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Filling in Some Pieces: The Supreme Court's Criminal Law Decisions in the 1998-1999 Term

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FILLING IN SOME PIECES: THE SUPREME COURT'S CRIMINAL LAW DECISIONS IN THE 1998-1999 TERM

*William E. Hellerstein*¹

The Court's criminal law decisions contained no landmark rulings and effected no doctrinal sea changes. However, the Court was very active in the Fourth Amendment area and it rendered a very important decision concerning the interplay between the hearsay rules and the confrontation clause. In addition to these cases, I will discuss several others of importance, including the closely divided ruling striking down Chicago's anti-gang ordinance.²

Searches and Seizures

The Court decided seven Fourth Amendment cases in which it analyzed the protection people have in their cars, homes, and in another person's home. Three cases upheld the authority of the police to search or seize vehicles without warrants: *Florida v. White*,³ *Maryland v. Dyson*,⁴ and *Wyoming v. Houghton*.⁵ Only in one case, *Knowles v. Iowa*,⁶ did the Court determine that the police search of the car violated the Fourth Amendment. Our privacy interest in our homes fared slightly better in that the Court, in *Wilson v. Layne*⁷ and *Hanlon v. Berger*⁸ found that such interest outweighed any law enforcement interest in having the media accompany the police into a home to record execution by the police of an arrest or search warrant. However, in *Minnesota v. Carter*,⁹ the Court narrowly ruled that the Fourth Amendment does not apply to persons engaged in a criminal enterprise conducted

¹ Professor of Law, Brooklyn Law School.

² *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999).

³ 119 S.Ct. 1555 (1999).

⁴ 119 S.Ct. 2013 (1999).

⁵ 119 S.Ct. 1297 (1999).

⁶ 525 U.S. 113 (1998).

⁷ 119 S.Ct. 1692 (1999).

⁸ 119 S.Ct. 1706 (1999).

⁹ 525 U.S. 83 (1998).

briefly in an acquaintance's apartment.¹⁰ As I will develop later, this case may be a sleeper in that it may well broaden a person's privacy interests in someone else's home. Let me turn to the vehicle cases first.

In *Wyoming v. Houghton*,¹¹ the issue was whether a police officer, who validly stopped the driver of a vehicle, could lawfully search the purse of a passenger when the officer had probable cause to believe that there were drugs in the vehicle.¹² The officer stopped a car containing three people; a man and two women.¹³ The officer saw in the male driver's pocket a hypodermic syringe. He asked the driver why he had the syringe, and with remarkable candor, the driver stated that he used it to take drugs.¹⁴ With the driver and passengers ordered out of the car, one of the women identified herself as "Sandra James."¹⁵ When the officer inspected the purse left in the back seat, he saw a driver's license for Sandra K. Houghton, not Sandra James.¹⁶ Ms. Houghton then asserted ownership of the purse. A second search of the purse turned up drugs and drug paraphernalia. Houghton was later convicted of drug possession.¹⁷

The question for the Court was whether the officer violated the Fourth Amendment in searching Houghton's purse left on the back seat of the car. In an opinion written by Justice Scalia (and joined by Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Thomas, and Breyer), the Court held the search was valid because the officer had probable cause to believe that there were drugs in the car.¹⁸ The officer did not have to have probable cause to believe that there were drugs in the purse itself, nor did he have to get a warrant simply because Ms. Houghton asserted ownership.¹⁹

Five members of the Court resolved the question by considering two issues: (1) whether the common law considered the search or

¹⁰ *Id.* at 91.

¹¹ 119 S.Ct. 1297 (1999).

¹² *Id.* at 1299.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Houghton*, 119 S. Ct. at 1300.

¹⁸ *Id.* at 1304.

¹⁹ *Id.* at 1302.

seizure valid and (2) whether the search was “reasonable” within the meaning of the Fourth Amendment.²⁰ Even though the Court stated that if the common law was clear, then it would not have to address the second issue or reasonableness, it did so. Justice Scalia pointed out that under the common law, officers could search ships without a warrant and he relied heavily on *Carroll v. United States*,²¹ which involved an officer’s authority in the 1920’s to search for bootleg liquor in a vehicle.²² As you well know, the *Carroll* case established the “automobile exception,” which meant that a warrant was not necessary to search a vehicle because of its inherent mobility so long as the officer had probable cause to believe that contraband was in the car.²³ Justice Scalia concluded that the search at issue was similar. Justice Scalia also pointed out that in *United States v. Ross*,²⁴ the Court specifically stated 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.”²⁵

However, this case involved the search of a passenger’s purse, property that did not seemingly belong to the male driver. No matter, said Justice Scalia. A passenger could be a confederate in smuggling drugs and a passenger has a “reduced expectation of privacy with regard to property that [he or she] transport[s] in cars.”²⁶ Justice Scalia opted for the brightline rule that the officer could search the purse despite the passenger’s claim of ownership. If the officer has probable cause to believe that drugs are in the car, the officer may search the containers in the car, even the purse.²⁷

The majority distinguished the Court’s prior decisions in *United States v. Di Re*²⁸ and *Ybarra v. Illinois*,²⁹ which held that an individual’s mere presence in an automobile, or in a public tavern,

²⁰ *Id.* at 1301.

²¹ 267 U.S. 132 (1925).

²² *Id.* at 155.

²³ *Id.*

²⁴ 465 U.S. 798 (1982).

²⁵ *Id.* at 825.

²⁶ *Houghton*, 119 S. Ct. at 1302.

²⁷ *Id.*

²⁸ 332 U.S. 581 (1948).

²⁹ 444 U.S. 85 (1979).

as to which police have probable cause does not justify the warrantless search of the individual's person.³⁰ It reasoned that the search of an individual's person is more intrusive than a search of the individual's belongings.³¹

In a separate concurrence, Justice Breyer attempted to draw a line distinguishing between searches of property and of people:

I cannot argue that the fact that the container was a purse makes a legal difference. . . . But I can say that it would matter if a woman's purse, like a man's billfold were attached to her person. It might then amount to a kind of 'outer clothing'. . . In this case, the purse was separate from the person.³²

He also made it clear that he did not read the majority opinion as holding that history can automatically determine the answer to a Fourth Amendment question.³³

In dissent, Justice Stevens, joined only by Justices Souter and Ginsburg, rejected the majority's two part test stating that "[t]o my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th century common law 'yields no answer.'"³⁴

Instead, he reminded the Court of its "established preference for warrants and individualized suspicion."³⁵ Thus, he would have either required the officer to get a warrant or to have probable cause to believe that there were drugs in the purse. He attempted to limit the scope of the case by reminding us that the majority was only addressing automobile searches.³⁶

The decision in *Houghton* should surprise no one. Justice Stewart's admonition in *Coolidge v. New Hampshire*³⁷ that there is

³⁰ See *DiRe*, 332 U.S. at 587; *Ybarra*, 444 U. S. at 91.

³¹ *Houghton*, 119 S. Ct. at 1302 (noting that *DiRe* and *Ybarra* "turned on the unique, significantly heightened protections afforded against searches of one's person").

³² *Id.* at 1304 (Breyer, J., concurring).

³³ *Id.*

³⁴ *Id.* at 1306 n.3 (Stevens, J., dissenting).

³⁵ *Id.*

³⁶ *Id.* at 1307 (noting that "[t]hankfully the Court's automobile-centered analysis limits the scope of its holding").

³⁷ 403 U.S. 443, 461 (1971).

nothing “talismanic” about vehicles that authorizes wholesale abrogation of the warrant requirement is not in grand estate.³⁸ The Court’s automobile search cases over the past 20 years have not labored under that directive. *Houghton* extends the car search doctrine and gives the police virtual *carte blanche* to search anything in a vehicle as long as they have probable cause. Nonetheless, two principles limiting police conduct in the automobile context are still operative: (1) searches of passengers are valid only if the officer has reasonable suspicion to believe that they are armed and dangerous, the “frisk” standard of *Terry v. Ohio*,³⁹ and (2) the scope of the search, while not limited by an officer’s knowledge of who owns the object, is limited by the officer’s knowledge of where the object may be.⁴⁰ For example, in *Houghton*, the officer’s knowledge of the location of the drugs was the entire car; in prior cases, the scope of the search was limited by probable cause as to an area, like the trunk, or a particular object, like a paper bag.⁴¹ *Houghton* simply makes it irrelevant who owns the container, but does not undermine limitation of the scope of the officer’s search when probable cause is for a particular location or object.

In two other cases, the Court also rejected the need to get a warrant, whether to search a vehicle for drugs, or whether to seize a vehicle that itself was contraband subject to forfeiture.

In *Maryland v. Dyson*,⁴² in a per curiam opinion, the Court reaffirmed the principle that the Fourth Amendment’s automobile exception permits a warrantless search of an automobile as to which the police have probable cause, even when the officers have ample opportunity to obtain a warrant.⁴³

Maryland police had developed probable cause to believe that the defendant would be returning to Maryland with a load of drugs in his car.⁴⁴ They did not attempt to obtain a warrant and waited 13

³⁸ *Id.* at 461-62.

³⁹ 392 U.S. 1 (1968).

⁴⁰ *See generally*, *Wyoming v. Houghton*, 119 S. Ct. 1297 (1999).

⁴¹ *Id.*

⁴² 119 S.Ct. 2013 (1999).

⁴³ *Id.* at 2014.

