 revolver.

Wardlow, who had a lengthy criminal record, was convicted of unlawful use of a weapon by a felon and sentenced to two years. But his conviction was overturned by the Illinois Supreme Court - which ruled that "the sudden and unprovoked flight of a suspect upon seeing police" is "insufficient to create a reasonable suspicion of involvement in criminal activity."

Indeed, said the court, the cops had acted on "nothing more than a hunch" when they decided to chase Wardlow (who, since his conviction was overturned, has served time on an unrelated drug charge).

The Illinois decision - which is now going to be reviewed by the U.S. Supreme Court - is just as demeaning to law-enforcement officers as was the similar 1996 ruling by Manhattan Federal Court Judge Harold Baer that invalidated a police search of a car from which four men had fled in Washington Heights.

Like Wardlow, the men were engaged in criminal activity: The car held 80 kilos of heroin and cocaine and $1 million in cash. But Baer ruled that fleeing the police in Washington Heights should not be considered suspicious - in fact, he said, such behavior is entirely reasonable in an area where "residents ... tend to regard police as corrupt, abusive and violent."

To date, the Supreme Court has never spelled out exactly what constitutes "reasonable suspicion" of criminal activity. But a certain measure of common sense should govern.

"Flight from police is such an extreme reaction that it lies outside the bounds of normal human conduct," argued Chicago prosecutor Veronica Ximena Calderon. "Flight from police provides the strongest indication that criminal activity is afoot."

To say otherwise - as the Illinois Supreme Court did - creates an untenable state of affairs in which police are forced to "shrug their shoulders and helplessly stand watching" while people run away from them.

Nowhere in these rulings is there any suggestion that training and street experience provide cops with more than just a "hunch" about possible criminal activity. In the wake of the Amadou Diallo case, however, police are being

portrayed as a group of gun-toting vigilantes who have no more ability to recognize suspicious activity than does the average bystander.

That, at least, seems to be the underlying assumption of a bill announced last week by Reps. Henry Hyde (R-Ill.) and Jose Serrano (D-Bronx) that would launch an investigation of the adequacy of police-training policies.

At least that's what Hyde thought he was introducing. As Serrano's press release makes clear, his intent is to establish a national commission that will "investigate the apparent pattern of police violence against people of color in New York City" and "examine the causes of police abuse of power" - a situation, he says, that has "reached crisis proportions."

Serrano, like Wardlow's defenders, maintains that police don't know what constitutes suspicious behavior. "Does the policeman know that if you stop an Amadou Diallo, for instance, ... that maybe sticking your hand in your pocket doesn't necessarily mean you have a weapon?" asks Serrano. "You could have a green card to show the police officer."

Indeed he might. But he might also have a gun and the cop who hesitates without at least taking the precaution of protecting himself against that possibility might find himself on the receiving end of a hail of bullets.

That leads to widespread demoralization - which is why, not surprisingly, arrests here have fallen sharply since the Diallo shooting. Sure, cops should do their job correctly but they should be allowed to do their job. And a cop whose knowledge and experience is constantly being second-guessed by jurists who've never had to patrol a high-crime neighborhood can't do his job.

In a famous 1926 opinion delivered while he was still sitting on the New York Court of Appeals, the renowned Justice Benjamin Cardozo lamented the ominous implications of excluding important evidence for such reasons: "The criminal is go free because the constable has blundered," he wrote.

Hopefully, the Supreme Court will come to the realization that - in the case of Sam Wardlow and many others like it - the constables did not blunder.

REASONABLE SUSPICION ENOUGH

South Bend Tribune

Wednesday, February 24, 1999

James J. Kilpatrick, Universal Press Syndicate

These were the circumstances in Chicago on a September day in 1995, when police arrested Sam Wardlow:

Police Officer Timothy Nolan was patrolling a section of the city known for heavy traffic in narcotics. His patrol car was one of four police cars that converged for a full-court press in the 4000 block of West Van Buren. Nolan was wearing his full police uniform.

Sam Wardlow was standing in front of No. 4035. He looked at Nolan and fled. Nolan followed in hot pursuit. Wardlow ran at top speed down an alley. After a brief chase, Nolan and his partner cornered their target on West Congress Street.

Nine years of experience as an officer had taught Nolan that guns are commonplace in neighborhoods where illicit drugs are sold. He therefore performed what is known at law as a "Terry stop-and-frisk." He patted down the suspect and squeezed a bulky white envelope that Wardlow was carrying. Nolan was not surprised to find that it contained a fully loaded Colt .38 revolver.

The rest is quickly told. Wardlow had a criminal record. Nolan arrested him on a charge of unlawful use of a weapon by a felon. Before trial, Wardlow moved to suppress the evidence. The trial judge denied the motion. He said that when a person runs away from a police officer, "there's reasons to think there's a problem. They have a right to make inquiry."

Wardlow was found guilty as charged and sentenced to two years in prison, but the appellate court reversed. The Illinois Supreme Court affirmed that opinion: "The weapon that was the basis for defendant's conviction should have been suppressed as the product of the unconstitutional seizure of his person."

Illinois has filed a petition for review by the Supreme Court. I think it likely that the Supremes will take the case, for lower state and federal courts are sharply divided on the key question: Are police in a high-crime area justified in stopping and searching a person who breaks and runs at the mere sight of an officer?

