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## Tiptoeing Through the Tulips: The Supreme Court's Major, But Modest by Comparison, Criminal Law Rulings During the 1994-95 Term

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## Tiptoeing Through the Tulips: The Supreme Court's Major, But Modest by Comparison, Criminal Law Rulings During the 1994-95 Term

Cover Page Footnote

12-2

**TIPTOEING THROUGH THE TULIPS: THE  
SUPREME COURT'S MAJOR, BUT MODEST BY  
COMPARISON, CRIMINAL LAW RULINGS  
DURING THE 1994-95 TERM**

*Leon Lazer:*

For those of you who may have some anxiety about how this schedule is going to work out, our next speaker is going to speak about the criminal law cases, and indeed, the Commerce Clause case that I will mention in a moment that was dealt with by the Supreme Court in the last term.

It is my pleasure now to introduce a speaker who has been with us through the six annual conferences that preceded this one. He is, in my view, one of the leading authorities on criminal law in this country. I remember him very well as he was the Chief of the Appeals Bureau of the Legal Aid Society in New York City when I was a member of the appellate division. That appeals bureau was the best that we heard and I am referring as competitors to the Appeals Bureau of the District Attorney's Office, the Attorney General, Corporation Counsel and the like. He is now a professor at Brooklyn Law School.

On four occasions the New York State Nominating Commission has sent his name to the governor as a prospective appointee to the New York State Court of Appeals, and he does not have that title, so the governor did not necessarily follow that recommendation. The governor did not follow it as to me either. And while Bill Hellerstein was sent up four times, I think Joseph Sullivan underwent number five, and he never made it either, so we have got a pretty good group up here.

It is my real pleasure now to introduce Professor Hellerstein who will talk about the criminal law cases of the last term, and also, the gun-free school zones case which is a Commerce Clause case in relation to which Professor Hellerstein has some special connection. And so it is my pleasure to introduce him to you now.

*Professor William E. Hellerstein:*\*

Thank you, Judge Lazer.

## INTRODUCTION

Oh my, was that not some term? As should be apparent to anyone who has not been on leave from the American legal system for the past year or comatose, the Supreme Court's 1994-95 term was one for the ages. Although the Court issued the fewest number of opinions since the 1955 term, in no recent term has it rendered as many foundation-shaking rulings as it did this term.<sup>1</sup> The decisions on term limits, voting rights, desegregation, affirmative action, separation of powers, freedom of speech and religion, and the Commerce Clause contain the potential for significant alteration of generally accepted constitutional precepts. Not surprisingly, commentators opined that major sea changes had taken place<sup>2</sup> and that the true "Reagan Court" had finally arrived.<sup>3</sup>

With one exception, the Commerce Clause decision in *United States v. Lopez*,<sup>4</sup> the Court's criminal law decisions were relatively modest. There were no major departures from settled precedents. In three Fourth Amendment cases, the Court retained its less than generous perspective as to the scope of the amendment's protections.<sup>5</sup> In cases involving the Double Jeopardy<sup>6</sup> and Ex Post Facto Clauses,<sup>7</sup> the Court also took a restrictive view. But where the obligation of prosecutors to

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\* Professor of Law, Brooklyn Law School; Juris Doctor, Harvard Law School (1962).

1. Linda Greenhouse, *Farewell to the Old Order in the Court*, N.Y. TIMES, section 4, p.1, col.1, July 2, 1995.

2. *Id.*

3. Joan Biskupic, *The Supreme Court Ronald Reagan Wanted Has Arrived*, WASH. POST WEEKLY, July 10-16, 1995, p.31.

4. 115 S. Ct. 1624 (1995).

5. See *infra* notes 89-185 and accompanying text.

6. See *infra* notes 186-215 and accompanying text.

7. See *infra* notes 216-266 and accompanying text.

disclose evidence that is material and favorable to the defense was at issue, the Court stood firm on the defendant's side, as it did on a number of habeas corpus issues.<sup>8</sup> The Court also construed a number of federal criminal statutes, discussion of which is largely beyond the scope of today's program.

## I. CRIME AND THE COMMERCE CLAUSE

Undoubtedly, the decision in *United States v. Lopez*<sup>9</sup> is very important. What is less than clear is why. Is *Lopez* the first step in a broad assault by the Court on congressional power? Does it jeopardize other federal criminal statutes enacted pursuant to the commerce power? Does it cast doubt upon various aspects of the Contract With America, such as congressionally enacted tort reform and limits on punitive damages? Is it important because it resurrects Commerce Clause<sup>10</sup> concepts that, in the 1930's, thwarted President Roosevelt's and Congress' ability to ameliorate serious, nation-wide economic distress? Or does *Lopez's* main significance lie in that it is a "process" decision, one in which the Court, as a precondition for approval, has now directed Congress to abide by specific legislative processes, such as adequate hearings and sufficient findings of fact, when a statute's legitimacy is not immediately apparent? Or, is there less here than actually meets the eye?

Perhaps much turns on the meaning of "important." If it means "significant," then it is important because not since *Carter Coal Company*<sup>11</sup> in 1935 has the Court declared a statute directed at

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8. See *infra* notes 267-368 and accompanying text.

9. 115 S. Ct. 1624 (1995).

10. U.S. CONST. art. I, § 8, cl. 3. This clause states that Congress has the power "[t]o regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes." *Id.*

11. *United States v. Carter Coal Company*, 298 U.S. 238 (1935). In *Carter Coal*, the Court held that the Bituminous Coal Conservation Act of 1935, 49 Stat. 991, which stated that the mining and distribution of coal was so affected with a national public interest and so related to the general welfare of the country that the industry should be regulated by controlling the wages, hours and working conditions of the miners, was beyond the power of

private entities under the Commerce Clause unconstitutional.<sup>12</sup> If, on the other hand, “important” means “portentous,” perhaps it is less so. Let’s see what the Court did and why.

Alfonso Lopez was a 12th-grade student at Edison High in San Antonio, Texas who carried a concealed handgun into his school.<sup>13</sup> He was charged with violating the Gun-Free School Zones Act of 1990,<sup>14</sup> which prohibited “any individual knowingly to possess a firearm at a place that [he] knows. . . is a school zone.”<sup>15</sup> The district court denied his motion to dismiss the indictment, finding that the statute was a constitutional exercise of Congress’s commerce power.<sup>16</sup> However, the Fifth Circuit reversed because it believed that there had been insufficient congressional findings and legislative history to establish the relationship between the conduct prohibited and interstate commerce.<sup>17</sup> The court of appeals’ ruling is heavily a “process” decision; it is a greater mystery whether the same is true of the Supreme Court’s decision.

Chief Justice Rehnquist’s majority opinion held the statute unconstitutional because the conduct which it purported to regulate, possession of a weapon within 1000 feet of school

Congress. *Id.* at 299. The Court concluded that the mining and manufacturing of coal was not within the bounds of interstate commerce. *Id.* at 299-300.

