

# Recent Criminal Decisions of the United States Supreme Court: The 1998-1999 Term

Charles H. Whitebread

While the Supreme Court heard fewer cases than in previous sessions, there were many decisions that will nonetheless have an identifiable impact on constitutional criminal procedure.<sup>1</sup> During the 1998-1999 term, the Supreme Court ruled on approximately two dozen cases relevant to constitutional criminal procedure, many with regard to search and seizure and others dealing with a myriad of legal issues significantly affecting constitutional criminal procedure. Some rights of the criminal defendants were constricted, whereas others were reinforced and expanded. In particular, the Court constricted Fourth Amendment search and seizure rights in automobiles, but simultaneously protected individual privacy from media intrusion during home searches. The Court provided for a Fifth Amendment right to remain silent during sentencing and a Sixth Amendment protection from certain accomplice statements. The Court also considered the right to practice one's profession and the right to loiter. Finally, several federal habeas corpus issues were reviewed by the Court as well as the federal carjacking statute and the Comprehensive Drug Abuse Prevention and Control Act.

## FOURTH AMENDMENT

The Supreme Court devoted a considerable amount of time to the Fourth Amendment right against unreasonable searches and seizures during the 1998-1999 term. In *Minnesota v. Carter*,<sup>2</sup> the Court constricted this Fourth Amendment right, holding that the defendants did not have a "legitimate expectation of privacy" while in the apartment of another individual for the sole purpose of packaging cocaine. Therefore, no Fourth Amendment claim could be raised. Chief Justice Rehnquist explained that the presence of the defendants in the apartment was more similar to that of a business transaction than that of an overnight stay by a guest. Therefore, because the defendants were present only in the apartment for a business transaction, they could not have had a legitimate expectation of privacy and could not invoke Fourth Amendment protection.

The Court acted to preserve individual privacy in *Wilson v. Layne*<sup>3</sup> and *Hanlon v. Berger*.<sup>4</sup> In both cases, the Court held that

it is a violation of the Fourth Amendment for police to bring a member of the media or other third party into a home during the execution of a warrant when the presence of the third party does not aid in the execution of the warrant. Chief Justice Rehnquist observed that while the presence of the media may at times serve legitimate law enforcement principles, if the media's presence is not directly related to the specific purpose of the intrusion, the Fourth Amendment bars the media's entry. The *Wilson* Court stated that "the importance of the right of residential privacy [is] at the core of the Fourth Amendment." The Court was not willing to sacrifice this Fourth Amendment right in favor of any First Amendment considerations supportive of the media.

The Court took several opportunities to address search and seizure in the context of automobiles. In *Florida v. White*,<sup>5</sup> the Court held that police are not required to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that the automobile is forfeitable contraband. Justice Thomas noted that because an automobile is "movable contraband" that can be "spirited away," it is particularly important that police not be encumbered by a warrant requirement for fear that the vehicle may be moved before the warrant is obtained. The Court further explained that "Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places." Next, in *Maryland v. Dyson*,<sup>6</sup> the Court held that a finding of probable cause that a vehicle contains contraband is sufficient to justify a warrantless search under the Fourth Amendment. In *Wyoming v. Houghton*,<sup>7</sup> the Court further held that the Fourth Amendment is not violated when a police officer, acting on probable cause, searches a passenger's belongings in an automobile without a warrant. Justice Scalia, writing for the majority, relied on the Court's prior decision in *United States v. Ross*,<sup>8</sup> where the Court, based on historical evidence, held that "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Scalia reasoned that while *Ross* did not contemplate the presence of a passenger, the previous Court would have expressly mentioned such a limitation

## Footnotes

1. For a more in-depth review of the decisions of the past Term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 1998-1999 (Amer. Acad. of Jud. Educ. 1999).
2. 525 U.S. 83 (1998).
3. 526 U.S. 603 (1999).

4. 526 U.S. 808 (1999).
5. 526 U.S. 559 (1999).
6. 527 U.S. 465 (1999).
7. 526 U.S. 295 (1999).
8. 456 U.S. 798 (1982).

had it intended one. The Court did acknowledge some Fourth Amendment protection in automobile searches in *Knowles v. Iowa*,<sup>9</sup> where the Court held that a full-blown search of an automobile subsequent to the issuance of a traffic citation is not permissible unless the search is necessary to disarm a suspect in order to take him into custody or needed to preserve evidence for trial.