The high court took a stab at answering a closely related question almost 31 years ago in an Ohio case involving one John W. Terry. He and another man, Richard Chilton, were arrested by Cleveland detective Martin McFadden in 1963. At the time, McFadden had 39 years of experience as a police officer. When he saw Terry and Chilton walking nervously back and forth in front of a store on Huron Road, he suspected that an armed robbery was about to occur. The officer identified himself and asked for the suspects' names. When they mumbled, McFadden spun Terry around and frisked him. Both Terry and Chilton were carrying revolvers.

Following their convictions for carrying concealed weapons, Terry appealed, but the Supreme Court affirmed his conviction. The stop-and-frisk was "the tempered act of a policemen who in

the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so."

Chief Justice Earl Warren, speaking for an 8-1 court, refused to lay down bright lines--either that all such searches are presumptively reasonable or presumptively unreasonable. Every case would depend upon the facts. This is the language that has divided lower courts for 30 years:

"We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own and others' safety, he is entitled ... to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

With its opinion in the Sam Wardlow case, Illinois has put the state's police officers in a lose-lose position. If police stop a fleeing suspect and find weapons or contraband, the evidence will be suppressed. If they do not stop and frisk, armed criminals will saunter away. In this instance, I would come down on the side of the cops. Reasonable suspicion is good enough for me.

WILLIAMS v. TAYLOR

Setting Standards for Condemned Prisoners to Challenge the Death Penalty

Matthew Frey *

A Virginia case before the Supreme Court this term will shed light on the conditions under which a state prison inmate may seek to have his conviction reversed in federal court under provisions contained in a recent federal anti-crime bill. The result may have widespread influence on the appeals process in death penalty cases nationwide.

The case centers on the plight of Terry Williams, an ex-con who, while imprisoned for another crime, confessed to the 1985 killing of Harris Thomas Stone, an elderly Danville resident. Convicted of capital murder in state court, Williams embarked on a protracted appeals process. Among other claims, Williams alleged that his lawyer at trial failed to introduce evidence that would have mitigated his death sentence.

Twice rebuffed by the Virginia Supreme Court, Williams, in 1997, filed a federal habeas corpus petition under provisions of the federal Antiterrorism and Effective Death Penalty Act of 1996, which Congress passed in part to limit death penalty appeals. Williams contended that his sentence failed to follow established federal law.

Most recently, the United States Court of Appeals for the Fourth Circuit ruled against Williams. The court found that the factors that Williams claimed would have mitigated his sentence had they been introduced at trial did not contain a "reasonable probability" of having persuaded the jurors who convicted Williams to have chosen life imprisonment over the death penalty.

Writing for the court, Judge Karen J. Williams emphasized that Williams likely stood to gain no mercy from a jury well acquainted with his past. She recounted Williams's long and violent criminal history, including his attack on an elderly woman whom Williams robbed and left for dead shortly after he murdered Stone. Referring to Supreme Court precedent, Judge Williams wrote that "Given the overwhelming aggravating factors [in Williams's case], there is no reasonable probability that the [mitigating evidence] would have . . . changed the sentence imposed." Turning the convict's own argument against him, Judge Williams noted that the "disclosure of the defendant's juvenile history might even have been harmful to his case."

Out of the welter of issues Williams has raised throughout his lengthy appeals process, the Supreme Court has agreed to decide whether Williams was right to bring an appeal under the Antiterrorism Act and whether, were his trial lawyer in fact deemed ineffective, Williams would have to show that all twelve jurors would have voted for life imprisonment over the death penalty.

Two daughters of Harris Stone, the man Williams was convicted of killing, oppose his execution.

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* College of William and Mary School of Law, Class of 2001; Co-Director, Student Division of the Institute of Bill of Rights Law.

98-8384 Williams v. Taylor

Ruling below (4th Cir., 163 F.3d 860):

Even assuming that habeas corpus petitioner's trials counsel were objectively unreasonable in failing to investigate, prepare, and present certain evidence in mitigation of punishment during sentencing phase of trial within meaning of test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Lockhart v. Fretwell*, 506 U.S. 364 (1993), for reviewing claims of ineffective assistance of counsel, state supreme court reasonably applied clearly established federal law when it determined, in light of overwhelming evidence of petitioner's future dangerousness to society, that petitioner had not been prejudiced by such failure, and thus properly denied petitioner's state petition for habeas corpus following imposition of death sentence: that one hypothetical juror might be swayed by particular piece of evidence is insufficient to establish prejudice.

Questions presented: (1) When both federal district judge and state trial judge who had originally sentenced petitioner to death concluded that counsel's deficient performance was prejudicial under test articulated in *Strickland v. Washington*, did Fourth Circuit err in denying relief by reformulating *Strickland* test so that : (a) ineffective assistance of counsel claims may be assessed under "windfall" analysis articulated in *Lockhart v. Fretwell*, even when trial counsel's error was no "windfall," and (b) petitioner must show that absent counsel's deficient performance in penalty phase, all 12 jurors would have voted for life imprisonment, even when state law would have mandated life sentence if only one juror had voted for life imprisonment? (2) Did Fourth Circuit err in concluding that, under 28 U.S.C. § 2254(d)(1), state habeas court's decision to deny federal constitutional claim cannot be "contrary to" clearly established federal law unless it is in "square conflict" with decision of this court that is "controlling as to law and fact"? (3) Did Fourth Circuit err in concluding that, under 28 U.S.C. § 2254(d)(1), state habeas court's decision to deny federal constitutional claim cannot involve "unreasonable application of" clearly established federal law unless state court's decision is predicated on interpretation or application of relevant precedent that "reasonable jurists would *all* agree is unreasonable"?