12. The only decision after 1935 to render a statute unconstitutional under the Commerce Clause is *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held that Congress could not regulate the wages and hours paid by states to their employees. But even that ruling was overruled nine years later. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

13. *Lopez*, 115 S. Ct. at 1626.

14. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844 (1990) (codified at 18 U.S.C. §§ 921, 922).

15. 18 U.S.C. § 922(q)(2)(A). The term “school zone” is defined as “in, or on the grounds of, a public, parochial or private school” or “within a distance of 1,000 feet from the grounds of a public, parochial or private school.” *Id.* § 921(a)(25).

16. *Lopez*, 115 S. Ct. at 1626.

17. *Id.*

property, does not “substantially affect” interstate commerce.<sup>18</sup> He pointed out that, by its terms, the statute had nothing to do with “commerce” or any sort of economic enterprise, regardless of how broadly those terms are defined.<sup>19</sup> Also, he explained, the statute “is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>20</sup> Therefore, the statute could not be sustained, he concluded, under those cases which upheld the regulation of activities that arose out of or were “connected with a commercial transaction, which viewed in the aggregate, substantially affect[ed] interstate commerce.”<sup>21</sup> In short, the aggregation principle of *Wickard v. Filburn*<sup>22</sup> will not cover it.

Lastly, Rehnquist said the statute did not contain a jurisdictional element which, based on a case-by-case analysis, would ensure that the firearms possession in question had the requisite nexus to interstate commerce.<sup>23</sup> Consequently, Rehnquist stated, to uphold the government’s contention that the statute is justified because firearms possession in a local school zone does indeed substantially affect interstate commerce would require the Court to “pile inference upon inference” in a manner

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18. *Id.* at 1634.

19. *Id.* at 1630-31.

20. *Id.* at 1631.

21. *Id.*

22. 317 U.S. 111 (1942). In *Wickard*, the Court held that the amendments to the Agricultural Adjustment Act of 1938, which limited the amount of wheat a farmer could keep for his own consumption, was a valid exercise of the power of Congress to regulate interstate commerce. *Id.* at 128-29. The Court stated that:

[E]ven if appellee’s activity be local and though it may be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect’.

*Id.* at 125.

23. *Lopez*, 115 S. Ct. at 1631.

that would convert congressional Commerce Clause authority into a general police power of the sort held only by the states.<sup>24</sup>

The government faced two basic obstacles in its defense of the statute: the absence of a meaningful legislative record and the *reductio ad absurdum* quality of its own argument. Ostensibly mindful of institutional constraints, Rehnquist acknowledged that “[w]e agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.”<sup>25</sup> With that said, however, the Chief Justice proceeded to condemn the shortcomings of Congress’s legislative process in this instance: “But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.”<sup>26</sup>

Most significant was the government’s or the dissenters’ inability to offer a limiting principle to their argument. The government argued that carrying a gun affected commerce because guns may lead to crime and that will affect commerce. However, the government conceded that under its theory, “Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.”<sup>27</sup> Without a limiting principle, the government’s argument was a sitting duck for Rehnquist’s assertion that “it is difficult to perceive any limitation on federal power, even in areas such as criminal law

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24. *Id.* at 1634.

25. *Id.* at 1631.

26. *Id.* at 1632. Although not relied upon by the government in this case, the Violent Crime Control and Law Enforcement Act of 1994 amends § 922(q) to include the finding of Congress in regard to the effects that firearm possession in school zones has on interstate and foreign commerce. *Id.* at n.4; see Pub. L. No. 103-322, § 320904, 108 Stat. 1796 (1994).

27. *Lopez*, 115 S. Ct. at 1632.



enforcement or education where states historically have been sovereign.”<sup>28</sup>

Rehnquist conceded that broad language in the Court’s modern Commerce Clause cases had conferred upon Congress extremely broad powers and even had suggested “the possibility of additional expansion . . . .”<sup>29</sup> Nonetheless the Court, he stated, “decline[s] here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated.”<sup>30</sup>

Some may read *Lopez* as evincing a major shift in Commerce Clause adjudication -- a return to the uncharitable view of congressional power expressed by Court in the 1930’s. Others may view it less drastically but still conclude that the Court now will subject Commerce Clause legislation to exceedingly close scrutiny. Both of these readings may be premature.

The majority’s opinion must be read in conjunction with Justice Kennedy’s concurrence, joined by Justice O’Connor.<sup>31</sup> In content and tone they differ markedly. Kennedy emphasizes that “great restraint” is called for “before the Court determines that the [Commerce] Clause is insufficient to support an exercise of the national power,”<sup>32</sup> and that the “substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes.”<sup>33</sup> Nonetheless, because the Framers did not give Congress unlimited power the Court must, Kennedy concludes, maintain a proper federal-state balance, and in this case, “[t]he statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our

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28. *Id.*

29. *Id.* at 1634.

30. *Id.*

31. *Id.* at 1634-42.

32. *Id.* at 1634 (Kennedy, J., concurring).

33. *Id.* at 1640 (Kennedy, J., concurring).

intervention is required.”<sup>34</sup> Taken at face value, neither Justice Kennedy nor Justice O’Connor appear ready to strike Congress’ commerce power in all but the most extreme instance.

Not so for Justice Thomas. His concurrence aspires wistfully to the Commerce Clause jurisprudence of the “nine old men.” Like the majority of the early New Deal Court, Justice Thomas believes, for example, that manufacture is not commerce and that the Court was wrong to so conclude.<sup>35</sup> Only his grudging acknowledgment that “many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years,”<sup>36</sup> and that “[c]onsideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clear,”<sup>37</sup> appears to stand in his way.

Justice Breyer wrote the principal dissent in which Justices Stevens, Souter, and Ginsburg joined.<sup>38</sup> While he acknowledged that judicial review of Commerce Clause-driven statutes is appropriate, he defended, on institutional and practical grounds, the deference which Congress has been accorded in modern times. The Constitution, Breyer observed, “delegates the commerce power directly to Congress,” and the determination of a “significant factual connection between the regulated activity and interstate commerce . . . requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.”<sup>39</sup> That empirical judgment in enacting the Gun Free School Zones Act, he concluded, was entirely rational because of the extensive reports and other materials to which Congress had access.<sup>40</sup> From these materials, which he annexed to his opinion, Congress could rationally find that “guns in schools significantly undermine the quality of education in our Nation’s classrooms,

34. *Id.* (Kennedy, J., concurring).

35. *Id.* at 1643 (Thomas, J., concurring).

36. *Id.* at 1650 n.8 (Thomas, J., concurring).

37. *Id.* (Thomas, J., concurring).

38. *Id.* at 1657.

39. *Id.* at 1658 (Breyer, J., dissenting).

40. Justice Breyer stated: “[f]or one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious.” *Lopez*, 115 S. Ct. at 1659.