#### FIFTH AMENDMENT

The Court considered the impact of prior guilty pleas during sentencing in *Mitchell v. United States*.<sup>10</sup> In a 5-4 decision, the Court held that, in the federal system, defendants who enter a guilty plea do not waive their privilege against self-incrimination during the sentencing phase. During Mitchell's sentencing hearing, the trial court ruled that because of the defendant's guilty plea, she no longer maintained a right to remain silent and was obligated to discuss the details of the crimes. On review, the Supreme Court held that the privilege against self-incrimination remains in a sentencing hearing even after a criminal defendant has entered a guilty plea. Justice Kennedy explained that while the Fifth Amendment should not broadly allow a witness to "pick and choose what aspects of a particular subject to discuss," the amendment should not be interpreted too narrowly so that the individual relinquishes all rights upon pleading guilty. The majority further held that for the very same reasons the Court had prohibited negative inferences from silence during trial, negative inferences should not be drawn during sentencing when a defendant chooses to remain silent.

#### SIXTH AMENDMENT

In *Lilly v. Virginia*,<sup>11</sup> the Court considered the right of confrontation. While the justices disagreed as to the rationale behind their decision, a majority found that the admission of an accomplice's self-inculpatory statement that simultaneously inculpated the defendant violated the defendant's Sixth Amendment right to confrontation. A plurality of four justices based their decision on the notion that while the "against penal interest" exception to the hearsay rule is a "firmly rooted hearsay exception" in some instances, the use of a confession by an accomplice that incriminates the defendant is inherently unreliable.

#### EIGHTH AMENDMENT

In *Jones v. United States*,<sup>12</sup> the Court held that the Eighth Amendment does not require that a jury be instructed as to the consequence of its failure to reach a unanimous decision. Petitioner Louis Jones, Jr. was charged and convicted of kidnapping resulting in the death of the victim under 18 U.S.C. §1202(a)(2). During a separate sentencing hearing, the Government utilized its discretion under the Federal Death Penalty Act<sup>13</sup> and sought the death penalty. The jury was not instructed as to the consequences of a deadlock, which, under

the statute, would preclude imposition of the death penalty. Nevertheless, the jury unanimously sentenced the defendant to death. On review, the Supreme Court concluded that the jury was not misled, reasoning that to instruct the jury about deadlock consequences "has no bearing on the jury's role in the sentencing process. Rather it speaks to what happens in the event that the jury is unable to fulfill its role."

#### DUE PROCESS

The Court also reviewed a variety of due process issues. In *City of West Covina v. Perkins*,<sup>14</sup> the Court announced that under the Due Process Clause, an individual does not have a right to be notified of available state remedial procedures after the police seize property pursuant to a valid search warrant. Police officers from the City of West Covina had searched respondent Perkins' home pursuant to a valid search warrant and seized property, including a gun, ammunition, an address book, and more than \$2,000 in cash. The police officers left behind a form entitled, "Search Warrant: Notice of Service," in which the police officers listed each item that was removed from the premises and the phone numbers of the investigators involved in the investigation. The number of the warrant was not included because the warrant had been sealed. Perkins then contacted one of the detectives, who informed him that in order to have the property returned, a court order would need to be procured. Perkins then contacted the Municipal Court that issued the search warrant and was informed that the judge who issued the warrant was on vacation and that there was no record of property being held under Perkins' name. Writing for the Court, Justice Kennedy explained that the primary purpose for notice under the Due Process Clause is "to ensure that the opportunity for a hearing is meaningful." He explained that individualized notice that the property has been seized is necessary because an individual would have no other way of knowing that the property had been seized. But due process does not require notifying the individual of the available remedies when those remedies are "established by published, generally available state statutes and case law."

The Court also considered an individual's right to practice his or her profession in the context of criminal proceedings. In *Conn v. Gabbert*,<sup>15</sup> the Court held that a prosecutor does not violate an attorney's Fourteenth Amendment right to practice his profession when the prosecutor causes the attorney to be searched at the same time that his client testifies before a grand jury. Respondent Paul Gabbert was an attorney for Traci Baker, a witness in the case of Lyle and Erik Menendez. Upon retrial of the brothers, petitioners David Conn and Carol Najera, both deputy district attorneys in Los Angeles, grew suspicious that Baker possessed a letter from Lyle Menendez instructing her to give false testimony at trial. Baker was subpoenaed to appear before a grand jury and to produce the letter. Police obtained a search warrant to search Baker's home for the letter. When

9. 525 U.S. 113 (1998).