Terry WILLIAMS, Petitioner-Appellee,
v.
John TAYLOR, Warden, Sussex I State Prison, Respondent-Appellant

United States Court of Appeals
for the Fourth Circuit

Decided December 18, 1998

WILLIAMS, Circuit Judge:

On September 30, 1986, a Virginia jury convicted Terry Williams of the capital murder of Harris Thomas Stone. Following the jury's determination that Williams presented a future danger to society, the trial court sentenced Williams to death. After exhausting all available state remedies, Williams petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief. * * * The district court ordered that the writ be granted on the ground that Williams's trial counsel were ineffective because they failed to present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial. The remaining allegations in Williams's habeas petition were dismissed.

On appeal, the Commonwealth contends that the writ was erroneously granted. We agree. The Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective during the sentencing phase of Williams's trial was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. As a result, Williams is not entitled to habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). * * * Moreover, we conclude that none of the claims raised in Williams's cross-appeal provide a basis for federal habeas relief. Accordingly, we affirm in part and reverse in part.

I.

As recited by the Virginia Supreme Court, the undisputed facts are as follows:

> Stone, an elderly man who resided on Henry Street in Danville, was found dead in his bed shortly before 2:00 a.m. Sunday, November 3, 1985. There was no sign of a struggle, no blood was observed on Stone's body, and he was fully clothed. Despite a diligent search, Stone's wallet, which he customarily kept fastened in the back pocket of his pants, was never found.
>
> The local medical examiner, who examined the body [at] about 9:30 that Sunday morning, noted an abrasion on the chest, but no bruising. Stone's history of heart disease and the police failure to report anything suspicious about the circumstances of Stone's death led the local medical examiner to conclude that Stone's death was due to heart failure. However, when Stone's blood alcohol content was later analyzed and was reported to be 0.41%, the regional medical examiner's office in Roanoke amended the finding of the cause of death to alcohol poisoning. Stone's daughter testified Stone looked "a little high" when she last saw him entering his house shortly after 6:00 p.m. on Saturday, November 2,

1985.

When the funeral director, Jack Miller, observed Stone's body on Monday morning, he called a bruise or abrasion over the left ribs to the attention of the police. The police told Miller that the local medical examiner believed the bruise was an old one. Though Miller disagreed with the local medical examiner, on instructions from the police he embalmed the body.

Almost six months later, the chief of police in Danville received an anonymous letter from an inmate of the local jail in which the author admitted killing "that man Who Die on Henry St." The police interviewed Williams, an inmate of the Danville jail at the time, who eventually admitted that he had written the letter and later gave multiple confessions to the murder and robbery of Stone. Williams said he had first struck Stone in the chest, and later on his back, with a mattock and had removed three dollars from Stone's wallet.

Stone's body was exhumed. On July 2, 1986 Dr. David Oxley, a forensic pathologist and Deputy Chief Medical Examiner for Western Virginia, performed an autopsy. When Dr. Oxley opened the body, he found Stone's fourth and fifth ribs on the left side had been fractured and displaced inward, puncturing the left lung and depositing a quantity of blood in the left chest cavity. * * *

After a jury trial in the Circuit Court of the City of Danville, Virginia, Williams was convicted of the capital murder of Mr. Stone. Based on its finding of future dangerousness * * * the jury recommended that Williams be sentenced to death. Following the jury's recommendation, the trial court sentenced Williams to death. On direct appeal, the Virginia Supreme Court affirmed Williams's conviction and death sentence. * * * The United States Supreme Court denied Williams's petition for a writ of certiorari. * * *

Williams filed a habeas corpus petition in the Danville Circuit Court on August 26, 1988. After a hearing, the Danville Circuit Court dismissed the majority of Williams's claims. Almost seven years later, Williams amended his habeas petition to include several claims that his trial counsel were ineffective. In June 1995, the Danville Circuit Court held an evidentiary hearing on the issue of ineffective assistance of trial counsel.

Prior to any action on the hearing, however, jurisdiction over the habeas petition was transferred to the Virginia Supreme Court. * * * By order dated May 6, 1996, the Virginia Supreme Court directed the Danville Circuit Court to report its findings of fact and conclusions of law relating to the ineffective assistance of counsel claims addressed at the June 1995 evidentiary hearing. * * *

On August 15, 1996, the Danville Circuit Court forwarded its Findings of Fact and Recommended Conclusions of Law (the Report) to the Virginia Supreme Court. The Danville Circuit Court found that trial counsel's "performance at the guilt phase of the trial was both professional and competent." * * * Of particular importance here, the Danville Circuit Court concluded that trial counsel

properly handled the court-appointed mental health experts, and that lead trial counsel, E.L. Motley, was not suffering from a mental impairment during the course of his representation of Williams.