⁴⁴ *Id.* at 2013.

hours for the defendant to drive by.⁴⁵ They stopped his car, searched it, and seized a bag of crack cocaine.⁴⁶ The Maryland Court of Special Appeals held the search unlawful, emphasizing the lack of exigent circumstances justifying the officers' failure to obtain a warrant.⁴⁷

The Supreme Court reversed summarily, holding that the bright-line rule established by the automobile exception does not require "a separate finding of exigency precluding the police from obtaining a warrant."⁴⁸ The majority pointed out that both *United States v. Ross*⁴⁹ and *Pennsylvania v. Labron*,⁵⁰ made clear that "the automobile exception does not have a separate exigency requirement. . ."

Justice Breyer, joined by Justice Stevens, agreed with the majority as to the law but dissented from the majority's decision to summarily decide the case.⁵¹

All that can be said about this case is that it demonstrates how far the Court has traveled from the original "automobile exception" rationale of *Carroll v. United States*.⁵² That was a case in which the officers could not have obtained a warrant which, by definition, rendered the circumstances exigent.⁵³ That factor eventually dropped out and a vehicle's *potential* mobility replaced it.⁵⁴ For some reason, the Maryland court thought that the exigency rationale of *Carroll* still existed; it was mistaken.⁵⁵

In *Florida v. White*,⁵⁶ the police also had time to get a warrant before seizing a car, but they did not seek one.⁵⁷ The Court, with Justice Thomas writing the opinion for a 7-2 majority, held that the Fourth Amendment does not require the "police to obtain a warrant

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Dyson*, 119 S. Ct. at 2014.

⁴⁸ *Id.*

⁴⁹ 456 U.S. 798 (1982).

⁵⁰ 518 U.S. 938 (1996).

⁵¹ *Dyson*, 119 S. Ct. at 2014 (Breyer, J., dissenting).

⁵² 267 U.S. 132 (1925).

⁵³ *Id.* at 153.

⁵⁴ *Id.*

⁵⁵ *Dyson*, 119 S. Ct. at 2014.

⁵⁶ 119 S.Ct. 1555 (1999).

⁵⁷ *Id.* at 1557.

before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband.”⁵⁸

The majority took the same approach that it did in *Houghton*: “whether the action was regarded as an unlawful search and seizure when the [Fourth] Amendment was framed.”⁵⁹ As it had in *Houghton*, the majority relied on “founding-era statutes” that authorized warrantless searches and seizures of contraband on vessels.⁶⁰ These early practices, when coupled with the Court’s “automobile exception” precedents, allowed the majority to extend police authority to the seizure of the car itself as contraband.

The majority also pointed out that the Fourth Amendment requires less of police when their actions occur in public places.⁶¹ It referred to the general rule that although a warrant is required to make a felony arrest of a suspect in the suspect’s home, no warrant is required to arrest a suspect in a public place.⁶²

The majority also found the facts of the case “nearly indistinguishable from those” in *G.M. Leasing Corp. v. United States*,⁶³ in which the Court upheld the warrantless seizures of automobiles in partial satisfaction of income tax assessments.

Justice Souter concurred briefly, joined by Justice Breyer, admonishing that the Court’s opinion should not be read as “a general endorsement of warrantless seizures of anything a State chooses to call ‘contraband,’ whether or not the property happens to be in public when seized.”⁶⁴

In dissent, Justice Stevens, joined only by Justice Ginsburg, expressed concern about the timing of the seizure. The police, who had probable cause to believe that the defendant had used the vehicle to sell illegal drugs, waited more than two months to seize

⁵⁸ *Id.* at 1560.

⁵⁹ *Id.* at 1558.

⁶⁰ *Id.*

⁶¹ *Id.* at 1559.

⁶² *Id.*

⁶³ 429 U.S. 338 (1977). In *GM Leasing Corp.*, the Internal Revenue Service (the “IRS”) sought satisfaction of unpaid taxes from the general manager of an automobile leasing corporation. *Id.* at 342-43. The IRS, claiming that the corporation was an alter ego of the general manager, seized automobiles owned by the corporation that were in open and public places. *Id.* at 343-44.

⁶⁴ *White*, 119 S. Ct. 1560.

it.⁶⁵ In fact, the officers seized the vehicle after arresting the defendant at work “on an unrelated matter and obtaining his keys.”⁶⁶ They then went to the company’s parking lot and performed an “inventory search.” Justice Stevens maintained that neither the exigency nor the diminished privacy justification for the automobile exception eliminates the need for a neutral magistrate to oversee seizures of property for forfeiture, especially when, as in this case, the conduct giving rise to the forfeiture occurred months prior to the seizure and the owner of the property is in custody.⁶⁷

As with *Houghton*, anyone who has followed the Court’s automobile exception jurisprudence over the past two decades should experience no surprise over the decision in *White*. What continues to be noteworthy is the reluctance of state courts to be as restrictive in construing the Fourth Amendment as is the Supreme Court.

*Knowles v. Iowa*⁶⁸ was the only case in which a police search of a car was found unreasonable. At issue was an officer’s authority to search a car once the officer had given the driver a traffic citation.⁶⁹ An Iowa statute authorized the police to search incident to citation if the offense would have authorized a search incident to arrest. Specifically, it provided that a police officer’s decision to issue a citation in lieu of making an arrest “does not affect the officer’s authority to conduct an otherwise lawful search.”⁷⁰ The Iowa Supreme Court had interpreted the statute to mean that officers issuing citations on the basis of probable cause have the same authority to search drivers and vehicles as they would have if they opted to arrest the drivers.⁷¹

The defendant did not challenge the officer’s authority to arrest him for a traffic violation; instead he challenged only the authority to search incident to a citation.⁷²

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1562.

⁶⁸ 525 U.S. 113 (1999).

⁶⁹ *Id.* at 114.

⁷⁰ Iowa Code Ann. § 805.1(4) (West 1997).

⁷¹ *Knowles*, 525 U.S. at 115-16.

⁷² *Id.*

In a unanimous opinion, Chief Justice Rehnquist held that it is the arrest itself, and not just the probable cause underlying the arrest, that justifies the search-incident to arrest doctrine.⁷³ He explained that the rationales of the search-incident doctrine — the need to disarm a suspect and the need to preserve evidence — did not apply where only a citation is issued.⁷⁴ When a citation is issued, the officer is not subject to what the Court had previously described as “the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.”⁷⁵ Although disarming a suspect promotes the “weighty” interest in officer safety, the Chief Justice pointed out that a traffic stop is so brief that a search does not outweigh the driver’s interest in personal security.⁷⁶ The *Terry* frisk doctrine adequately protects the officer, said the Chief Justice: officers may pat-down the driver if they have reasonable suspicion to believe that the driver is armed and dangerous.⁷⁷

With respect to the need to preserve evidence, the Chief Justice stated that no other evidence of speeding could be found by searching the driver of the car.⁷⁸ If the officer was dissatisfied with the driver’s identification, the officer could arrest the driver rather than issue a citation.⁷⁹ In addition, the Chief Justice stated that it was “remote” that an officer would “stumble into evidence wholly unrelated to the traffic offense.”⁸⁰

Broken down to its essentials, the case stands for the proposition that issuance of a traffic citation simply does not give an officer authority to search the stopped vehicle. The Court’s unanimity suggests that on the facts of the case, it was a no-brainer. The idea that a person’s car could be searched on nothing more than the issuance of a traffic citation appears to have been too much, even for a Court that has long found privacy in our cars and trucks largely unworthy of protection. Perhaps the Court’s members were

⁷³ *Id.* at 117.

⁷⁴ *Id.*

⁷⁵ *United States v. Robinson*, 414 U.S. 218, 234-235 (1973).

⁷⁶ *Knowles*, 119 S. Ct. at 118.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

simply able to envision themselves on the highways or byways stopped for a speeding ticket only to find themselves subject to a car search.

Before the street celebrations become exuberant, consider that the Iowa statute was extremely broad, matching the mere issuance of a ticket with the right to search. In many of its search incident cases, the Court has preferred bright-line rules which the police could follow with ease; there may yet be circumstances in which the search-incident doctrine may be found applicable to issuance of a citation, such as Iowa's allowance of a citation for a crime as serious as burglary in the second degree.⁸¹

Let me turn next to the decisions in which the Court addressed the privacy interests in one's home that are protected by the Fourth Amendment.

In *Wilson v. Layne*,⁸² and its companion case of *Hanlon v. Berger*,⁸³ the Court unanimously held that the presence of the media during the execution of warrants in homes violated the Fourth Amendment.⁸⁴ In *Wilson*, the main case, U.S. Marshals invited a reporter and photographer to accompany them when the marshals and county officers executed arrest warrants for a fugitive who was thought to be in his home.⁸⁵ The invitation to the media was extended as part of a Marshals Service "ride-along" policy.⁸⁶ The warrants did not explicitly authorize the media to be present or to assist the officers. After entering the house with the officers at about 6:45 a.m., the media representatives took photographs and witnessed a confrontation between the officers and the fugitive's father.⁸⁷ They also saw the fugitive's mother who, like her husband, had been in bed when the officers arrived and was lightly clad. The pictures taken were never published.⁸⁸ In *Hanlon*, a

⁸¹ Iowa Code Ann. § 805.1 (West 1997).

⁸² 119 S. Ct. 1692 (1999).