[and that] Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem.”<sup>41</sup>

Perhaps the key weakness of the Breyer dissent is that it fails to respond to the majority’s call for a delimiting principle. Good appellate lawyers know that when the Court asks for such a principle, it is wise to provide one; dissenting justices, of course, need not do so. However, Justice Breyer’s choice to argue the case on its facts, as he perceived them, might have been strengthened by inclusion of a hypothesis in which Congress conceivably would exceed its enumerated power. As the legislative record stood, to allow Congress to render mere possession of a weapon in a discrete location a federal crime would seem to leave little else that would be beyond Congress’ commerce power. That neither Justice Breyer nor the Solicitor General articulated a circumstance that would be beyond Congressional power ceded the high ground to the majority. Quite possibly, there is none that commends itself. If the majority is correct – that “possession of a gun in a local school zone is in no sense an economic activity that might . . . substantially affect any sort of interstate commerce,”<sup>42</sup> and that one could only establish a nexus by piling up inferences – then it is arguable that the majority is not wrong to make its stand in this case for the principle that there is indeed *some* point at which use of the commerce power to achieve a desirable social goal is indefensible.

*Lopez* was not a lightning bolt from outer space. I believe it was more like an accident waiting to happen. In *Perez v. United States*,<sup>43</sup> decided in 1971, the Court upheld as a valid exercise of the commerce power, Title II of the Consumer Credit Protection Act,<sup>44</sup> which criminalized extortionate credit transactions that

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41. *Id.*

42. *Id.* at 1634.

43. 402 U.S. 146 (1971).

44. Pub. L. No. 90-321, Title II, §202(a), 82 Stat. 159, 18 U.S.C. § 891 (1994).

were purely intrastate in character under the principle that they nevertheless directly affected interstate commerce. Justice Stewart dissented, arguing that “it is not enough to say that loan-sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting.”<sup>45</sup> That same year, in *United States v. Bass*,<sup>46</sup> Justice Marshall’s majority opinion affirmed the reversal of a conviction for possession of firearms in violation of a provision of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>47</sup> which applied to any person convicted of a felony “who receives, possesses, or transports in interstate commerce or affecting commerce [any] firearm.”<sup>48</sup> The government had contended that the commerce limitations in the law applied only to “transports” and that possession and receipt were punishable without showing a connection with commerce.<sup>49</sup> The defendant argued that the Commerce Clause did not constitutionally apply to simple possession of a firearm.<sup>50</sup> The Court avoided that constitutional claim by agreeing with Bass’s threshold argument that the statute was ambiguous and the rule of lenity, applicable to criminal statutes, required that the statute be read to impose a requirement that even as to possession, the government had to demonstrate a commerce nexus.<sup>51</sup>

Justice Stewart’s *Perez* dissent and the Court’s avoidance of the constitutional issue in *Bass* suggested that a time might come when Congressional crime control through the Commerce Clause could cross the line into the general police power reserved to the states. The absence of findings or a significant legislative record in *Lopez*, plus the absence of any limiting principle, undoubtedly combined to bring to fruition the type of concerns expressed by

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45. *Perez*, 402 U.S. at 157 (Stewart, J., dissenting).

46. 404 U.S. 336 (1971).

47. 18 U.S.C. § 1202(a).

48. *Id.*

49. *Bass*, 404 U.S. at 338.

50. *Id.*

51. *Id.* at 347.

Justice Stewart and those that were implicit in *Bass*.<sup>52</sup> For these reasons, Professor Gerald Gunther's comment that *Lopez* is a "welcome warning shot across the Congressional bow"<sup>53</sup> may be the most perceptive comment on *Lopez* of all.

If Professor Gunther's assessment is accurate, then *Lopez* is not "important" as in "portentous." If *Lopez* is primarily a "warning shot," it is intended to suggest strongly to Congress that it must bring more to the table when its commerce legislation resembles a simple criminal statute and little else. For the time being, I believe the Gunther reading of *Lopez* is the most accurate. First, the Court itself gave an immediate indication that it was not about to rewrite the book on judicial review of Commerce Clause legislation. Second, lower federal courts have not read *Lopez* that way.<sup>54</sup>

Within days of *Lopez*, the Court rendered a per curiam decision in *United States v. Robertson*,<sup>55</sup> in which, in the face of a Commerce Clause challenge, it upheld a conviction under section 1962(a) of the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>56</sup> Robertson had been convicted on various narcotics charges and for having invested narcotics proceeds in an Alaskan gold mine.<sup>57</sup> He was convicted under RICO for using those proceeds in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged

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52. I do not think that *Scarborough v. United States*, 431 U.S. 563 (1977) necessarily altered the Court's course. While the Court adopted a broad construction of a federal criminal law in the face of federalistic concerns, it was still a construction designed to avoid a constitutional decision. *Id.* at 572. *Scarborough* involved the same provision regarding possession of firearms that had been at issue in *Bass*. See *supra* notes 46-51 and accompanying text. However, in *Bass*, the government had made no attempt at all to establish a connection with commerce. In *Scarborough* it did, albeit minimally, by showing that the firearms had once moved in interstate commerce. *Scarborough*, 431 U.S. at 575.

53. Aric Press & Bruce Shenitz, *Justice: The Supreme Court Says No to Congress*, NEWSWEEK, May 8, 1995, at 72.

54. See *infra* notes and accompanying text 66-87.

55. 115 S. Ct. 1732 (1995).

56. 18 U.S.C. § 1962(a) (1988 & Supp. V).

57. *Robertson*, 115 S. Ct. at 1732.

in, or the activities of which affect, interstate or foreign commerce.”<sup>58</sup> The Court averted the Commerce Clause challenge upon which the Ninth Circuit had based its reversal by observing that both the court of appeals and the parties had miscast their arguments by focusing on whether the activities of the gold mine “affected” interstate commerce.<sup>59</sup> The Court found it unnecessary to reach that argument because the trial evidence focused primarily on the interstate activities of the mine.<sup>60</sup> The evidence established that much of the equipment for the mine had not been purchased locally but had been transported in interstate commerce.<sup>61</sup> It was also established that Robertson had brought workers from outside Alaska to the mine and that he took about fifteen percent of the mine’s proceeds out of the state.<sup>62</sup> A Court interested in continuing an onslaught on Congressional use of its commerce power could have approached the case differently.

Since *Lopez* was decided, five circuit courts of appeal have upheld against Commerce Clause challenges federal statutes banning machine guns,<sup>63</sup> outlawing carjacking<sup>64</sup> and protecting access to abortion clinics.<sup>65</sup>

In *United States v. Wilks*,<sup>66</sup> the Tenth Circuit upheld a federal statute which makes it illegal to transfer or possess a machine gun manufactured after 1986.<sup>67</sup> Like the statute struck down in

58. *Id.* (quoting 18 U.S.C. § 1962(a)).

59. *Id.* at 1733.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See infra* notes 67-70 and accompanying text.

64. *See infra* notes 71-75 and accompanying text.

65. *See infra* notes 76-83 and accompanying text.

66. 58 F.3d 1518 (10th Cir. 1995).