The Danville Circuit Court did conclude, however, that trial counsel's failure to present certain mitigating evidence during the sentencing phase of the trial warranted relief. Specifically, the Danville Circuit Court found that trial counsel failed to investigate and present (1) Williams's juvenile commitment records from the Beaumont Correctional Center, (2) records, including statements from Williams's siblings, that provided a summary of Williams's early home life, (3) the testimony of Williams's estranged wife and eleven- year-old daughter, and (4) the testimony of Williams's friend Bruce Elliot. According to the Report, had this evidence been developed and presented at the sentencing phase of Williams's trial, the jury would have learned that Williams "had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; and that he was borderline mentally retarded." * * * Continuing, the Report stated that the evidence in question would have shown that Williams's "conduct had been good in certain structured settings in his life (such as when he was incarcerated) and . . . that he had redeeming qualities." * * * In summary, the Danville Circuit Court found that the mitigating evidence probably would have been given weight by at least one member of the jury. Because one juror would have been the difference between life and death, the Report ultimately concluded that Williams was prejudiced by trial counsel's failure to make use of the mitigating evidence.

Both the Commonwealth and Williams filed objections to the Report. The Commonwealth argued that trial counsel were not ineffective during the sentencing phase of Williams's trial for making a tactical decision not to introduce evidence that was just as likely to operate to Williams's disadvantage. Williams, in contrast, argued that the Danville Circuit Court erred in finding that his trial counsel were effective during the guilt phase of his trial. On January 13, 1997, the Virginia Supreme Court ordered briefing and argument on the one issue that the Danville Circuit Court found warranted relief, and adopted the Danville Circuit Court's recommendation that the other claims be dismissed.

On June 6, 1997, the Virginia Supreme Court unanimously rejected the Danville Circuit Court's finding that trial counsel's failure to present certain mitigating evidence during the sentencing phase warranted relief. * * * In so holding, the Virginia Supreme Court reviewed Williams's ineffective assistance of counsel claim under Strickland v. Washington, * * * and, to a lesser extent, Lockhart v. Fretwell, * * *. After assuming that Williams's trial counsel's performance was deficient, the Virginia Supreme Court concluded that Williams failed to demonstrate prejudice.

On December 12, 1997, Williams filed a habeas corpus petition pursuant to 28 U.S.C.A. § 2254 in the United States District Court for the Eastern District of Virginia. In his petition Williams argued, among other things, that his counsel were ineffective in several respects. On April 7, 1998, the district court ordered that the writ be granted on the ground that Williams's trial counsel were ineffective for failing to present evidence in

mitigation of punishment during the sentencing phase of Williams's trial. In so ruling, the district court specifically concluded that the Virginia Supreme Court's application of *Strickland* and *Lockhart* was unreasonable. The remaining allegations in Williams's habeas petition were dismissed.

On appeal, the Commonwealth contends that the district court erred in granting Williams federal habeas relief. In particular, the Commonwealth argues that the Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. In his cross-appeal, Williams contends: (1) that his lead trial counsel's mental illness rendered his assistance constitutionally ineffective, and (2) that his trial counsel's failure to handle properly several matters related to his court-appointed mental health experts rendered their assistance constitutionally ineffective. We address the Commonwealth's and Williams's arguments in turn.

II.

Before we address the merits of either the Commonwealth's appeal or Williams's cross-appeal, we must first determine the applicable standard of review. The Antiterrorism and Effective Death Penalty Act of 1996 provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

We recently interpreted subsection (1) to prohibit the issuance of the writ unless (a) the state court decision is in "square conflict" with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, * * * "In other words, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.*

Williams contends, however, that we erroneously construed § 2254 in *Green v. French*. * * * Thus, Williams argues that the standard of review adopted in that case should not be followed here. This argument need not detain us long. "It is well established that a decision of this Court is binding on other panels unless it is overruled by a subsequent en banc opinion of the Court or an intervening decision of the United States Supreme Court." * * * Neither the en banc Court nor the United States Supreme Court has

overruled (or even called into question) the standard of review adopted by this Court in *Green v. French*. Indeed, since *Green v. French* was decided, we have applied the new standard in *Fitzgerald v. Greene*, * * *, *Wright v. Angelone*, * * *, and *Cardwell v. Greene*, * * *. As a consequence, the standard of review enunciated in *Green v. French* continues to be the binding law of this Circuit.

III.

Although the Virginia Supreme Court unanimously found that Williams's trial counsel were not ineffective, * * * the district court concluded that the Virginia Supreme Court unreasonably applied *Strickland v. Washington*, * * *, and *Lockhart v. Fretwell*, * * *, in finding no prejudice. In addition, the district court found that the Virginia Supreme Court "made an error of fact in discussing its finding of no prejudice." * * * Finding that Williams's trial counsel were constitutionally ineffective for failing to investigate, prepare, and present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial, the district court ordered that the writ be granted. * * * In contrast to the district court, we conclude that the Virginia Supreme Court's finding of no prejudice was neither based on an unreasonable application of the tests set forth by the United States Supreme Court in *Strickland* and *Lockhart* for determining prejudice, nor based on an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing held by the Danville Circuit Court.

A.