⁸³ 119 S. Ct. 1706 (1999).

⁸⁴ *Wilson*, 119 S. Ct. at 1695.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1696.

⁸⁷ *Id.*

⁸⁸ *Id.*

television crew recorded police execution of a search warrant at a ranch.⁸⁹

Writing for the Court in *Wilson*, Chief Justice Rehnquist held that the police conduct was contrary to the “centuries-old principle” embodied in the Fourth Amendment, “of respect for privacy in the home.”⁹⁰ He pointed out that although the officers had warrants, what they do in the home must be “related to the objectives of the authorized intrusion.”⁹¹ Here, the media representatives did not take part in the execution of the arrest warrant, nor was it a case in which a private person accompanies the police to aid in the warrant’s execution, such as to help them identify stolen property.⁹²

The Chief Justice also made clear that publicizing anti-crime efforts and ensuring the accuracy of such publicity do not justify media presence when measured against the special protection the Fourth Amendment provides for homes stating:

Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home. And even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant.⁹³

Justice Stevens dissented from the majority’s conclusion that the officers in both cases were entitled to qualified immunity because the law prohibiting media ride-alongs was not clearly established at the time of the police actions.⁹⁴

The implications of the two decisions with respect to media presence in our homes in tandem with the police are very clear. Unless the media presence is functionally related to the execution of a warrant, it will be constitutionally unacceptable. But what about media involvement outside the home? Will it be less clear? For example, Judge Allen Schwartz of the U.S. District Court for

⁸⁹ *Hanlon*, 119 S. Ct. 1706.

⁹⁰ *Wilson*, 119 S. Ct. 1697.

⁹¹ *Id.* at 1698.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1701 (Stevens, J., dissenting).

the Southern District of New York has held that the police practice of parading a "notable" suspect before the media, a common practice known as the "perp-walk," violated the Fourth Amendment because it was an unreasonable seizure of the person.⁹⁵ In similar reasoning, but antedating the Court's decision in *Wilson and Hanlon*, Judge Schwartz presciently reasoned that a perp-walk had no rational relationship to a suspect's arrest and therefore was unreasonable.⁹⁶ Although the City has appealed the ruling, I expect that after *Wilson and Hanlon*, Judge Schwartz will be upheld.

For me, *Minnesota v. Carter*⁹⁷ is the most interesting, confusing, difficult, and deceptive decision of all.

First, the facts: a woman had given the defendants permission to use her apartment to package cocaine.⁹⁸ In exchange, she was given a cut of the drugs. The defendants had never been to the apartment before and had no other connection to the premises. While they were at work in the apartment, an informer told the police that, as he was passing by the window of the apartment, he saw what he believed to be people packaging drugs.⁹⁹ An officer who was dispatched in response to the tip crept up to a window of the apartment, peeked through a gap in a window blind, and observed the defendants and the woman sitting around the kitchen table placing white powder into bags.¹⁰⁰ These observations prompted the officer to stop the defendants' car when they left the apartment, and the stop turned up drugs and a firearm.¹⁰¹

Chief Justice Rehnquist, writing for Justices O'Connor, Scalia, Kennedy, and Thomas, held that the Fourth Amendment afforded no protection to the defendants.¹⁰² The defendants did not stay overnight in the homeowner's apartment, there was no suggestion that they had a previous relationship with the apartment dweller, the sole purpose in the apartment was to package cocaine, a task

⁹⁵ See *Lauro v. City of New York*, 39 F. Supp. 2d 351, 354 (S.D.N.Y. 1999).

⁹⁶ *Id.* at 354.

⁹⁷ 525 U.S. 83 (1999).

⁹⁸ *Id.* at 86.

⁹⁹ *Id.* at 85.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 86.

¹⁰² *Carter*, 525 U.S. at 91.

that took only 2 and ½ hours, and with this “purely commercial” transaction, the defendants were more like people “simply permitted on the premises.”¹⁰³

Justice Ginsburg, joined by Justices Stevens and Souter, argued that the Court’s decision puts householders’ privacy in their own homes at risk by encouraging the police to invade a home in the hopes of gathering evidence about a visitor.¹⁰⁴ For her, the touchstone of whether a short-term visitor’s privacy is protected by the Fourth Amendment should be whether the householder “chooses to share the privacy of her home and her company with a guest. . . individuals do not have to stay overnight to reasonably expect privacy when they are invited into someone else’s home.”¹⁰⁵ Justice Breyer agreed with Justice Ginsburg’s privacy analysis but concurred in the result on the ground that the police officer had not conducted a search.¹⁰⁶

At first blush, some may think that the Court’s decision is a serious setback for the right to privacy within the home. But read correctly, the case in actuality *extends* Fourth Amendment privacy protection beyond where it had been previously.

In *Minnesota v. Olson*,¹⁰⁷ the Court held that overnight guests have a reasonable expectation of privacy in their hosts’ homes.¹⁰⁸ The question that remained unanswered after *Olson* was what was the legitimate privacy expectation of persons who were not overnight guests. Although he joined the majority’s grounds for rejecting the privacy interests of the defendants in *Carter*, Justice Kennedy wrote a concurring opinion in which he stated that “as a general rule, social guests will have an expectation of privacy in their host’s home.”¹⁰⁹

Aligning himself with Justices Ginsburg, Stevens, Souter, and Breyer, Justice Kennedy stated:

I would expect that most, if not all, social guests legitimately expect that, in accordance with social custom, the

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 106.

¹⁰⁵ *Id.* at 107-09.

¹⁰⁶ *Id.* at 103.

¹⁰⁷ 495 U.S. 91 (1990).

¹⁰⁸ *Id.* at 100-01.

¹⁰⁹ *Carter*, 525 U.S. at 102.

homeowner will exercise her discretion to include or exclude others for the guests' benefit. As we recognized in *Minnesota v. Olson*, 495 U.S. 91 (1990), where these social expectations exist—as in the case of an overnight guest—they are sufficient to create a legitimate expectation of privacy, ~~even in the absence of any property right to exclude others.~~ In this respect, the dissent must be correct that reasonable expectations of the owner are shared, to some extent, by the guest.¹¹⁰

Counting the hands, one must conclude, as did Justice Ginsburg herself, that “five members of the Court would place under the Fourth Amendment’s shield, as least, ‘almost all social guests.’”¹¹¹ Consequently, although a clear defeat for the defendants, the bottom line of the Carter decision is that *Minnesota v. Olson* is not confined to overnight guests, as a number of federal courts had previously held.¹¹² In fact, *Carter* places into serious question numerous decisions by the New York courts that have refused to extend *Olson* to the non-overnight social guests or visitors of a homeowner, even guests with personal connections to the host’s home,¹¹³ foremost of which is the New York Court of Appeals’ decision in *People v. Ortiz*.¹¹⁴

In *Ortiz*, the court held that the defendant did not have a legitimate expectation of privacy in his girlfriend’s apartment.¹¹⁵ Both his girlfriend and his 3-month old daughter lived in the apartment. Ortiz visited the apartment once or twice a week, and stayed overnight on occasion, but had not slept there in a month.¹¹⁶ He did not keep clothes in the apartment but he did help with household expenses. Nonetheless, the court held that Ortiz was a

¹¹⁰ *Id.* at 101.

¹¹¹ *Id.* at 109 n.4.

¹¹² See, *United States v. Torres*, __ F.3d __, 1998 WL 823184, at 3 (1st Cir. 1998); *Terry v. Martin* (120 F.3d 661, 663 (7th Cir. 1997); *United States v. Gale*, 136 F.3d 192, 195 (D.C. Cir. 1998); *United States v. Maddox*, 944 F.2d 1223, 1234 (6th Cir. 1991). But see, *United States v. Fields*, 113 F.3d 313, 320-322 (2d Cir. 1997); see also, *Bonner v. Anderson*, 81 F.3d 472 (4th Cir. 1995).

¹¹³ See, *Brooks Holland, High Court Improves Standing of Social Guests to Challenge Searches*, N.Y. Law Jour., January 12, 1999, pp.1,7.

¹¹⁴ 83 N.Y.2d 840, 633 N.E.2d 1104, 611 N.Y.S.2d 500 (1994).

¹¹⁵ *Id.* at 842, 633 N.E.2d at 1105, 611 N.Y.S.2d at 501.

¹¹⁶ *Id.*

“casual visitor—on the date of his arrest” with “relatively tenuous ties,” who thus had no legitimate expectation of privacy.¹¹⁷ In other words, it appears that Ortiz would have had to stay in the apartment the night before his arrest in order to have the Fourth Amendment protection afforded by *Olson*. I do not think that is the case any longer.

The Confrontation Clause

In *Lilly v. Virginia*,¹¹⁸ the Court once again struggled with the issue of the relationship between the rules against hearsay and the confrontation clause, and the Court’s inability to craft a majority opinion evidences the Justices’ less than successful efforts towards staking out a doctrinal common ground.¹¹⁹

The defendant, Benjamin Lilly, his brother Mark, and his brother’s roommate, Gary Barker were arrested after a crime rampage in the course of which they murdered the owner of a car that they wanted to use.¹²⁰ In a confession to the police, Mark stated that Benjamin was the shooter.¹²¹ Mark admitted that he was present when the victim was shot but claimed that he had been drinking heavily and did not take part.¹²² At Benjamin Lilly’s trial, for murder and other crimes, the prosecution called Mark as a witness, but he invoked his Fifth Amendment privilege and declined to testify.¹²³

The trial court admitted Mark’s confession. It ruled that the confession fell within Virginia’s hearsay exception for statements against penal interest.¹²⁴ It further ruled that there was no violation of the confrontation clause because a statement against penal interest was a “firmly rooted” exception and thus within existing U.S. Supreme Court precedents.¹²⁵ The Virginia Supreme Court affirmed.