10. 526 U.S. 314 (1999).

11. 527 U.S. 116 (1999).

12. 527 U.S. 373 (1999).

13. 18 U.S.C. § 3591 et seq.

14. 525 U.S. 234 (1999).

15. 526 U.S. 286 (1999).

police tried to execute the warrant, they were told that Baker had turned all her letters over to Gabbert. Police then obtained a warrant to search Gabbert. While searching Gabbert, whereupon the police actually found the letter, Baker was appearing before the grand jury. The Supreme Court determined that Gabbert's Fourteenth Amendment right to practice his calling was not violated by the search or by the questioning of his client before a grand jury without his presence. The Court observed that the "Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation." The Court further noted that this Fourteenth Amendment right applies to a "prohibition" on work, not the sort of "brief interruption" that occurred in this instance.

The Supreme Court also reviewed the constitutionality of a city ordinance that placed loitering restrictions on gang members in *City of Chicago v. Morales*.<sup>16</sup> The Court held that a city ordinance that requires a police officer to order individuals reasonably believed to be criminal gang members to disperse because they are loitering, accompanied by criminal punishment for failure to comply with the dispersal order, is unconstitutionally vague in violation of the Due Process Clause. Justice Stevens, writing for a plurality composed of himself, Justice Souter and Justice Ginsburg, deemed the ordinance unconstitutional because it hinders the freedom to loiter. The plurality asserted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." The plurality also objected to the ordinance because it criminalizes an activity that has no requisite scienter. The plurality explained that due to the ordinance's vagueness, the law is invalidated because there is not sufficient notice to enable an ordinary person to know that his or her conduct is prohibited and the ordinance encourages arbitrary and discriminatory behavior. The plurality further noted that there is a lack of clarity as to what constitutes compliance with the dispersal order. Additionally, the ordinance covers too many people and too many innocent activities. Justice O'Connor, joined by Justice Breyer, concurred in the Court's judgment and agreed that the ordinance is unconstitutionally vague because "it lacks sufficient minimal standards to guide law enforcement officers." For example, she noted, there is no definition of what constitutes an "apparent purpose." Justice O'Connor also said that there are reasonable alternatives that Chicago could use that more narrowly focus the discretion and the activity targeted by the statute. In a separate concurrence, Justice Breyer said, "The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case." Justice Kennedy also concurred with the judgment because an unexplained dispersal order is inadequate notice.

## FEDERAL HABEAS CORPUS

With respect to federal habeas corpus relief, the Court first considered the exhaustion of remedies requirement in *O'Sullivan v. Boerckel*.<sup>17</sup> The Court held that a state prisoner petitioning for a federal writ of habeas corpus must exhaust all state remedies, including the assertion of claims to the state supreme court for discretionary review. Writing for the majority, Justice O'Connor emphasized the importance of allowing the state courts the first chance to resolve federal constitutional questions in order to reduce friction between state and federal courts. The Court noted that "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."

In *Strickler v. Greene*,<sup>18</sup> the Court considered a habeas petitioner's failure to raise a *Brady* claim of non-disclosure of exculpatory evidence prior to the habeas proceeding. The Court found that while petitioner was able to establish cause for failing to raise a *Brady* claim prior to federal habeas (because the prosecution withheld the exculpatory evidence), petitioner did not have a viable claim for relief because he failed to show a reasonable probability that the evidence would have changed the outcome of the jury's decision. The Court had previously decided in *Brady v. Maryland*<sup>19</sup> that the state has a duty to disclose evidence favorable to the accused. The state violates *Brady* when three conditions are met: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. The *Strickler* Court focused most of its analysis on the third prong of *Brady*, ultimately concluding that the suppression of the evidence was not prejudicial to the accused. Justice Stevens, citing *Kyles v. Whitley*,<sup>20</sup> noted that the standard of review "is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Based on this standard, the Court found that there was ample evidence in the record, notwithstanding the undisclosed exculpatory evidence, to warrant a finding of guilt.

## STATUTORY INTERPRETATION

This term, the Supreme Court took time to interpret the parameters of several criminal statutes. In *Richardson v. United States*,<sup>21</sup> the Court concluded that a jury that considers a violation under section 408 of the Comprehensive Drug Abuse Prevention and Control Act<sup>22</sup> must unanimously agree as to the specific violations that they find make up a "continuing criminal enterprise." Justice Breyer, writing for majority, observed that to allow jurors to consider different offenses runs a risk of unfairness. Justice Breyer also noted that "this Court has indicated that the Constitution itself limits a State's power to define

16. 527 U.S. 41 (1999).