In *Strickland*, the Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel. * * * First, Williams must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. * * * This, however, is no simple task. A court's review of counsel's performance is "highly deferential." * * * Indeed, courts must afford a strong presumption that counsel's performance was within the wide range of professionally competent assistance. *See id.* If Williams is able to demonstrate that his trial counsel's performances were objectively unreasonable, he must then "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." * * * As a result, Williams's trial counsel may be deemed ineffective only if their "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." * * *

In *Lockhart*, the Supreme Court clarified the meaning of prejudice under *Strickland*. * * * Although the Supreme Court in *Strickland* focused primarily on whether "the result of the proceeding would have been different," * * *, the Supreme Court in *Lockhart* clarified that "an analysis focusing solely on mere outcome determination . . . is defective," * * *. Instead, a proper prejudice analysis must consider "whether the result of the proceeding was fundamentally unfair or unreliable." * * * As a result, a court may not "set aside a conviction or sentence solely because the outcome would have been different but for counsel's error." * * *

The Virginia Supreme Court assumed, without deciding, that Williams's trial counsel's performance fell below an

objective standard of reasonableness. * * * The district court, however, concluded that Williams's trial counsel were, in fact, deficient. Like the Virginia Supreme Court, we will assume, without deciding, that Williams's trial counsel were objectively unreasonable in failing to investigate, prepare, and present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial. Despite assuming that Williams's trial counsel were objectively unreasonable in failing to introduce the evidence in question, we cannot say that the Virginia Supreme Court's decision that Williams was not prejudiced thereby was an unreasonable application of the tests developed in either *Strickland* or *Lockhart* for determining prejudice. * * *

We shall demonstrate that the criminal proceeding sentencing defendant to death was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a "reasonable probability" that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome. Therefore, any ineffective assistance of counsel did not result in actual prejudice to the accused. The jury was presented with the murder of an intoxicated, elderly person in his own bedroom committed by a 31-year-old man. The murder weapon was a tool customarily used to dig stumps. At the time, defendant had been out of the penitentiary for only seven months, released on parole for convictions of burglary and grand larceny.

The accused was in the midst of a crime spree, preying upon defenseless individuals. Following commission of these crimes of murder and robbery in November 1985, the defendant savagely beat an elderly woman about her head in March 1986, leaving her lying in the street unconscious with multiple injuries. At the time of trial, she was in a nursing home "vegetating" from a brain injury with no hope of recovery.

Upon being questioned in April and May 1986 about the November 1985 crimes, the defendant admitted to the recent theft of two motor vehicles. He also admitted setting fire to clothes on the porch of a residence late one night in December 1985, luring the occupant outside, and stabbing him with a knife in order to rob him. The accused later was convicted of the vehicle thefts and, at the time of trial for the present crimes, had been convicted of an arson that took place in the city jail.

While held in jail on the present offenses, he related to a police officer "that he wanted to just choke some of the guys in the jail cell, and one day some had gone to the library and one guy was laying on the bed, and he got the urge to just go over and choke him. Another time he was playing cards and he thought he could just hit someone and break that person's jaw without him ever knowing what hit him."

The jury also heard that defendant had served time in the penitentiary for an armed robbery committed when he was about 20 years old. The jury did not know of 14 criminal offenses committed by defendant from 1966 to 1975.

Drawing on *Strickland*, we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner

"suffered insufficient prejudice to warrant setting aside his death sentence," * * * the predicate of which was that there is a probability that he would commit criminal acts of violence which would constitute a continuing serious threat to society. The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment. Of course, those assumptions are belied by the four-month crime spree beginning with the present crimes and by the defendant's current attitude while in jail toward other inmates.

What the Supreme Court said in *Strickland* applies with full force here:

> "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." * * *

Indeed, disclosure of the defendant's juvenile history might even have been harmful to his case. * * *

* * *

IV.

In his cross-appeal, Williams contends that his trial counsel were ineffective in several respects. First, Williams argues that his lead trial counsel was mentally ill. Second, Williams argues that his trial counsel mishandled several matters related to his court-appointed mental health experts. We address these arguments in turn.

A.

Almost one year after Williams's trial, his lead trial counsel, E.L. Motley, Jr., was diagnosed with depression. Soon thereafter, Motley's depression rendered him incapable of practicing law. In fact, after a series of complaints to the Virginia Bar, Motley was forced to surrender his license. In his habeas petition, Williams contends that his Sixth Amendment right to effective assistance of counsel was violated because Motley was mentally impaired during his trial.

It is well established that the Sixth Amendment right to counsel "cannot be satisfied by mere formal appointment." * * * Rather, the Sixth Amendment guarantees criminal defendants the assistance of "a reasonably competent attorney." * * * As a consequence, an attorney's mental incapacity may violate his client's Sixth Amendment right to counsel. Here, however, the Danville Circuit Court specifically found, after a two-day evidentiary hearing, that Motley was not acting under a mental or emotional disability during Williams's trial:

> Petitioner alleges that he was denied his Sixth Amendment right to counsel because E.L. Motley, Jr.[,] was mentally impaired and unable to effectively represent him in the preparation, trial and appeal of his complex, capital murder case. This court has heard evidence relating to this claim, but finds that Motley

was not acting under a mental or emotional disability during the course of his representation of Williams. Specifically Motley did not begin to have problems related to his depression until the late spring or early summer of 1987. Williams' case was tried in 1986. His brief on direct appeal was filed in March, 1987. The opinion of the Supreme Court of Virginia was issued in September, 1987.