¹¹⁷ *Id.*

¹¹⁸ 119 S.Ct. 1887 (1999).

¹¹⁹ *Id.* at 1892.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Lilly*, 119 S. Ct. at 1892-93.

¹²⁴ *Id.* at 1893.

¹²⁵ *Id.*

The Supreme Court reversed and the bottom line is that Benjamin Lilly's right to confrontation was violated.¹²⁶ Beyond that, the goal of charting a workable doctrinal postulate of the hearsay exception–confrontation clause interrelationship remains elusive.

Justice Stevens wrote the main opinion but was joined only by Justices Souter, Ginsburg, and Breyer. The plurality opinion adhered to the “general framework” of *Ohio v. Roberts*,¹²⁷ in which the Court held that admission of a hearsay statement will satisfy the confrontation clause if either (1) the statement falls within a “firmly rooted hearsay exception” or (2) the statement contains “particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statement’s reliability.”¹²⁸ The plurality accepted the Virginia Supreme Court’s ruling that the Mark’s confession was against his penal interest as a matter of state law.¹²⁹ However, it said that federal law governs the question of whether such a statement comes within a “firmly rooted” hearsay exception and can thus be admitted for confrontation clause purposes without further inquiry.¹³⁰

Justice Stevens’ plurality opinion pointed out that a hearsay exception cannot be considered “firmly rooted” unless it has been established as reliable in light of “longstanding judicial and legislative experience.”¹³¹ Justice Stevens maintained that the declaration against penal interest exception was “of quite recent vintage” and thus was unlike the exception for dying declarations, excited utterances, and statements made during the course of and in furtherance of a conspiracy, all of which the Court had previously held were “firmly rooted.”¹³²

The plurality divided statements against penal interest into three categories: (1) voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the

¹²⁶ *Id.* at 1901.

¹²⁷ 448 U.S. 56 (1980).

¹²⁸ *Id.* at 66.

¹²⁹ *Lilly*, 119 S. Ct. at 1893.

¹³⁰ *Id.*

¹³¹ *Id.* at 1895.

¹³² *Id.* at 1897.

declarant committed, or was involved in the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant.¹³³ It placed Mark's statement in the third category, which encompasses statements that are presumptively unreliable even when the accomplice incriminates himself together with the defendant.¹³⁴ The plurality pointed out that the concept that such statements are "inherently unreliable" informed the Court's narrow interpretation in *Williamson v. United States*,¹³⁵ of the federal evidentiary rule on statements against penal interest, as well as the Court's decision in *Bruton v. United States*,¹³⁶ and other cases on the efficacy of limiting instructions when confessions implicating more than one defendant are sought to be introduced in joint trial. The plurality would have held squarely that "accomplices confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."

The plurality also read the Virginia Supreme Court's decision as holding that Mark's confession was admissible under the "residual admissibility test" of *Roberts* because Mark was implicating himself and there was independent evidence that corroborated elements of his statements.¹³⁷ Justice Stevens declared that it was "highly unlikely that the presumptive unreliability that attaches to accomplices confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old ex parte affidavit practice – that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing."¹³⁸ Justice Stevens further pointed out that any reliance on corroborating evidence to support the reliability of a hearsay statement was foreclosed by the Court's decision in *Idaho v.*

¹³³ *Id.* at 1895.

¹³⁴ *Id.*

¹³⁵ 512 U.S. 594 (1994).

¹³⁶ 391 U.S. 123 (1968).

¹³⁷ *Lilly*, 119 S. Ct. at 1899.

¹³⁸ *Id.* at 1900.

Wright.¹³⁹ In *Wright*, the Court rejected the proposition that “evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears particularized guarantees of trustworthiness.”¹⁴⁰ Consequently, Mark’s confession, which was non-firmly rooted hearsay, had to be found reliable on its own terms; it could not meet that standard because Mark was trying to shift the burden from himself to his brother during the course of police interrogation – a circumstance bereft of inherent guarantees of trustworthiness.

Justices Scalia and Thomas each concurred separately in the judgment. Justice Scalia saw the prosecution’s introduction of a tape recording of Mark’s statements without making Mark available at trial as “a paradigmatic Confrontation Clause (sic) violation.”¹⁴¹ Both Justices share the view that the confrontation clause regulates hearsay statements “only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions.”¹⁴² That Mark’s confession was of that genre was sufficient to secure their votes for reversal. However, Justice Thomas was emphatic in signaling his agreement with Chief Justice Rehnquist, and Justices Scalia and O’Connor, that the confrontation clause does not impose a “blanket ban on the government’s use of accomplice statements that incriminate a defendant.”¹⁴³

Chief Justice Rehnquist, joined by Justices O’Connor and Kennedy, concurred in the judgment, but disagreed strongly with the plurality.¹⁴⁴ He maintained that Mark’s confession, insofar as it implicated Benjamin, was not a declaration against penal interest at all, since it simply shifted blame to Benjamin, and did not implicate Mark in the murder.¹⁴⁵ Therefore, the Chief Justice insisted, the case simply did not present “the question whether the Confrontation Clause permits the admission of a genuinely self-inculpatory statement that also inculpatates a codefendant, and our

¹³⁹ 497 U.S. 805 (1990).

¹⁴⁰ *Id.* at 822.

¹⁴¹ *Lilly*, 119 S. Ct. at 1903 (Scalia, J., concurring in part).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1903-04.

¹⁴⁵ *Id.*

precedent does not compel the broad holding suggested by the plurality today.”¹⁴⁶

The Chief Justice stated that it remained an open question whether the declaration against penal interest exception – properly construed as encompassing only statements that actually tend to implicate the declarant – is a firmly rooted hearsay exception.¹⁴⁷ He noted with approval that some lower federal courts had found the declaration against penal interest to be firmly rooted when they were (1) statements made in custody that truly implicate the declarant in criminal activity and do not attempt to shift blame to the defendant; and (2) statements made in a non-custodial setting where the declarant admits to taking part in criminal activity with the defendant.

What then is the current status of the declaration against penal interest exception in relation to the confrontation clause? A crucial starting point is the definition of the exception itself. Remember, the Virginia Supreme Court’s definition, which was sufficiently broad to embrace Mark’s confession, is not a universal definition. Consider the definition set forth in Federal Rule 804 (b)(3) that provides a hearsay exception for a statement which “so far tended to subject the declarant to civil or criminal liability * * * that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.”¹⁴⁸

In *Williamson v. United States*,¹⁴⁹ the trial court admitted a confession that a drug buyer made to the police, identifying Williamson as the seller.¹⁵⁰ The Court held that the declarant’s confession implicating Williamson was inadmissible under Rule 804 (b)(3) because fingering Williamson did not in fact run counter to the declarant’s interest.¹⁵¹ It was in *Williamson* that the Court noted that statements of accomplices are often self-serving insofar as they implicate others, since the accomplice may be hoping to improve his own situation.¹⁵² Mark’s confession in *Lilly* fell within

¹⁴⁶ *Id.* at 1905.

¹⁴⁷ *Lilly*, 119 S. Ct. at 1905.

¹⁴⁸ FED. R. CIV. P. 804 (b)(3).

¹⁴⁹ 512 U.S. 594 (1994).

¹⁵⁰ *Id.* at 598.

¹⁵¹ *Id.* at 605.

¹⁵² *Id.* at 602.

the ambit of *Williamson*. Thus, although admissible as a declaration against penal interest under Virginia law, it would not have been admissible in federal court under Rule 804 (b)(3) as construed in *Williamson*. This distinction lies at the heart of Chief Justice Rehnquist's strong disagreement with the entire cast of the plurality's opinion.

From a criminal defense perspective, the battle in *Lilly* may have been won, but if one looks closely and tallies the score, the war, assuming the Court's composition remains the same, may have been lost. The Chief Justice and Justices O'Connor and Kennedy would seem to have little problem holding that a statement that truly implicates the declarant as well as the defendant – and that is therefore admissible under Rule 804 (b)(3) as construed in *Williamson*, falls within a firmly rooted hearsay exception. Justices Scalia and Thomas, who view the confrontation clause even more narrowly, would clearly permit the use of a hearsay statement that in fact is self-inculpatory to the declarant. Moreover, even under the plurality's approach, as Professor Capra of Fordham Law School has pointed out, “a truly self-inculpatory declaration would satisfy the Confrontation Clause because it would carry sufficient circumstantial guarantees of trustworthiness and would therefore satisfy the *Roberts* standards for non-firmly rooted hearsay,” noting that in *Williamson*, the Court said that the “very fact that a statement is generally self-inculpatory – which our reading of Rule 804 (b)(3) requires – is itself one of the particularized guarantees of trustworthiness that makes a statement admissible under the Confrontation Clause.”¹⁵³

Habeas Corpus and *Brady* material¹⁵⁴

If ever there was a case in which, from the defense perspective, the operation was a success but the patient died figuratively and literally, *Strickler v. Greene*¹⁵⁵ was it.