17. 526 U.S. 838 (1999).

18. 527 U.S. 263 (1999).

19. 373 U.S. 83 (1963).

20. 514 U.S. 419 (1995).

21. 526 U.S. 813 (1999).

22. 21 U.S.C. § 848.

crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition.”

The Court reviewed the federal carjacking statute<sup>23</sup> in two cases. The statute establishes that it shall be a federal offense for anyone to take an automobile “with the intent to cause death or serious bodily harm.” In *Holloway v. United States*,<sup>24</sup> the Court held that the intent requirement for carjacking is satisfied by proof that, at the moment that the defendant demanded or took control of the automobile, defendant conditionally intended to kill or cause serious bodily harm if necessary. The Court said it preferred a “commonsense” reading of the statute, explaining that Congress “intended to criminalize a broader scope of conduct than attempts to assault or kill in the course of automobile robberies.” The Court looked to the context of the intent requirement, thus finding that the intent requirement modified the “taking” of the automobile. Therefore, the mens rea requirement should only be examined at the precise moment the defendant demands or takes the vehicle. This reading of the statute abrogates the Ninth Circuit’s decision in *United States v. Randolph*.<sup>25</sup>

In *Jones v. United States*,<sup>26</sup> the Court held that the provisions of the carjacking statute that imposed higher penalties when death or serious bodily injury occur are themselves additional elements of an offense and not mere sentencing guidelines. Under the statute, there are three subsections with different potential punishments: (1) unless serious bodily injury or death result, a person may not be imprisoned for more than 15 years under this statute; (2) if serious bodily injury results, a person may not be imprisoned for more than 25 years; and (3) if death results, a person may be imprisoned up to life.<sup>27</sup> Justice Souter explained that while at first glance the subsections do not appear to be separate offenses, further investigation shows that, in fact, subsections (2) and (3) are separate offenses. While both sections do contain steeper penalties, they also contain additional elements upon which those penalties hinge. The Court relied on a basic rule of statutory interpretation which provides that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” If the statute were interpreted to mean that the subsections were merely sentencing guidelines and not additional elements, a constitutional concern would arise. That is, when the judge finds by a preponderance of evidence that great bodily harm has occurred, increasing the maximum sentence, the accused may have been denied the right to a jury trial on this issue.

#### JURY INSTRUCTIONS

In *Neder v. United States*,<sup>28</sup> the Court found that a jury instruction that omits an element of an offense is nevertheless subject to a harmless-error analysis. Petitioner was indicted and tried for nine counts of mail fraud, nine counts of wire

fraud, twelve counts of bank fraud and two counts of filing a false income tax return. During the trial, the judge incorrectly instructed the jury that it need not consider materiality on the tax offenses and did not mention materiality as an element for the mail and wire fraud counts. Chief Justice Rehnquist, writing for a five-justice majority, noted that “an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” The Court unanimously agreed that materiality is an element of federal mail fraud under 18 U.S.C. §1341.

#### CONCLUSION

For the most part, the decisions of the 1998-1999 term, while important, made no radical upheavals to constitutional criminal procedure. Under the leadership of Chief Justice Rehnquist, the Court continued to expand law enforcement’s ability to search and seize an individual’s possessions and property. Concurrently, the Court did substantiate several small but nevertheless significant rights maintained by criminal defendants, including the right to remain silent, the right to loiter, and the right to confrontation.



Charles H. Whitebread (A.B., Princeton University, 1965; LL.B., Yale Law School, 1968) is the George T. and Harriet E. Pflieger Professor of Law at the University of Southern California Law School, where he has taught since 1981. Before that, he taught at the University of Virginia School of Law from 1968 to 1981. He is found on the Web at <http://www-rcf.usc.edu/~cwhitebr/>.

Professor Whitebread gratefully acknowledges the help of his research assistant, Whitney Jones.

23. 18 U.S.C. § 2119.

24. 526 U.S. 1 (1999).

25. 93 F.3d 656 (9th Cir. 1996).

26. 526 U.S. 227 (1999).

27. 18 U.S.C. § 2119.

28. 527 U.S. 1 (1999).