It is clear that what problems Motley did have thereafter did not manifest themselves during the trial of this case. Motley prioritized his work by placing the criminal matters ahead of civil matters, and capital murder cases receiving the highest priority. Both Motley and Smitherman prepared the appellate brief, after being counsel in the trial of these cases.

During the two years that he knew Motley, Smitherman never noticed anything about Motley during the course of Williams' trial. Smitherman did not begin to notice a difference in Motley's behavior until 1988. Smitherman noticed no sign of any dysfunction in Motley during the time of their joint representation of Williams.

Based on the testimony at the evidentiary hearing, and on the personal observations of this Court during the course of the criminal trial, this Court finds that E.L. Motley was acting under no disability during the course of his representation of the petitioner. Furthermore, to the extent that any claim presented by the petitioner herein is based on the mental problems suffered by Mr. Motley, such claims lack merit.

In fact, at no time during the trial did Motley exhibit any conduct which would lead one to believe he was suffering from any disability. The Virginia Supreme Court adopted the Danville Circuit Court's finding and dismissed Williams's Sixth Amendment claim.

The finding that Motley's legal work was not adversely affected by his depression until after the conclusion of Williams's trial and appeal is entitled to a presumption of correctness in this federal habeas corpus proceeding. * * * We cannot say that the Danville Circuit Court's findings, which were adopted by the Virginia Supreme Court, are "an unreasonable determination of the facts in light of the evidence presented." * * * As a result, Williams's claim is without merit and was properly dismissed by the district court.

B.

On July 10, 1986, Dr. Centor was appointed by the trial court to examine Williams after Williams's counsel intimated that he "may lack substantial capacity to understand the proceedings against him or to assist his attorney in his own defense." * * * Dr. Ryans, although not specifically appointed by the trial court, assisted Dr.Centor in evaluating Williams at the Central State Hospital. On August 13, 1986, Dr. Centor filed a report with the trial court that dealt solely with Williams's competency to plead. During the sentencing phase, Dr. Ryans and Dr. Centor were called by the Commonwealth as witnesses. Both doctors testified, based solely on Williams's criminal history, that Williams represented a future danger to society.

In his habeas petition Williams contends that his trial counsel mishandled several matters related to Dr. Ryans and Dr. Centor, the court- appointed mental health experts. Specifically, Williams asserts that trial counsel: (1) failed to object to the dual appointment of mental health experts, (2) failed to use the court-appointed experts in violation of Ake v. Oklahoma, * * *, (3) failed to bar the Commonwealth's use of the court-appointed experts, and (4) failed to rebut the court-appointed experts' damaging testimony.

1.

First, Williams claims that trial counsel were ineffective because they failed to object to the dual appointment of mental health experts. In response, the Commonwealth argues that the claim is procedurally defaulted because it was never presented to the Virginia state courts, and, in the alternative, is without merit. We agree with the Commonwealth that this claim was procedurally defaulted. As a result, we decline to address the merits.

"In the interest of giving state courts the first opportunity to consider alleged constitutional errors occurring in a defendant's state trial and sentencing," a state prisoner must "exhaust" all available state remedies before he can apply for federal habeas relief. * * * To exhaust state remedies, a habeas petitioner must present the substance of his claim to the state's highest court. * * * A procedural default occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred."

It is undisputed that Williams failed to present the substance of this claim to the Virginia Supreme Court. * * * As a result, Williams failed to satisfy the exhaustion requirement. Moreover, if this claim was presented to the Virginia Supreme Court for the first time at this juncture, it would be procedurally barred pursuant to Va.Code Ann. § 8.01-654(B)(2) (Michie Supp.1998). Under § 8.01-654(B)(2), "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." * * * Accordingly, we conclude that this claim is procedurally defaulted.

We may excuse Williams's procedural default, however, if he can demonstrate either cause for and resulting prejudice from the default,or that he has suffered a fundamental miscarriage of justice. * * * Because Williams has not established either, his claim is not cognizable in a federal habeas petition. * * *

2.

Next, Williams claims that trial counsel were ineffective for failing to use the court-appointed experts in violation of Ake. Like Williams's first claim, this claim was never raised in state court and, therefore, is procedurally defaulted. Because Williams cannot demonstrate cause for and resulting prejudice from the default, or that he has suffered a fundamental miscarriage of justice, this claim is not properly before us on federal habeas review * * *.

3.

Next, Williams asserts that trial counsel were ineffective for failing to prevent the Commonwealth from calling his court-appointed experts as witnesses. * * * In particular, Williams contends that his trial counsel should have objected when Dr. Ryans and Dr. Centor testified that he was a future danger to society. As the district court noted, however, Virginia law does not necessarily bar testimony from court-appointed experts. Indeed, the testimony is admissible so long as the expert does not use "statements or disclosure" made to him by the defendant as part of the basis for forming his opinion on future dangerousness. * * * Because the experts' testimony was not based on any statements Williams made but rested solely on Williams's criminal record, any objection would have been futile. As such, trial counsel's performance was simply not deficient. Accordingly, the Virginia Supreme Court's rejection of the claim cannot be deemed an unreasonable application of *Strickland.*

4.