¹⁵³ Daniel J. Capra, *Out-of-Court Statements and the Confrontation Clause*, N.Y.L.J. July 9, 1999, pp. 3,4.

¹⁵⁴ *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment).

¹⁵⁵ 119 S.Ct. 1936 (1999).

Strickler and his cohort Henderson were charged with capital murder and related crimes arising out of the abduction of an African-American female college student in a shopping mall parking lot.¹⁵⁶ The state's main witness at trial was Anne Stoltzfus who observed the abduction but did not call the police.¹⁵⁷ A week and a half later, Stoltzfus mentioned the incident to some classmates at James Madison University, one of whom called the police.¹⁵⁸ Because of the prosecutor's open file policy, Strickler's attorney did not file a pretrial motion for discovery of possible exculpatory evidence.¹⁵⁹ But the prosecutor failed to disclose exculpatory materials in the police files (kept in another county), which consisted of notes taken by a detective during interviews with Stoltzfus and letters written by Stoltzfus to the detective, that cast serious doubt on significant portions of her testimony.¹⁶⁰ Strickler was found guilty and sentenced to death.¹⁶¹ The Virginia Supreme Court affirmed his conviction.

On state habeas, Strickler claimed ineffective assistance of counsel based in part on his attorney's failure to file a Brady motion for disclosure of all exculpatory evidence.¹⁶² The prosecution argued that such a motion was unnecessary because of the prosecutor's open file policy.¹⁶³ The trial court denied relief and the Virginia Supreme Court again affirmed.

Strickler then filed a federal habeas petition and the district court granted access to the exculpatory Stoltzfus materials for the first time.¹⁶⁴ And, you can accept incontestably, that in the hands of competent counsel, they were of significant impeachment value, certainly on the issue of sentence.¹⁶⁵ The district court vacated the conviction and sentence for failure to disclose.¹⁶⁶ The Fourth Circuit reversed because Strickler had procedurally defaulted his

¹⁵⁶ *Id.* at 1941-42.

¹⁵⁷ *Id.* at 1941.

¹⁵⁸ *Id.* at 1943.

¹⁵⁹ *Id.* at 1945-46.

¹⁶⁰ *Id.* at 1941.

¹⁶¹ *Id.*

¹⁶² *Strickler*, 119 S. Ct. at 1946.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1947.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Brady claim by not raising it at trial or on state habeas.¹⁶⁷ It also held that the Stoltzfus materials would not have changed the verdict or the sentence.¹⁶⁸

In the Supreme Court, Strickler went 2 for 3, a .667 batting average, one that would insure immediate admission into the Baseball Hall of Fame. For Death Row inmates who are habeas petitioners with Brady claims, still not good enough. The Court held that Strickler had indeed established two components of his Brady claim.¹⁶⁹ First, that the Stoltzfus materials were wrongfully denied him and second, that there was cause for his failure to raise his claim in the state proceedings.¹⁷⁰ However, he whiffed on the third component because, although there was a reasonable “possibility” that the Stoltzfus materials could have affected the verdict and or sentence, Strickler failed to demonstrate that there is a reasonable “probability” that his conviction or sentence would have been different had the suppressed documents been disclosed to the defense.¹⁷¹

The Court emphasized that the distinction between “possibility” and “probability” is important.¹⁷² Yet, in the same breath, it stated that the test is not whether the defendant would more likely than not have received a different verdict with the suppressed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.¹⁷³ Looking at the record, the Court believed that other evidence provided strong support for the conclusion that Strickler would have been convicted of capital murder and sentenced to death even if Stoltzfus had been severely impeached or her testimony excluded entirely.¹⁷⁴ Therefore, concluded the Court, Strickler cannot show prejudice sufficient to excuse his procedural default.¹⁷⁵

This is not the place for me to argue whether the Court is right in its assessment of the record evidence. Personally, I believe it is not

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Strickler*, 119 S. Ct. at 1955.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1953-54.

¹⁷² *Id.* at 1953.

¹⁷³ *Id.* at 1954.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1955.

and Justice Souter's strong dissent makes the case that the majority is wrong.¹⁷⁶ You will have to read it for yourselves. Just let me leave you with several thoughts and observations.

First, the division among the Justices was unusual. Justice Stevens wrote the opinion for the majority. Only Justices Souter and Kennedy dissented. It is a strange occurrence, indeed, to have Justice Kennedy on the side of a habeas petitioner and come up so short. In fact, Justice Kennedy's apparent displeasure at oral argument with Virginia's position created considerable optimism among those, including myself, who worked on Strickler's behalf. I can posit only that the particular brutality of the crime and the nature of the victim may have contributed to the unlikely arrangement of the Justices in this case.

Second, from a jurisprudential standpoint the operation was not a failure. The majority disapproved of the overly aggressive Fourth Circuit's approach to the case which, if upheld, would have imposed a "due diligence" requirement on defense counsel in a case in which he relied on the prosecution's representation that due to its open file policy, defense counsel had been presented with all exculpatory evidence there was, even if it was in a police file in another county and arguably even unknown to the prosecution.¹⁷⁷ In fact, the Court found inexplicable how the Fourth Circuit could conclude that, while it was reasonable for trial counsel to rely on the open file policy, it was unreasonable for post-conviction counsel to do so.¹⁷⁸

In this regard, the Court reaffirmed Brady's basic principles that Brady violations do not turn on the good or bad faith of the prosecutor; the duty to disclose exculpatory materials exists even where there has been no request, the duty encompasses impeachment evidence, and that it makes no difference that the evidence is known only to police investigators and not to the prosecutor.¹⁷⁹

¹⁷⁶ *Id.* at 1957 (stating that "[w]e have treated "reasonable likelihood" as synonymous with "reasonable possibility" and thus have equated materiality in perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt").

¹⁷⁷ *Strickler*, 119 S. Ct. at 1947.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1948.

It is also significant that in a federal habeas case, the Court found the “cause” requirement satisfied by trial and state habeas counsel’s reliance on the prosecution’s stated open file policy.¹⁸⁰ It allows the parties to avoid unnecessary motion practice and it minimizes mistrust by the defense of prosecutorial representations. Since prosecutorial good faith is not an issue under *Brady*, the finding of cause by the Court is certainly sensible.

From Strickler’s perspective, what went wrong? Apart from the nature of the crime itself, the case either boils down to precise meaning in language or to two groups of viewers watching the same film and seeing different films. As to language, the majority conceded that “the District Court was surely correct that there is a reasonable *possibility* that either a total, or just a substantial discount of Stoltzfus’ testimony might have produced a different result either at the guilt or sentencing phases.”¹⁸¹ But it is not enough because it is not a “reasonable probability.” Justice Souter points out that “the continued use of the term ‘probability’ raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, ‘more likely than not.’”¹⁸² Consequently, he suggests that “‘significant possibility’ would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence.”¹⁸³ On such distinctions rests the difference between life and death.

Habeas Corpus and Preservation of Issues for Review

*O’Sullivan v. Boerckel*¹⁸⁴ is a case of importance for appellate criminal defense practitioners who would like to preserve their client’s access to federal habeas without gumming up the works in the state appellate process; jurisprudentially, it is a case that arguably stands comity doctrine on its head. In *Grey v. Hoke*,¹⁸⁵ the Second Circuit arrived at the same result but in a little known

¹⁸⁰ *Id.* at 1949.

¹⁸¹ *Strickler*, 119 S. Ct. at 1953.

¹⁸² *Id.* at 1956 (Souter, J., dissenting).

¹⁸³ *Id.* at 1957.

¹⁸⁴ 119 S.Ct. 1728 (1999).

¹⁸⁵ 933 F.2d 117 (2d Cir. 1991).

decision that discussed the issues rather perfunctorily. Now that the Supreme Court has ruled, I think this a good occasion to remind ourselves of the care that must be taken by state court appellate defense lawyers to fully protect a defendant's federal constitutional rights.

Boerckel was convicted for rape, burglary and aggravated battery.¹⁸⁶ The main evidence against him was his written confession.¹⁸⁷ On his intermediate appeal, he raised a number of issues: 1) that his confession was the fruit of an illegal arrest, 2) that his confession was coerced, and 3) that he had not validly waived his Miranda rights.¹⁸⁸ He also claimed prosecutorial misconduct, that he had been denied discovery of exculpatory material, and that the evidence was insufficient.¹⁸⁹ The Illinois Appellate Court affirmed his conviction.

In his petition for leave to appeal to the Illinois Supreme Court, Berkel raised only three issues: the illegal arrest-fruits issue, the prosecutorial misconduct issue, and the discovery issue.¹⁹⁰ Leave to appeal was denied.