67. *Id.* at 1522. *See* 18 U.S.C. § 922. Congress passed this section as part of the Firearms Owners’ Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (1986), which amended the Gun Control Act of 1986, 18 U.S.C. §§ 921-28. Section 922(o) states:

- (1) Except as provided in paragraph 2, it is unlawful for any person to transfer or possess a machinegun.
- (2) This subsection does not apply with respect to--

*Lopez*, the machine gun statute does not contain a jurisdictional element. However, the court upheld the statute after concluding that a machine gun -- unlike the handgun in *Lopez* -- is "an item bound up with interstate attributes."<sup>68</sup> The Court further held that machine guns are a "commodity . . . transferred across state lines for profit by business entities."<sup>69</sup>

In *United States v. Oliver*,<sup>70</sup> the Ninth Circuit upheld the federal carjacking statute, emphasizing that the statute contained an express interstate commerce element, which the statute in *Lopez* did not.<sup>71</sup> The court also noted that, unlike in *Lopez*, "Congress was not silent regarding the effect of carjacking on interstate commerce."<sup>72</sup>

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- (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
  - (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

*Id.*

68. *Wilks*, 58 F.3d at 1521.

69. *Id.* (quoting *United States v. Hunter*, 843 F. Supp. 235, 249 (E.D. Mich. 1994)).

70. 60 F.3d 547 (9th Cir. 1995).

71. *Id.* at 550. The court noted that the carjacking statute was very different from the statute in *Lopez*. *Id.* First, the court stated that the statute only applies to the taking of a car that has moved in interstate commerce. *Id.* Secondly, the court said that cars themselves are "instrumentalities of commerce." *Id.*

72. *Id.* Specifically, Congress relied on the increasing rate of motor vehicle theft, the inability of local law enforcement agencies to prosecute perpetrators effectively and "the emergence of carjacking as a 'high growth industry' that involves taking stolen vehicles to different states to retitle, exporting vehicles abroad or selling cars to 'chop shops' to distribute various auto parts for sale." *Id.* (quoting *United States v. Martinez*, 49 F.3d 1398, 1400 n.2 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 749 (1996) (citing H.R. REP. NO. 102-852(I), 102d Cong., 2d Session 13-17, reprinted in 1992 U.S.C.C.A.N. 2829, 2833)).

In similar fashion to *Oliver*, the Third Circuit upheld the statute in *United States v. Bishop*.<sup>73</sup> However, highly respected Judge Edward R. Becker dissented, stating that Congress passed the carjacking law not because it was worried about carjacking's impact on interstate commerce but "as a response to its accurate perception of carjacking as a crime of violence."<sup>74</sup>

In *Cheffer v. Reno*,<sup>75</sup> the Eleventh Circuit held that the Freedom of Access to Clinic Entrances Act<sup>76</sup> was a valid exercise of Congress' Commerce Clause power.<sup>77</sup> The court pointed out that, unlike the statute in *Lopez*, the clinic access law regulates commercial activity, specifically the provision of reproductive health services, and includes extensive congressional findings to support the conclusion that commerce is substantially affected.<sup>78</sup> The Eleventh Circuit rejected the reasoning employed by the district court in *United States v. Wilson*.<sup>79</sup> In *Wilson*, the Wisconsin district court held that the statute was beyond Congressional power because it does not regulate commercial entities -- the reproductive health providers - - "but rather regulates private conduct affecting commercial entities."<sup>80</sup> The *Cheffer* court noted that the district court cited no authority "for the proposition that Congress' Commerce Clause authority extends only to the regulation of commercial actors, and not private individuals who interfere with commercial

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73. 66 F.3d 569 (1995). In *Bishop*, the Court held that Congress did not exceed its authority under the Commerce Clause when it enacted the carjacking statute because Congress had a rational basis for believing that carjacking had a substantial effect on interstate commerce. *Id.* at 576.

74. *Id.* at 591.

75. 55 F.3d 1517 (11th Cir. 1995).

76. 18 U.S.C. § 248 (1995).

77. *Cheffer*, 55 F.3d at 1521.

78. *Id.* at 1520.

79. 880 F. Supp. 621 (E.D. Wis.), *rev'd*, 1995 WL 765450 (7th Cir. Dec. 29, 1995).

80. *Id.* at 678.



activities in interstate commerce.”<sup>81</sup> The Fourth Circuit has also upheld the statute in similar fashion.<sup>82</sup>

On the other hand, the Ninth Circuit has held that the Commerce Clause does not reach simple arson of a private home under 18 U.S.C. § 844(i), which makes it a federal crime to destroy by fire “any building . . . used in interstate or foreign commerce or in any activity affecting interstate commerce.”<sup>83</sup> The Commerce Clause link alleged by the government was that the house obtained natural gas from the Pacific Gas & Electric Company, some of which came from out-of-state sources.<sup>84</sup> The court held that a private home that “merely receives natural gas from out-of-state sources is neither an article nor an instrumentality of commerce. The arson of such a structure has only a remote and indirect effect on interstate commerce.”<sup>85</sup> Additionally, an Arizona district court has declared unconstitutional the 1992 Child Support Recovery Act,<sup>86</sup> which makes it a federal crime for a parent to fail to pay child support for an out-of-state child, as being in excess of Congress’ commerce power.<sup>87</sup>

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81. *Cheffer*, 55 F.3d at 1520 n.6.

82. *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995). The Fourth Circuit held that Congress passed the Freedom of Access to Clinic Entrances Act based on an extensive legislative record and that its regulatory measures were “reasonably adapted to permissible ends.” *Id.* at 647.

83. *United States v. Pappadopoulos*, 64 F.3d 522, 524 (1995).

84. *Id.* at 525.

85. *Id.* at 528.

86. 18 U.S.C. § 228.

87. *See United States v. Mussari*, 894 F. Supp. 1360 (1995). The court held that even though the statute requires diversity between the defendant and the unsupported child, an interstate nexus without a substantial effect on commerce is not enough. *Id.* at 1364. It emphasized that the statute is a criminal statute that interferes with the states’ own legislation concerning a traditionally state problem, and that Congress did not make a plain statement that it intended to so dramatically alter the balance between state and federal relations. *Id.* at 1363. The court rejected the government’s argument that the statute is aimed at interstate “flight” by parents to avoid their obligation, stating that there is no “flight” element in the statute. *Id.* at 1364. The court also rejected the government’s affectation argument which asserted that non-

It seems fair to conclude that *Lopez* will bring to the Court as many challenges to Congressional enactments under the Commerce Clause as there are lawyers to construct them. But it also seems possible to conclude that few, if any, statutes will be found to suffer from the infirmities of the Gun Free School Zones Act.<sup>88</sup> There may, indeed, be less to *Lopez* than meets the eye.

## II. THE FOURTH AMENDMENT

In contrast with last term, in which no Fourth Amendment rulings were handed down, this term produced three significant decisions. The first case involved the Fourth Amendment in conflict with computer-based error; the computer won.