Finally, Williams argues that trial counsel were ineffective for failing to rebut the damaging testimony of his court-appointed experts. In essence, Williams is upset that trial counsel were unable to find an expert who supported his theory of the case. This Court has made clear, however, that a criminal defendant does not have a right to favorable expert testimony. * * * Thus, that trial counsel were unable to rebut the damaging testimony of his courtappointed experts does not render their assistance ineffective.

V.

Because Williams has failed to provide any grounds upon which habeas relief may be granted, the decision of the district court is affirmed in part and reversed in part.

AFFIRMED IN PART AND REVERSED IN PART.

SUPREME COURT DELAYS VA EXECUTION TO CONSIDER STANDARDS FOR APPEALS

The Washington Post

Tuesday, April 6, 1999

Joan Biskupic and Donald P. Baker
Washington Post *Staff Writers*

The U.S. Supreme Court announced yesterday that it would take up the appeal of condemned Virginia killer Terry Williams, who has been on death row for 13 years and was slated to be executed today.

On Friday, the justices issued an order postponing Williams's execution. Now that they have agreed to hear his argument that he was denied adequate legal help at his sentencing, it's likely that Williams's case will not be resolved until sometime next year.

An eventual ruling in the dispute, which also will address a provision of a 1996 federal law intended to curtail the appeals process in death penalty cases, will affect condemned inmates nationwide.

Williams was convicted and sentenced to die for the 1985 slaying of an elderly Danville man, Harris Thomas Stone, who was found in his bed. The death originally was not considered a homicide, and the medical examiner, finding that Stone's blood-alcohol content was at 0.41 percent, determined that he died of alcohol poisoning. About six months later, however, Williams confessed that he had struck Stone with a gardening tool known as a mattock and taken his wallet containing $3.

Williams was found guilty in 1986 of capital murder and robbery. He contended in his petition to the high court that his lead trial lawyer, who himself was in the throes of a disciplinary hearing during the trial, failed to begin preparing for the sentencing phase until about a week beforehand and presented "virtually nothing" to the jury that would have influenced it to give Williams life in prison rather than death.

In its order agreeing to hear the case of Williams v. Taylor yesterday, the Supreme Court said it would focus on standards for permitting a prisoner to challenge a death sentence -- and on whether Williams must demonstrate that if he hadn't had such a bad lawyer, all 12 jurors would have voted for life in prison rather than the death penalty.

The 4th U.S. Circuit Court of Appeals rejected Williams's contention that he should be resentenced, using a particularly stiff standard of review and ruling that any errors his lawyer made during the 1986 sentencing did not unconstitutionally prejudice the jury.

"We are pleased that the Supreme Court has recognized that there are important legal issues at stake in this case," said Brian A. Powers, the Washington attorney representing Williams on appeal.

Two daughters of the victim are among those who oppose Williams's being put to death.

Pollie Cosby, 44, of Chatham, Va., said yesterday that Williams deserves leniency -- life in prison without the

possibility of parole -- because "if he hadn't confessed, no one would have known" that her father had been murdered.

"That's the main reason," said Cosby, who added that otherwise she is not opposed to the death penalty.

She said her sister, Janidean Stones, 37, of Gretna, Va., also opposes the execution and, unlike her, opposes all death sentences as a matter of principle.

Meanwhile, a group of religious and civil rights organizations is planning a protest in Charlottesville today against the four other executions still scheduled this month in Virginia.

The coalition – which includes the Charlottesville Friends Meeting, Amnesty International, the American Civil Liberties Union of Virginia, Virginians for Alternatives to the Death Penalty and the Charlottesville Center for Peace and Justice – plans a protest on the date of each of the scheduled executions.

Also This Term:

98-7540 Carmell v. Texas

Ruling below (Tex. App., 963 S.W.2d 833):

State law that, as amended in 1993, removed prior requirement that minor victim of sex offense inform third party within six months of alleged offense in order for conviction of such offense to be "supportable" on uncorroborated testimony of victim, Tex. Code Crim. P. Art. 38.07, is rule of procedure within meaning of precedent on ex post facto clause, *Hopt v. Utah*, 110 U.S. 574 (1884), and was thus applicable upon its adoption to pending and future prosecutions, including defendant's prosecution based on victim's 1995 disclosure to her mother of assault alleged to have occurred in 1992.

Question presented: Did Texas Court of Appeals err, in violation of Fifth and 14th Amendments, by concluding that application of 1993 version of Tex. Code Crim. P. Art. 38.07 was not ex post facto when: (i) offense occurred in 1992, one full year before adoption of new rule of law; (ii) there was no outcry for approximately three years, and law in effet at time required outcry within six months; and (iii) petitioner would have otherwise been entitled to acquittal?

98-7809 Martinez v. California Court of Appeal

Ruling below (Cal. Ct. App., 10/16/98, unpublished):

Defendant's motion to represent himself on appeal is denied.

Question presented: Does criminal defendant have constitutional right to elect self-representation on direct appeal from judgment of conviction?

98-1255 United States v. Martinez-Salazar

Ruling below (9th Cir., 146 F.3d 653, 63 Crim L. Rep. 290):

Federal defendant who, in exhausting his allotment of peremptory strikes, is forced to use on against venireperson whom he should have been allowed to strike for cause is entitled to reversal of his conviction.

Question presented: Is defendant entitled to automatic reversal of his conviction in case in which he used peremptory challenge to remove potential juror whom district court erroneously failed to remove for cause, and he ultimately exhausted his remaining peremptory challenges?