Boerckel later filed a federal habeas petition pro se. Counsel was appointed and the petition was amended to set forth six grounds for relief: (1) the no valid waiver claim; (2) the coerced confession claim; (3) the insufficiency of the evidence; (4) the confession-illegal fruit claim; (5) that he received ineffective assistance of counsel at trial and on appeal; and (6) the denial of discovery claim.¹⁹¹

The district court found that Boerckel had procedurally defaulted on numbers 1, 2, and 3 by failing to include them in his petition for leave to appeal. The Seventh Circuit reversed, holding that Boerckel was not required to present these claims in his petition for discretionary review to the Illinois Supreme Court.¹⁹²

The Supreme Court reversed by 6-3 vote, with Justice O'Connor writing for the Court. Framing the issue as "whether a prisoner

¹⁸⁶ *O'Sullivan*, 119 S. Ct. at 1730.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1731.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

must seek review in a state court of last resort when that court has discretionary control over its docket,”¹⁹³ she held 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.”¹⁹⁴

On its face, this does not seem an unreasonable requirement. However, as in most States, including New York, the Illinois intermediate appellate courts are the primary focus of the system, whereas the Illinois Supreme Court, like our own Court of Appeals, does not grant leave in cases presenting routine claims without legal significance beyond the case itself. Indeed, Illinois Supreme Court Rule 315(a) described the factors that channel that Court’s discretion to entertain a criminal appeal: “the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court, the need for the exercise of the Supreme Court’s supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.”¹⁹⁵

Boerckel’s counsel argued that the Rule must be read to discourage the filing of petitions raising routine allegations of error and to direct litigants to present only those claims that meet the criteria defined by the Rule.¹⁹⁶ Justice O’Connor rejected what she labeled “a stylized portrait of the Illinois appellate review process,”¹⁹⁷ and pointed out that Rule 315 (a) by its own terms left the Illinois Supreme Court “free to take cases that do not easily fall within the descriptions listed in the Rule.”¹⁹⁸ Since review in the Illinois Supreme Court is not unavailable, Justice O’Connor concluded that requiring state prisoners to give the Illinois Supreme Court the opportunity to resolve constitutional errors in the first instance better “serves the comity interests that drive the exhaustion doctrine.”¹⁹⁹ In her view, that Illinois has adopted a

¹⁹³ *Id.*

¹⁹⁴ *O’Sullivan*, 119 S. Ct. at 1732.

¹⁹⁵ ILL. SUP. CT. R. 315 (a).

¹⁹⁶ *O’Sullivan*, 119 S. Ct. at 1733.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1734.

discretionary review system may reflect little more than that there are resource constraints on the Illinois Supreme Court.²⁰⁰ Consequently, Justice O'Connor stated, "[w]e hold today only that the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable."²⁰¹ Boerckel, having failed to present his claims in his petition for discretionary review, had procedurally defaulted on those claims.

The Court's holding can be read narrowly and that is how Justice Souter, who concurred, read it.²⁰² He drew a distinction between the Illinois Supreme Court Rule and one in which a state's highest court, such as South Carolina's, makes it clear that it does not require a criminal defendant to petition the high court in order to exhaust all claims as long as those claims had been presented to the state's intermediate appellate court.²⁰³

The more interesting question is whether the majority's opinion really serves the interests of comity and whether it has the unwelcome consequence of adding unnecessary complexity to the criminal appellate process, the shoals of which defense counsel must navigate.

Justice Stevens, in dissent, makes a strong case for believing that comity is actually disserved.²⁰⁴ First, he criticizes the majority for erroneously conflating the exhaustion requirement with the procedural default doctrine, pointing out that the presence or absence of exhaustion "tells us nothing about whether a prisoner has defaulted his constitutional claims."²⁰⁵ But his most serious criticism is his faulting of the majority for almost failing entirely to address the real issue: whether Boerckel's failure to include all six of his habeas claims in his petition for leave to appeal should result in a procedural default of the three claims he did not raise.²⁰⁶

²⁰⁰ *Id.* at 1733.

²⁰¹ *O'Sullivan*, 119 S. Ct. at 1734.

²⁰² *Id.* (stating that he "agree[d] with the Court's strict holding that "the creation of a discretionary review system does not, without more, make review in the Illinois Supreme Court unavailable" for purposes of federal habeas exhaustion).

²⁰³ *Id.*

²⁰⁴ *Id.* at 1735-36.

²⁰⁵ *Id.* at 1738.

²⁰⁶ *Id.*

Here, Justice Stevens is more in touch both with the purpose of comity and the realities of advocacy in a system which directs appellate counsel to be selective. He points out that “[d]iscretionary review rules not only provide an effective tool for apportioning limited resources, but they also foster more useful and effective advocacy.”²⁰⁷ He noted that the Court’s own practice with petitions for certiorari mirrors the factors which the Seventh Circuit found animated the Illinois Supreme Court’s discretionary review rule.²⁰⁸ In a word, what underlies Justice Stevens’ position is the reality that the Illinois Supreme Court would not be terribly unhappy to learn that a federal district court had granted habeas relief on a ground not presented in a discretionary review petition because counsel in good faith had complied with the court’s rule and where the trial court and the intermediate appellate court had the opportunity to pass on the issue. Thus, Justice Stevens thinks it regrettable that “[t]he Court today . . . requires defendants in every criminal case in States like Illinois to present to the state supreme court every federal issue that the defendants think might possibly warrant some relief if brought in a future federal habeas petition.”²⁰⁹ Justice Breyer, in his own dissent, echoes Justice Stevens’ concerns and emphasizes, as did Justice Souter, that the Court’s holding is narrow and that the Court has left open the question of whether a state can affirmatively indicate its wish to dispense with the exhaustion requirement in its discretionary review process.²¹⁰

New York criminal appellate practitioners, if previously unaware of the Second Circuit’s *Grey v. Hoke* decision, should be alert to the Supreme Court’s embracing of *Grey* in *O’Sullivan v. Boerckel*. The practice before our Court of Appeals mirrors that in Illinois. Once an application for leave to appeal is made to the court, the Clerk’s Office assigns the application to one of the court’s members. Counsel will then prepare a leave letter to the judge assigned setting forth the issues that merit review. The letter is appropriately designed to emphasize the importance of the issue or issues for which leave is sought, along the same lines suggested by

²⁰⁷ *O’Sullivan*, 119 S. Ct. at 1739.

²⁰⁸ *Id.* at 1740.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1741.

the Illinois rule. Nonetheless, there may be, and frequently are, other issues that were presented to the Appellate Division that counsel determines are not, given the limited jurisdiction of the Court of Appeals, significant enough to emphasize in a leave letter and which could very well detract from the effectiveness of the leave letter as to the issue or issues that would interest a judge of the court to grant leave. If leave to appeal is granted, all issues can be raised even though not adverted to in the leave letter.

The problem arises if leave to appeal is not granted and as in *O'Sullivan* the non-raised issues become the basis for a federal habeas petition; under *O'Sullivan* those issues are procedurally defaulted. Consequently, appellate counsel must make it clear in his leave letter that, in addition to the issue or issues discussed at length, leave is also sought on all other issues raised below that could be pursued either by counsel or the defendant pro se on federal habeas. As the Second Circuit held in *Grey*, merely attaching a copy of the defendant's Appellate Division brief does not preserve for federal review all issues raised in that brief.²¹¹ *O'Sullivan* (and *Grey*) requires counsel to trade selectivity for comprehensiveness and I would expect a judge of the Court of Appeals to understand why counsel is doing this. Being paranoid, I always worked under the assumption that someday a court would decide a case such as *Grey v. Hoke*. And now, the Supreme Court in *O'Sullivan* has followed suit. Accordingly, I have always included reference to all federal issues in my leave letters. It is now time for everyone to share that paranoia because it is reality.

The Privilege Against Self-Incrimination

In *Mitchell v. United States*,²¹² a closely divided Court stood firm in defense of the privilege against self-incrimination. The case presented two issues: whether in the federal criminal justice system, a plea of guilty waives the privilege in the sentencing phase of the case and whether in determining facts that may bear upon the severity of sentence, the sentencing judge may draw an adverse inference from the defendant's silence.²¹³

²¹¹ *Grey v. Hoke*, 933 F.2d 117, 120 (1991).

²¹² 119 S. Ct. 1307 (1999).

²¹³ *Id.* at 1309.

Mitchell pleaded guilty to four counts of illegal distribution of cocaine but reserved the right to contest at sentencing the quantity involved in the conspiracy count.²¹⁴ At sentencing, three of her co-defendants testified against her as to both the extent of her participation and the quantities of drugs she had sold; the government also relied on the testimony of one of its trial witnesses.²¹⁵ Mitchell did not testify, and she presented no other evidence. The district court ruled that by her guilty plea, she had waived her privilege and it drew an adverse inference from her silence at sentencing, thus accepting the government's case and imposing sentence accordingly.²¹⁶ The Third Circuit affirmed, pointing out that Mitchell's plea of guilty encompasses any incrimination with respect to crimes within its scope and that Mitchell did not claim that at sentencing she would risk incrimination as to any other crime.²¹⁷

The Supreme Court reversed. Justice Kennedy, writing for the five-member majority, held that a guilty plea is not a waiver of the privilege at sentencing.²¹⁸ It is merely an admission of guilt, and the waiver of rights it includes is a waiver at trial only. Justice Kennedy rejected the government's argument that the required Rule 11 colloquy for acceptance of a guilty plea is a waiver under the rule of *Rogers v. United States*,²¹⁹ and *Brown v. United States*,²²⁰ that a witness may not, in a single proceeding, voluntarily testify about a subject and then assert the Fifth Amendment privilege when cross-examined about the details.²²¹ Justice Kennedy pointed out that the plea colloquy is a "narrow inquiry" designed "to protect the defendant from an unintelligent or involuntary plea" and presents "little danger that the court will be misled by selective disclosure."²²² If the defendant refuses to answer a question during the colloquy, the court can reject the plea.

²¹⁴ *Id.* at 1310.