In *Arizona v. Evans*,<sup>89</sup> a 7-2 majority held that evidence seized in violation of the Fourth Amendment as the result of clerical errors by court employees that caused incorrect computer records fell within the good faith exception to the exclusionary rule.<sup>90</sup>

Isaac Evans was stopped by police because he was driving the wrong way on a one-way street. An immediate computer check established that Evans' license had been suspended and that there was an outstanding misdemeanor warrant for his arrest. Based on that warrant, he was placed under arrest. While being handcuffed, he dropped a marijuana joint and a search of his car revealed a bag of marijuana under the passenger seat. When the

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payment of child support affects the payment of federal welfare funds. *Id.* at 1365.

88. *See supra* note 14.

89. 115 S. Ct. 1185 (1995).

90. *Id.* at 1194. The Court has concluded that the good faith exception to the exclusionary rule should be applied:

[W]here the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'

*United States v. Leon*, 468 U.S. 897, 919-20 (1984) (quoting *Stone v. Powell*, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).

police notified the Justice Court that Evans had been arrested pursuant to the outstanding warrant, they were informed that the warrant had been quashed seventeen days earlier. Evans moved to suppress, arguing that because the warrant had been quashed his arrest was unlawful.

The trial court granted suppression because it concluded that the State had been at fault for failing to quash the warrant.<sup>91</sup> The court made no specific finding that the error was attributable to the Sheriff's Office or the Justice Court. The Arizona Court of Appeals reversed on the ground that "the exclusionary rule was not intended to deter Sheriff's Office employees or court employees who are not directly associated with the arresting officers or their police department."<sup>92</sup> The Arizona Supreme Court reversed and took the contrary position that the exclusionary rule applied to court clerks as well as the police because it would "hopefully serve to improve the efficiency of those who keep records in our criminal justice system."<sup>93</sup>

Chief Justice Rehnquist, writing for the Court, acknowledged that Evans' Fourth Amendment rights were violated. However, he reiterated that the exclusionary rule is a judicially-created rule and that the issue of whether suppression is required is an issue separate from that of whether the amendment has been violated.<sup>94</sup> Suppression was not required, he concluded, because the arresting officer was entitled to act on the computer information he possessed and that he had a duty to arrest Evans.<sup>95</sup> Application of the exclusionary rule to court or clerical employees, Rehnquist concluded, will have no particular effect because "they have no stake in the outcome of particular criminal prosecutions."<sup>96</sup>

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91. *Evans*, 115 S. Ct. at 1188.

92. *Id.*

93. *Id.* at 1189.

94. *Id.* at 1191.

95. *Id.* at 1193.

96. *Id.*

Evans' counsel relied heavily on *Whiteley v. Warden, Wyoming State Penitentiary*,<sup>97</sup> in which the Court held that Whiteley had been arrested unlawfully when police acted on the basis of a radio run that two suspects had been involved in two robberies.<sup>98</sup> The Court determined that because the information in the initial report did not constitute probable cause, the arresting officers were not insulated from its deficiencies and thus Whiteley's arrest was unlawful.<sup>99</sup> Rehnquist dispensed with *Whiteley* by reminding us that it pre-dated the Court's decisions in which the issue of exclusion became separated from whether the Fourth Amendment had been violated.<sup>100</sup>

Justice O'Connor, joined by Justices Souter and Breyer, agreed with the result but drew attention to the narrowness of the Court's holding.<sup>101</sup> She emphasized that the decision was limited to whether a court employee's departure from established procedures should trigger the exclusionary rule. But whether the police acted reasonably in their reliance on the recordkeeping system itself was a different question. She said: "[s]urely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy . . . ."<sup>102</sup> Justice O'Connor also thought that computer recordkeeping systems should be scrutinized no less thoroughly than are informers on whom the police are not entitled to blindly rely.<sup>103</sup>

Justice Souter, joined by Justice Breyer, concurred and pointed out that there remained open still another question:

[H]ow far, in dealing with fruits of computerized error, our very concept of deterrence by exclusion of evidence should extend to

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97. 401 U.S. 560 (1971).

98. *Id.* at 568.

99. *Id.* at 568-69.

100. *Evans*, 115 S. Ct. at 1192. *See, e.g.*, *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984); *United States v. Calandra*, 414 U.S. 338, 354 (1973).

101. *Evans*, 115 S. Ct. at 1194 (O'Connor, J., concurring).

102. *Id.* (O'Connor, J., concurring).

103. *Id.* (O'Connor, J., concurring).

the government as a whole, not merely the police, on the ground that there would otherwise be no reasonable expectation of keeping the number of resulting false arrests within an acceptable minimum limit.<sup>104</sup>

Justice Stevens' dissent frontally attacked the majority's view. Echoing themes that have been absent from the Court's Fourth Amendment jurisprudence for some time, Stevens reiterated the Brandeisian theme that the Amendment "is a constraint on the power of the sovereign, not merely on some of its agents."<sup>105</sup> He disputed that the exclusionary rule is "an extreme sanction" and, citing to Justice Stewart's writings, pointed out that application of the exclusionary rule merely put "the Government in the same position it would have been had it not conducted the illegal search and seizure in the first place."<sup>106</sup> Stevens also contended that the good faith exception adopted in *Leon* did not apply to Evans' arrest because "[t]he reasoning in *Leon* assumed the existence of a warrant; it was, and remains, wholly inapplicable to warrantless searches and seizures."<sup>107</sup> Stevens expressed very strongly his belief that the offense to a citizen's dignity "who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base,"<sup>108</sup> is no less outrageous than was the use of general warrants to the authors of the Bill of Rights.<sup>109</sup>

Justice Ginsburg's dissent, in which Justice Stevens joined, stated that Evans' case was not "idiosyncratic." She focused on the "new possibilities of error, due to both computer

104. *Id.* at 1195 (Souter, J., concurring).

105. *Id.* (Stevens, J., dissenting). See *Olmstead v. United States*, 277 U.S. 438, 472-479 (1928) (Brandeis, J., dissenting).

106. *Evans*, 115 S. Ct. at 1195 (Stevens, J., dissenting).

107. *Id.* at 1196 (Stevens, J., dissenting).

108. *Id.* at 1197 (Stevens, J., dissenting).

109. *Id.* (Stevens, J., dissenting). See *Warden v. Hayden*, 387 U.S. 294 (1966). In *Warden*, Justice Douglas, in his dissent, noted that "the definition of the general warrant included not only a license to search for everything in a named place but to search all and any places in the discretion of the officers." *Id.* at 315.

malfunctions and operator mistakes,”<sup>110</sup> and concluded that application of the exclusionary rule “may well supply a powerful incentive to the State to promote the prompt updating of computer records,” and that this was the Arizona Supreme Court’s “hardly unreasonable expectation.”<sup>111</sup>

The result in *Evans* comes as no surprise. Once the Court, in *United States v. Calandra*,<sup>112</sup> began its separation of the exclusionary rule from the Fourth Amendment itself, it created a wide berth in which the deterrence rationale could be applied on an ad hoc, rather than principled, basis.<sup>113</sup> This separation allowed the Court ten years later to read into the Amendment’s warrant clause, a “good faith” exception that allowed searches and seizures made pursuant to constitutionally deficient warrants

110. *Evans*, 115 S. Ct. at 1199 (Ginsburg J., dissenting).