98-1037 Smith v. Robbins

Ruling below (9th Cir., 152 F.3d 1062, 62 Crim. L. Rep. 1050):

No-merit brief, filed by appointed counsel in state defendant's appeal as of right, that summarized trial record and offered to brief any issues identified by court but failed to present any possible grounds for appeal failed to meet minimal standards of *Anders v. California*, 386 U.S. 738 (1967), even though it was adequate under California law; in light of counsel's failure to either provide vigorous representation or comply fully with *Anders* by moving to withdraw and filing adequate no-merit brief, petitioner was denied his Sixth Amendment right to effective assistance of counsel on appeal; facts of petitioner's case almost directly mirrored those of *Anders*, and, therefore, grant of relief did not involve application of "new rule" on collateral review, as prohibited by *Teague v. Lane*, 489 U.S. 288 (1989).

Questions presented: (1) Did Ninth Circuit err in finding that California's no-merit brief procedure, in which appellate counsel who has found no nonfrivolous issues remains available to brief any issues appellate court might identify, violates Sixth Amendment *Anders* right to effective assistance of counsel on appeal? (2) Did Ninth Circuit err when it ruled that asserted *Anders* violation required new appeal, without testing claimed Sixth Amendment error under *Strickland v. Washington*, 466 U.S. 668 (1984)? (3) Did Ninth Circuit violate rule announced in *Teague v. Lane*, which prohibits retroactive application of new rule on collateral review, when it invalidated California's well-settled, good-faith interpretation of federal law?

98-1441 Roe v. Ortega

Ruling below (9th Cir., 160 F.3d 534):

Rule of *United States v. Stearns*, 68 F.3d 328, 58 Crim. L. Rep. 1198 (9th Cir. 1995), that counsel's failure to file appeal after guilty plea conviction is ineffective assistance within meaning of Sixth Amendment even if no prejudice is shown, was mere application of circuit court's prior decision in *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992), and, therefore, as applied to habeas corpus petitioner whose trial post-dated *Lozada*, does not amount to "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989), which generally bars application of new rules of constitutional law on federal habeas corpus.

Question presented: Does trial counsel have duty under Sixth Amendment to file notice of appeal following guilty plea if defendant has not so requested, particularly if defendant has been advised of his appeal rights?

98-1299 New York v. Hill

Ruling below (N.Y., 92 N.Y.2d 406, 681 N.Y.S.2d 775, 704 N.E.2d 542):

Defendant, who was incarcerated in another state, did not waive speedy trial rights under Interstate Agreement on Detainers merely by concurring in trial date outside IAD's speedy trial provision after that date was proposed by court and accepted by prosection; indictment must be dismissed as untimely.

Question presented: Does defendant's express agreement to trial date beyond 180-day period required by IAD constitute waiver of his right to trial within such period?

98-1170 Portuondo v. Agard

Ruling below (2d Cir., 64 Crim. L. Rep. 123, modifying 117 F.3d 696, 61 Crim. L. Rep. 1408):

Although prosecutor is not forbidden by Constitution to make factual argument that defendant used his familiarity with testimony of prosecution witnesses to tailor his own testimony, generic argument that defendant's credibility is less than that of prosecution witnesses solely due to fact that he attended entire trial whereas other witnesses were present only for their own trial testimony amounts to improper bolstering of prosecution witnesses' credibility on basis of defendant's exercise of his constitutional right of presence at trial.

Question presented: Did Second Circuit err in extending this court's decision in *Griffin v. California*, 380 U.S. 609 (1965), which prohibited prosecutor's comment on defendant's right to remain silent, to prosecutor's comments on testifying defendant's presence in courtroom during testimony of other witnesses?

98-6322 Slack v. McDaniel

9th Cir., unpublished

Court denied request for certificate of probable cause to review district court ruling holding that petitioner's habeas corpus action is "second or successive petition" as to most of grounds raised in petition and, therefore, constitutes abuse of writ as to those grounds, and that petitioner has failed to exhaust state remedies on remaining ground.

Question presented: If person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles §2254 petition, are claims included within that petition that were not included with is initial § 2254 filing "second or successive" habeas applications?

98-942 Fiore v. White

Ruling below (3d Cir., 149 F.3d 221):

Precedents holding that states are under no constitutional obligation to apply their own decision on criminal law retroactively and that new state law decisions are not applicable retroactively on federal habeas corpus preclude federal habeas relief for petitioner who argued that he has due process right to retroactive application of state court decision, on direct appeal, that reversed conviction of co-defendant convicted of same crime on same facts; petitioner's claims that 14th Amendment's equal protection clause entitles him to benefit of decision in co-defendant's case is inconsistent with *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, which largely deny benefit of new constitutional rules to defendants on collateral review and invariably result in differential treatment of defendants who, although convicted at same time, exhaust their direct appeals at different times.

Questions presented: (1) Did state flout due process clause of 14th Amendment and evade federal habeas corpus relief for incontestably innocent prisoner by claiming that appellate decision constituted "new law," when in fact state did not and could not prove key element of crime at trial? (2) Should federal habeas relief be extended to protect federal constitutional rights when state refuses to retroactively apply case that based its decision on already existing clear language of statute?