²¹⁵ *Id.*

²¹⁶ *Mitchell*, 119 S. Ct. at 1311.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1309.

²¹⁹ 340 U.S. 367, 373 (1951).

²²⁰ 356 U.S. 148 (1958).

²²¹ *Mitchell*, 119 S. Ct. at 1313.

²²² *Id.* at 1312.

Justice Kennedy expressed particular concern that the government's position, that the plea and/or colloquy amounts to a waiver, would enable the government to rely entirely on the defendant's compelled testimony at sentencing to establish the basis for an enhanced sentence.²²³ He rejected it, stating that "criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power."²²⁴

Justice Kennedy also rejected the Third Circuit's theory that the entry of a guilty plea completes the incrimination of the defendant, thus extinguishing the privilege.²²⁵ He stated that the sentencing phase is part of the criminal case to which the privilege applies, pointing out that a defendant who has pleaded guilty may face additional consequences at sentencing. Mitchell herself faced a potential sentence of one year to life, depending on the conclusion drawn by the sentencing judge from the record evidence.²²⁶

Justice Kennedy further rejected the government's argument that even if the privilege applies at sentencing, it is permissible to draw an adverse inference from the defendant's silence.²²⁷ And he did not do so hesitatingly, stating that

[t]he rule prohibiting an inference of guilt from a defendant's silence has become an essential feature of our legal tradition. . . The rule . . . is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights.²²⁸

The rule of which Justice Kennedy spoke, of course, was the same rule announced almost 35 years ago in *Griffin v. California*,²²⁹ but which does not apply in civil cases or, as the

²²³ *Id.* at 1313.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Mitchell*, 119 S. Ct. at 1314.

²²⁷ *Id.* at 1315.

²²⁸ *Id.* at 1316.

²²⁹ 380 U.S. 609 (1965).

Court held in *Baxter v. Palmigiano*,²³⁰ to prison disciplinary hearings, two circumstances upon which the government relied. However, Justice Kennedy made clear that no line should be drawn between the guilt and punishment phases of criminal proceedings.²³¹ He pointed out that the stakes are higher at sentencing than in civil trials or prison disciplinary proceedings, and the “central purpose of the privilege -- to protect a defendant from being the unwilling instrument of his or her own condemnation” will continue to be of “vital importance” in the many cases in which the prosecution is motivated to ask for imposition of a severe sentence.²³²

It is worth noting that the Court left open the question of whether silence bears upon the determination of a lack of remorse or upon acceptance of responsibility for purposes of a downward departure under the sentencing guidelines.²³³ The Court’s decision seems limited to the use of adverse inferences in determining “the facts of the offense” or “the circumstances and details of the crime.”²³⁴

Justice Scalia, in a dissenting opinion joined by Chief Justice Rehnquist and Justices O’Connor and Thomas, viewed the majority’s holding on adverse inferences as an “extension” of *Griffin* rather than a refusal to adopt an “exception,” as Justice Kennedy portrayed the government’s position.²³⁵ He stated his belief that *Griffin* was wrongly decided and should not be extended to the sentencing phase.²³⁶ He argued that a defendant’s silence can be probative, that drawing adverse inferences from a defendant’s silence is reasonable, and that only in the last century have legislatures prohibited doing so as a matter of policy: *Griffin* sloppily imported policy judgments into constitutional analysis.²³⁷

Justice Thomas, as is his frequent inclination with respect to decisions that antedate his tenure on the Court, made clear that he

²³⁰ 425 U.S. 308 (1976).

²³¹ *Mitchell*, 119 S. Ct. at 1315.

²³² *Id.* at 1313.

²³³ *Id.* at 1316.

²³⁴ *Id.* at 1315.

²³⁵ *Id.* at 1317.

²³⁶ *Id.*

²³⁷ *Id.* at 1318-19.

was prepared to re-examine *Griffin*.²³⁸ In his view, “the explicit constitutional guarantee has been fully honored [in the event] a defendant is not ‘compelled. . .to be a witness against himself.’”²³⁹ If Justice Thomas’ position were accepted, it would mean that not only could an adverse inference be drawn from a defendant’s silence but that the prosecution would have the right to ask for an instruction to that effect. That such a possibility could be one vote away is surely something to contemplate.

Harmless Error

In *Neder v. United States*,²⁴⁰ in a decision subscribed to by five Justices, the Court resolved a split among lower courts about the scope of the harmless error rule, and held that the erroneous omission from jury instructions of an element of an offense does not qualify as “structural error” and therefore may constitute harmless error.²⁴¹ The question a reviewing court must ask is whether it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.”²⁴²

Neder was tried and convicted of tax fraud, mail fraud, wire fraud, and bank fraud at a time when federal court practice was that trial judges, rather than juries, made findings as to the materiality of alleged misrepresentations.²⁴³ That practice was ended by the Supreme Court in *United States v. Gaudin*,²⁴⁴ which held that the right to a jury trial requires that materiality, like all other elements of an offense, be decided by the jury.²⁴⁵ In affirming Neder’s convictions, the Eleventh Circuit held that *Gaudin*-type error is subject to harmless error analysis and held,

²³⁸ *Id.* at 1322 (Thomas, J., dissenting) (stating that “*Griffin* constitutionalizes a policy choice that a majority of the Court found desirable at the time”).

²³⁹ *Id.*

²⁴⁰ 119 S.Ct. 1827 (1999).

²⁴¹ *Id.* at 1841.

²⁴² The Court also resolved another split among the circuits by holding that the language in the federal mail (18 U.S.C. 1341), wire (18 U.S.C. 1343), and bank fraud (18 U.S.C. 1344) statutes that prohibits a “scheme or artifice to defraud” requires proof of materiality.

²⁴³ *Neder*, 119 S. Ct. at 1831.

²⁴⁴ 515 U.S. 506 (1995).

²⁴⁵ *Id.* at 522-23.

further, that since Neder did not contest the materiality of his false representations, such error does not require reversal.²⁴⁶

In *Sullivan v. Louisiana*,²⁴⁷ the Court had previously distinguished mere “trial” errors--errors that are subject to harmless error analysis from “structural” errors, which mandate reversal in every case. Neder argued that removal from the jury of an element of a charged offense constitutes a structural error.²⁴⁸ He relied heavily on *Sullivan* and Justice Scalia’s concurrence in *Carroll v. California*,²⁴⁹ for the proposition that, in order to find an instructional error harmless, a reviewing court must be able to conclude that on the facts of the case, the record demonstrates that the jury necessarily found each element of the offense despite the error.²⁵⁰

Chief Justice Rehnquist, for the majority, rejected this argument, characterizing those errors the Court has found to be “structural” as errors that so affect the fundamental framework of the trial mechanism itself as to render the trial “fundamentally unfair.”²⁵¹ Unlike in *Sullivan*, where the Court held that a jury instruction that erred in the definition of reasonable doubt was not subject to harmless error analysis, the Chief Justice pointed out that “[t]he error at issue here -- a jury instruction that omits an element of the offense -- differs markedly from the constitutional violations we have found to defy harmless-error review. Unlike such defects as the complete deprivation of counsel or trial before a biased judge, 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.”²⁵²

The Chief Justice drew support from a previous ruling in which the Court held that the erroneous removal of an offense element from the jury did not “seriously affect the fairness, integrity or public reputation of judicial proceedings,”²⁵³ and from cases in

²⁴⁶ *United States v. Neder*, 136 F.3d 1459, 1465 (11th Cir. 1998).

²⁴⁷ 508 U.S. 275 (1993).

²⁴⁸ *Neder*, 119 S. Ct. at 1835.

²⁴⁹ 491 U.S. 263 (1989).

²⁵⁰ *Neder*, 119 S. Ct. at 1834-35.

²⁵¹ *Id.* at 1833.

²⁵² *Id.*

²⁵³ *Johnson v. United States*, 520 U.S. 461 (1997).

which the Court had applied harmless-error review to improper jury instructions regarding evidentiary presumptions.²⁵⁴ The same rule, he concluded, should apply to jury instructions that omit an element of the offense. He pointed out that in previous opinions the Court noted that it can be difficult to distinguish between a jury instruction that misdescribes an element of an offense and a jury instruction that omits an element of an offense: “in both cases — misdescriptions and omissions — the erroneous instruction precludes the jury from making a finding on the *actual* element of the offense;” conclusive presumptions have the same effect, he concluded.²⁵⁵

Perhaps the most significant aspect of the *Neder* decision is that the Court could have found support in *Sullivan* for denying harmless error analysis in cases of omission to instruct on an element of an offense, but it chose not to do so.²⁵⁶ In *Sullivan*, the trial court gave the jury a defective “reasonable doubt” instruction.²⁵⁷ The Court concluded that the error was not subject to harmless error analysis because it vitiated all the jury’s findings and perforce precluded the jury from making a finding on the element of materiality.²⁵⁸ *Neder* argued that this strand of *Sullivan* commanded the same result in his case. However, although Rehnquist conceded that this line of reasoning in *Sullivan* did support *Neder*’s position, he maintained that it could not be squared with several harmless error cases,²⁵⁹ in which the Court applied harmless-error analysis to errors in jury charges where it was not possible to determine that the jury had in fact found the specific element at issue.²⁶⁰

Justice Scalia, joined by Justices Souter and Ginsburg, adhered to his “actual-finding” approach to harmless error expressed previously in his concurring opinion in *Carella* and in the Court’s

²⁵⁴ See, e.g., *Yates v. Evatt*, 500 U.S. 391 (1991); *Carella v. California*, 491 U.S. 263 (1989) (*per curiam*); *Pope v. Illinois*, 481 U.S. 497 (1987); *Rose v. Clark*, 478 U.S. 570 (1986).