111. *Id.* at 1200. (Ginsburg, J., dissenting). Justice Ginsburg also urged that *Michigan v. Long*, 463 U.S. 1032 (1983) should be overruled. *Id.* at 1203. In *Long*, the Court repudiated the long held presumption that, absent a clear indication that a case coming from a state court decided a federal question, the Court would presume that the lower court judgment rested on an adequate state ground and thus was not reviewable. 463 U.S. at 1040-41. Instead, it reversed the presumption by ruling that absent a clear statement that the state court had rested its judgment on state law, the Court would now assume that the judgment rested upon the state court’s determination of the federal issue. *Id.* Justice Ginsburg criticized the *Long* rule as an impediment to the states’ ability to serve their function as laboratories for developing solutions to new legal problems. *Evans*, 115 S. Ct. at 1198 (Ginsburg, J., dissenting). Also, Justice Ginsburg pointed out that *Long*’s plain statement rule had greatly increased the number of non-dispositive United States Supreme Court opinions because many state courts simply, on remand, clarify their previous rulings and affirm the judgment on independent state grounds. *Id.* at 1202 (Ginsburg, J., dissenting). The majority wanted no part of Justice Ginsburg’s call for an about-face and it will be a long time before *Long* will be rethought. Why the Court reversed the *Long* presumption, of course, is a subject for another day.

112. 414 U.S. 338, 354 (1974).

113. *Id.* at 354 (“Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong.”).

to survive.<sup>114</sup> In *Evans*, for the first time, the Court allowed a “good faith” type exception to rescue a warrantless seizure of a person insofar as the warrant relied on by the police no longer existed in law. But as Justice Ginsburg pointed out, *Evans* is not an isolated case.<sup>115</sup>

To the extent that computer technology expands, the capacity for both technological and human error also expands. Consequently, the frequency with which personal liberty will be limited because of such errors will also increase. Nonetheless, the Court has determined that law enforcement should be the beneficiary of such error, and not the citizen. By so holding, the Court has removed a substantial incentive for law enforcement agencies to take great care in the operation of their computer systems. Whether the holding in *Evans* is as limited as some members of the Court believe it is remains to be seen.<sup>116</sup>

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114. See *United States v. Leon*, 468 U.S. 897 (1984) (holding that the exclusionary rule should not be applied when the officer conducting the search acted on an objectively reasonable reliance on a warrant issued by a neutral magistrate that is subsequently determined to be invalid); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (same).

115. See *Rogan v. Los Angeles*, 668 F. Supp. 1384 (C.D. Cal. 1987). In *Rogan*, an action was brought against the city of Los Angeles and its police department after Terry Dean Rogan had been arrested five separate times on the basis of incorrect information contained in records entered into the F.B.I.’s National Crime Information Center. *Id.* at 1387-89; see also *French v. Chapman*, 785 F. Supp. 1277, 1278-79 (N.D. Ill. 1992) (misinformation in NCIC records twice caused plaintiff’s arrest and detention), *aff’d*, 991 F.2d 799 (7th Cir. 1993).

116. In a post-*Evans* case, the Florida Supreme Court held that police failure to update their computer records triggered the exclusionary rule. In *State v. White*, 660 So.2d 664 (Fla. 1995), the sheriff’s department failed to update its computer records for four days after an arrest warrant had been served on the defendant. *Id.* at 665. A majority of the court held that the police were not entitled to the good faith exception provided by *Evans* because the other members of the sheriff’s department knew that the warrant had been served and was no longer valid. *Id.* at 668. Therefore, under the “fellow-officer” rule of *Whiteley v. Warden*, 401 U.S. 560, 568 (1971), the arresting officer was charged with the knowledge that he had no authority to arrest the defendant. *White*, 660 So.2d at 668.

In *Wilson v. Arkansas*,<sup>117</sup> the Court answered a question that had remained open since the adoption of the Bill of Rights -- does the Fourth Amendment's protection against unreasonable searches and seizures require that, prior to execution of a search or arrest warrant, the police knock and announce their presence?<sup>118</sup> The good news is that it does. However, one's exuberance may be tempered by the Court's relegation of police failure to comply with the knock and announce requirement to just one element in the reasonableness equation.

In *Wilson*, Arkansas police obtained a warrant to search the defendant's home for drugs. They entered the premises through an unlocked screen door, identifying themselves as they did so. Inside the premises, they found drugs, drug paraphernalia, a gun and ammunition. Wilson herself was discovered in the bathroom, flushing marijuana down the toilet. She argued that the police should have knocked and announced their purpose before entering. The Arkansas Supreme Court affirmed Wilson's conviction, noting that no Arkansas statute or common law required the police to knock and announce when executing a search warrant and that no such requirement was embodied in the Fourth Amendment.<sup>119</sup>

Writing for the Court, Justice Thomas canvassed English common law sources and determined that they left "no doubt that

117. 115 S.Ct. 1914 (1995).

118. In *Ker v. California*, 374 U.S. 23, 40-41 (1963), a plurality determined that an unannounced entry was reasonable under the exigent circumstance doctrine but the Court did not decide the broader issue of whether absent exigent circumstances, such an entry would violate the Fourth Amendment. In *Miller v. United States*, 357 U.S. 301, 309 (1958), the Court focused on whether announcement was required as a matter of statutory interpretation of 18 U.S.C. § 3109 and did not reach the constitutional issue. 18 U.S.C. § 3109 states:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

*Id.*

119. *Wilson*, 115 S. Ct. at 1916.



the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.”<sup>120</sup> He also found that “[t]he common-law knock-and-announce principle was woven quickly into the fabric of early American law,”<sup>121</sup> and that there could be little doubt that the drafters of the Fourth Amendment believed it was a factor in the assessment of the reasonableness of a search or seizure.

Justice Thomas moved with alacrity, however, to caution that “[t]he Fourth Amendment’s flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.”<sup>122</sup> He emphasized that the Court was “simply hold[ing] that although a search and seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.”<sup>123</sup> Accordingly, he noted that there was considerable authority for dispensing with the knock-and-announce requirement in a variety of circumstances such as threats to officer safety, escapes, or the possibility of destruction of evidence. But Justice Thomas made it clear that “we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.”<sup>124</sup>

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120. *Id.*

121. *Id.* at 1917. *See, e.g.,* *People v. Gonzalez*, 259 Cal. Rptr. 846, 848 (Cal. Ct. App. 1989) (“Announcement and demand for entry at the time of service of a search warrant [is] part of Fourth Amendment reasonableness.”); *People v. Saechao*, 544 N.E.2d 745, 749 (Ill. 1989) (“The presence or absence of such an announcement is an important consideration in determining whether subsequent entry . . . is reasonable.”) (internal question marks omitted); *Commonwealth v. Groggin*, 587 N.E.2d 785, 787 (Mass. 1992) (“Our knock and announce rule is one of common law which is not constitutionally compelled.”).

122. *Wilson*, 115 S. Ct. at 1918.

123. *Id.* at 1919.

124. *Id.*

Perhaps there was no other way for the Court to treat the issue. Certainly no one could argue that this case provided a vehicle for deciding when and when not the police are required to knock and announce. But it is arguable that the Court could have weighed in much more heavily in favor of the knock and announce requirement than it did. After all if, as history demonstrates, the Framers were very concerned with such a requirement, then it should not necessarily be embedded in a “totality of the circumstances--just one element” approach. “Totality” cases decided on an ad hoc basis by lower courts present several problems. First, they tend generally to wind up in favor of the police and against the interests of the premises’ occupier. Second, keyed as they are to the “exigent circumstance” doctrine, they fluctuate in direct proportion to that doctrine. As some judges have noted, when drugs are involved, virtually all circumstances appear to be “exigent.”<sup>125</sup> Third, because “totality” cases are so fact-driven, very few will receive Supreme Court review, regardless of their correctness as to the exigency issue.

Given the overriding interest which the Court has always accorded the home,<sup>126</sup> it might have been better had the Court held, as it has with the Warrant Clause, that entries without compliance with the knock-and-announce requirement are presumptively unreasonable. Such a presumption would not be unduly burdensome to law enforcement interests. Just look at all the exceptions to the warrant requirement itself that the Court has made.<sup>127</sup> Of course, a logical response to this argument is that if

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125. *See, e.g.*, *United States v. MacDonald*, 916 F.2d 766, 776-77 (2d Cir. 1990) (Kearse, J., dissenting) (“[a]fter this decision there appears to be little left of the warrant requirement in narcotics cases”), *cert. denied*, 498 U.S. 1119 (1991).

126. *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 585 (1980) (“Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)).

127. *See, e.g.*, *Horton v. California*, 496 U.S. 128 (1990) (holding that there is no warrant requirement for seizure under the plain view doctrine as long as the nature of the seizable item is immediately apparent); *Chimel v. California*, 395 U.S. 752 (1969) (holding that a warrantless search incident

such is the case with the Warrant Clause, the presumptive approach is no better than the “totality” approach. Perhaps, but with the presumptive approach, the dignity of a person’s premises is a touch greater and, in a troublesome case, may receive more of the benefit of a doubt.

Justice Thomas left for another day the issue of whether exclusion is a constitutionally compelled remedy where the unreasonableness of a search stems from a police failure to knock and announce. Arkansas argued that any evidence seized in that circumstance is causally disconnected from the constitutional violation itself and, as is the case with the “independent source”<sup>128</sup> and “inevitable discovery”<sup>129</sup> doctrines, exclusion exceeds the purpose of precluding the government from benefiting from its unconstitutional conduct. Justice Thomas noted that this remedial issue was not addressed by the lower courts and was not, therefore, within the narrow question on

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to a valid arrest is valid so long as it is limited to arrestee’s person and area within his immediate control); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967) (holding that a governmental administrative policy which authorizes an inspector to enter premises without a warrant and search for code violations without probable cause does not violate the protections of the Fourth Amendment); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967) (holding that a warrant to enter one’s home is not necessary when in ‘hot pursuit’ of a felon provided the police have knowledge that the felon is dangerous); *Carroll v. United States*, 267 U.S. 132 (1925) (holding that the warrantless search of an automobile based on exigency was valid based on the rationale that it was not “reasonably practicable” for a police officer to go and get a warrant due to the inherent mobility of the vehicle and the risk of loss of the evidence).

128. *See Segura v. United States*, 468 U.S. 796, 813-16 (1984). In *Segura*, the Court held that whether the initial entry into the defendant’s home was illegal or not was irrelevant because there was an independent source for the discovery of the challenged evidence and as such, suppression of the evidence was not appropriate. *Id.* at 814-15.

129. *See Nix v. Williams*, 467 U.S. 431, 440-48 (1984). In *Nix*, the Court held that evidence relating to the discovery and condition of the victim’s body should have been admitted because it would have inevitably or ultimately been discovered even in absence of a constitutional violation. *Id.* at 449-50.

which certiorari was granted.<sup>130</sup> I believe it a fair bet that the issue will reach the Court in due course.<sup>131</sup>

Of the Term's three Fourth Amendment decisions, I consider *Vernonia School District 47J v. Acton*,<sup>132</sup> the most important as well as the most distressing. It may also contain Justice O'Connor's finest moment in Fourth Amendment jurisprudence - unfortunately in dissent.

In an opinion by Justice Scalia, the Court held, by a 6-3 vote, that school athletes can be subjected to random, suspicionless drug testing.<sup>133</sup> Once again, the Court employed its judicially-crafted "special needs" doctrine to water down Fourth Amendment protections.

The Vernonia, Oregon School District adopted a drug testing policy that required all interscholastic athletes sign a consent form and obtain written parental consent to the testing.<sup>134</sup> During the playing season, randomly picked athletes are required to report to a locker room accompanied by an adult monitor of the same gender.<sup>135</sup> The athletes are asked at that time to provide a list of any prescription medication they may be taking.<sup>136</sup> Male students then produce a urine sample at a urinal, remaining fully clothed with their backs to the monitor, who stands approximately twelve to fifteen feet behind the student.<sup>137</sup> Monitors may watch the student while he produces the sample.<sup>138</sup> Female students produce samples in an enclosed stall; they can be heard but not observed.<sup>139</sup> After the sample is

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130. *Wilson v. Arkansas*, 115 S. Ct. 1914, 1919 n.4 (1995).

131. *See New York v. Harris*, 495 U.S. 14 (1990) (holding that where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the use of a statement made by the suspect outside his home even though the statement is obtained after an in-house arrest in violation of *Payton*).

132. 115 S.Ct. 2386 (1995).

133. *Id.* at 2396.

134. *Id.* at 2389.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.<sup>140</sup> The samples are then sent to an independent laboratory for testing.

The school district implemented its drug testing policy as the result of a sharp increase in drug use in the mid to late 1980's. Although drug use extended well beyond student athletes, school officials determined that student athletes were "leaders of the drug culture" and "role models."<sup>141</sup> The officials were also concerned about the increased risk of sports-related injuries.

In the fall of 1991, James Acton, a seventh grade student, signed up to play football.<sup>142</sup> He was not allowed to play because he and his parents refused to sign the testing consent forms.<sup>143</sup> The Actons filed suit in the district court which denied their claims.<sup>144</sup> The Ninth Circuit reversed, finding that the testing policy violated both the Fourth and Fourteenth Amendments of the Federal Constitution and Article I, section 9 of the Oregon Constitution.<sup>145</sup>

The question of whether compelled urine-testing constitutes a search was settled six years ago in the *Skinner*<sup>146</sup> and *Von Raab*<sup>147</sup> cases. Therefore, Justice Scalia reminded us, the constitutionality of the test in the school context must be determined under a "reasonableness" standard, which calls for "balancing its intrusion on the individual's Fourth Amendment

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140. *Id.*

141. *Id.* at 2388-89.