²⁵⁵ *Neder*, 119 S. Ct. at 1834.

²⁵⁶ *Id.* at 1835.

²⁵⁷ *Sullivan*, 508 U.S. at 275.

²⁵⁸ *Id.* at 281.

²⁵⁹ *Neder*, 119 S. Ct. at 1835.

²⁶⁰ *Pope v. Illinois*, 481 U.S. 487 (1987); *California v. Roy*, 519 U.S. 2 (1996); *Carella v. California*, 491 U.S. 263 (1989).

unanimous opinion in *Sullivan*.²⁶¹ He chided the majority for departing from its position in *Sullivan*, stating that, “[w]hereas *Sullivan* confined appellate courts to their proper role of reviewing *verdicts*, the Court today puts appellate courts in the business of reviewing the defendant’s *guilt*.”²⁶²

Justice Stevens accepted a harmless error concept that was “close to” Scalia’s actual-finding approach, but he concurred because he believed that the jury had in fact found against Neder on the issue of materiality.²⁶³

Due Process: The Chicago Anti-Gang Ordinance

The last decision that I wish to discuss is far from the least important. In *City of Chicago v. Morales*,²⁶⁴ the Court struck down Chicago’s anti-loitering ordinance that was aimed at preventing gang members from controlling neighborhood streets.²⁶⁵ The ordinance authorized the police to arrest anyone who, refusing a police order to move on, remained “in one place with no apparent purpose” in the presence of a suspected gang member.²⁶⁶ Although the decision was very fractured, six Justices agreed that the ordinance gave too little notice to individuals as to what conduct is prohibited and too much discretion to the police to target innocent people.²⁶⁷ Justice Stevens wrote the majority opinion, in which only three of six parts were joined by a majority.

Justice Stevens concluded that the ordinance failed to give the ordinary citizen adequate notice of what is forbidden and what is permitted and thus was impermissibly vague.²⁶⁸ He pointed out that the term “loiter” may have a common and accepted meaning, but the ordinance’s definition of that term -- “to remain in any one place with no apparent purpose”-- does not; a person standing in a public place with a group of people would not know if he or she

²⁶¹ *Neder*, 119 S. Ct. at 1846-47 (Scalia, J., dissenting).

²⁶² *Id.* at 1848.

²⁶³ *Id.* at 1843.

²⁶⁴ 119 S.Ct. 1849 (1999).

²⁶⁵ *Id.* at 1863.

²⁶⁶ *Id.* at 1855.

²⁶⁷ *Id.* at 1860.

²⁶⁸ *Id.*

had an “apparent purpose.”²⁶⁹ He rejected the City’s argument that the ordinance provided adequate notice because loiterers are not subject to criminal sanction until after they have disobeyed a dispersal order.²⁷⁰ He pointed out that the fault in the City’s argument was twofold: (1) the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law, but a dispersal order, which is issued only after prohibited conduct has occurred, cannot retroactively provide adequate notice of the boundary between the permissible and the impermissible applications of the ordinance; (2) the dispersal order’s terms compound the inadequacy of the notice afforded by the ordinance, which vaguely requires that the officer “order all such persons to disperse and remove themselves from the area,” and thereby raises a host of questions as to the duration and distinguishing features of the loiterers’ separation.²⁷¹

Justice O’Connor, joined by Justice Breyer, concluded that the Chicago ordinance was unconstitutionally vague because it lacked sufficient minimal standards to guide the police, especially in its failure to provide any standard by which police can determine whether a person has an “apparent purpose.”²⁷²

Justice Kennedy agreed that the ordinance unconstitutionally reaches a broad range of innocent conduct and is not saved by the predicate of disobedience to a dispersal order.²⁷³ He argued that although it can be assumed that disobeying some police commands will subject a citizen to prosecution whether or not the citizen knows why the order is given, it does not follow that any unexplained police order must be obeyed without notice of its unlawfulness.²⁷⁴ He noted that “[a] citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a dispersal order based on the officer’s own knowledge of the identity or affiliations of other persons with whom the citizen is congregating; nor may the citizen be able to

²⁶⁹ *Id.* at 1854 n.2.

²⁷⁰ *Id.* at 1860.

²⁷¹ *Id.*

²⁷² *Morales*, 119 S. Ct. at 1863 (O’Conner, J., concurring).

²⁷³ *Id.* at 1865.

²⁷⁴ *Id.*

assess what an officer might conceive to be the citizen's lack of an apparent purpose."²⁷⁵

Justice Breyer also concurred separately and took issue with Justice Scalia's suggestion that the ordinance was not facially unconstitutional because it may provide fair warning to some individuals that it prohibits the conduct in which they are engaged.²⁷⁶ In Breyer's view, the ordinance is unconstitutional, not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide the police.²⁷⁷

Justice Scalia, in dissent, took issue with all aspects of the Court's decision. After underscoring the serious impact on Chicago's citizens by the city's gang problem, he criticized the Court for invalidating "this perfectly reasonable measure by ignoring our rules governing facial challenges, by elevating loitering to a constitutionally guaranteed right, and by discerning vagueness where, according to our usual standards, none exists."²⁷⁸

Justice Thomas, in a dissent joined by the Chief Justice and Justice Scalia, once again dug deeply into the well of legal history to demonstrate that anti-loitering and vagrancy laws are part of our heritage and thus put to the question Justice Stevens' assertion that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."²⁷⁹ He found nothing objectionable in the ordinance and was highly critical of the majority's favoring of the "rights" of gang members and their companions," over "the people who have seen their neighborhoods literally destroyed by gangs and violence and drugs."²⁸⁰

To be sure, *Morales*, is an important decision in the Court's modern tradition of disfavoring laws that trench upon a citizen's right to "hang out," whether alone or with others and to achieve that end by resort to its vagueness and anti-unbridled police discretion doctrines, represented in cases such as *Shuttlesworth v.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Morales*, 119 S. Ct. at 1866.

²⁷⁸ *Id.* at 1867. (Scalia, J., concurring).

²⁷⁹ *Id.* at 1881-82 (Thomas, J., dissenting).

²⁸⁰ *Id.* at 1887.

Birmingham,²⁸¹ *Coates v. City of Cincinnati*,²⁸² *Papachristou v. Jacksonville*,²⁸³ and *Kolender v. Lawson*.²⁸⁴ In addition, it is important to appreciate the differences between the Stevens plurality and the dissents in regard to the role and legitimacy of loitering and vagrancy statutes generally. The plurality traces their origins disapprovingly by focusing on their heritages from the Elizabethan poor laws and southern designs during Reconstruction to perpetuate quasi slave-like conditions on newly freed slaves,²⁸⁵ whereas the dissenters, especially Justice Thomas, extol their virtues as legitimate community policing devices.²⁸⁶

Nonetheless, not only does not the decision place beyond reach all loitering statutes, its swath is quite narrow. First, the social problem the City of Chicago sought to address is a serious one. Second, three Justices had no problem with it at all. Third, two other Justices, O'Connor and Breyer, distanced themselves from the breadth of Stevens' plurality opinion and even provided a road map towards achievement of an ordinance that would pass constitutional muster. Justice O'Connor emphasized that, "[i]t is important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding," and that Chicago still has open "reasonable alternatives to combat the very real threat posed by gang intimidation and violence." As examples, she listed adoption of laws that directly prohibit the congregation of gang members to intimidate residents, or the enforcement of existing laws to that effect, and a limiting construction (not given it by the Illinois Supreme Court) of the ordinance at issue as to avoid the vagueness problem by restricting the ordinance's criminal penalties to gang members or interpreting the term "apparent purpose" narrowly and in light of the Chicago City Council's findings.²⁸⁷ Thus, when you count up the Justices, you've got five who are willing to take a look at a slightly better drafted ordinance.

²⁸¹ 382 U.S. 87 (1965).

²⁸² 402 U.S. 611 (1971).

²⁸³ 405 U.S. 156 (1971).

²⁸⁴ 461 U.S. 352 (1983).

²⁸⁵ *Morales*, 119 S.Ct. at 1857-1858.

²⁸⁶ *Id.* at 1883-1885 (Thomas, J., dissenting).

²⁸⁷ *Id.* at 1864-1865 (O'Connor, J., concurring).

Think what you might advise if you were Corporation Counsel to the City of Chicago.

In sum, the decisions that I have discussed today reflect a Term in which the Court did not render any truly blockbuster decisions but filled some important spaces in several criminal law areas, such as the Fourth Amendment and the harmless error doctrine. It also was a Term that was quite balanced between government and defendant triumphs. Cases such as *Knowles v. Iowa* and *Morales* evinced a reining in by the Court of police authority, and *Mitchell* displayed a willingness to hold on to a Warren Court era Fifth Amendment principle. *Wilson v. Layne* and *Minnesota v. Carter* (depending on how one reads *Carter*) fell favorably on privacy rights in one's home. On the other hand, the Court's other Fourth Amendment motor vehicle rulings again diminished individual privacy rights when one is on the road. All in all it was a Term with something for everyone but not too much for anyone.