142. *Id.* at 2390.

143. *Id.*

144. 796 F. Supp. 1354, 1355 (D. Ore. 1992).

145. 23 F.3d 1514 (9th Cir. 1994).

146. *Skinner v. Railway Executives' Ass'n.*, 489 U.S. 602 (1989). In *Skinner*, the Court held that mandatory drug and alcohol testing of railroad employees was reasonable under the Fourth Amendment even in the absence of a warrant or reasonable suspicion because the compelling governmental interests outweighed the employees' privacy concerns. *Id.* at 633.

147. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). In *Von Raab*, the Court held that suspicionless drug screening through urinalysis of U.S. Customs Service employees applying for promotions that involve interdiction of illegal drugs or require carrying a firearm is reasonable under the Fourth Amendment. *Id.* at 677.

interests against its promotion of legitimate governmental interests.”<sup>148</sup> He reminded us further that when the government’s interests qualifies as a “special need,” neither a warrant nor probable cause is required, as was the case in *New Jersey v. T.L.O.*<sup>149</sup> where the Court determined that “special needs” existed in the public school context.

Justice Scalia observed that public school children have fewer and more limited rights than adults and that although children do not “shed their constitutional rights . . . at the schoolhouse gate,”<sup>150</sup> children “within the school environment have a lesser expectation of privacy than members of the population generally.”<sup>151</sup> That lesser expectation emerges, he stated, from the fact that they are children and that they “have been committed to the temporary custody of the State as schoolmaster.”<sup>152</sup> The school district was thus acting in its “custodial and tutelary” capacity “permitting a degree of supervision and control that could not be exercised over free adults.”<sup>153</sup> Consequently, Scalia reasoned, the “‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”<sup>154</sup> He noted that for their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. Student athletes, he emphasized, have even less privacy because, as the Seventh Circuit had put it, there is an “element of ‘communal undress’ inherent in athletic participation.”<sup>155</sup> In

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148. *Vernonia*, 115 S. Ct. at 2390 (quoting *Skinner*, 489 U.S. at 619).

149. 469 U.S. 325, 340-41 (1985) (holding that reasonable suspicion is all that is required for search of a student suspected of drug possession since the warrant requirement would unduly interfere with maintenance of swift and informal disciplinary procedures and the probable cause requirement would undercut teachers’ and administrators’ need for freedom to maintain order).

150. *Vernonia*, 115 S. Ct. at 2392.

151. *Id.* (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)).

152. *Id.* at 2391.

153. *Id.* at 2392.

154. *Id.*

155. *Id.* at 2393 (quoting *Schail by Kross v. Tippecanoe School Corp.*, 864 F.2d 1309 (7th Cir. 1988)).

addition, Justice Scalia observed, by choosing to compete in sports, student athletes “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”<sup>156</sup> In this respect, student athletes are “[s]omewhat like adults who choose to participate in a ‘closely regulated industry.’”<sup>157</sup>

From his conclusion that student athletes have a diminished expectation of privacy, Justice Scalia moved to an analysis of the nature of the intrusion on that privacy. Unsurprisingly, he found that it is “negligible.”<sup>158</sup> He noted that the conditions under which both male and female students produced urine samples “are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily.”<sup>159</sup> He further pointed out that the testing is limited in scope because it looks only for drugs, not for other medical data and that “the drugs for which the samples are screened are standard and do not vary according to the identity of the student.”<sup>160</sup> Moreover, disclosure of test results is limited and they are not turned over to law enforcement authorities.<sup>161</sup>

Justice Scalia also rejected the argument that the policy is more intrusive than it appears because students must identify in advance prescription medications they are taking in order to avoid sanctions for a false positive result.<sup>162</sup> He acknowledged that in *Von Raab* the Court flagged as one of the salutary features of the Customs Service drug testing program the fact that employees were not required to identify in advance their own medical information. But he was quick to point out that “we have never indicated that requiring advance disclosure of medications

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 2394.

is *per se* unreasonable,”<sup>163</sup> and that “[i]ndeed, in *Skinner* we held that it was not ‘a significant invasion of privacy.’”<sup>164</sup>

Finally, in what is the Court’s major leap forward (or backward depending on your frame of reference) from *T.L.O.* is its conclusion that reasonable suspicion is not required.<sup>165</sup> Justice Scalia reasoned that the government’s interest in deterring drug use by all students and protecting the safety of athletes is sufficiently important and that a suspicion-based policy may be “impracticable.”<sup>166</sup> Although he acknowledged that *Skinner* and *Von Raab* indicated that a “compelling interest” is required before the suspicion requirement may be eliminated, “compelling” means just “an interest which appears *important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.”<sup>167</sup> Here, Scalia said, “the nature of the concern is important -- indeed, perhaps compelling”<sup>168</sup> because “[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe.”<sup>169</sup> Furthermore,

the effects of a drug-infested school are visited upon not just the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction. Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug

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163. *Id.*

164. *Id.* (quoting *Skinner v. Railway Executives Ass’n.*, 489 U.S. 602, 626 n.7 (1989)).

165. *Id.* at 2396.

166. *Id.*

167. *Id.* at 2394-95.

168. *Id.* at 2395.

169. *Id.*



user or those with whom he is playing his sport is particularly high.<sup>170</sup>

Justice Ginsburg concurred, expressing her belief that the decision was limited in that it “reserv[ed] the question of whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school.”<sup>171</sup>

With due respect to Justice Ginsburg, I doubt very much that when presented with the broader issue, the Court will cabin *Vernonia* as Justice Ginsburg implies it might. Although student athletes were purportedly “leaders of the drug culture,”<sup>172</sup> the school district’s concerns were with the entire student body. Indeed, the broader concern was credited by the majority when it quoted from the district court’s findings that “the administration was at its wits end,” and that “[d]isciplinary problems had reached ‘epidemic proportions.’”<sup>173</sup> Also, as prior cases such as *Skinner* and especially *Von Raab* demonstrate, the Court has shown a remarkable capacity to declare something a “special need,” and then determine that the Fourth Amendment’s components, a warrant, probable cause, or even reasonable suspicion, are inoperative. If drug use is “epidemic” in a particular school, I see little in the majority opinion or its antecedent “special needs” rulings to put beyond bounds random testing of an entire student body. Even if Justice Ginsburg joined the three dissenters, Justices O’Connor, Stevens and Souter, the required votes to cabin *Vernonia* as it is understood by Ginsburg would fall a vote short.

Justice O’Connor’s dissenting opinion is as much a splendid call for common sense in Fourth Amendment interpretation as it is a reminder of how far the Court has departed from basic Fourth Amendment principles. First, Justice O’Connor pointed

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170. *Id.*

171. *Id.* at 2397.

172. *See supra* note 142.

173. *Vernonia*, 115 S. Ct. at 2389.

out that “[b]lanket searches, because they can involve ‘thousands or millions’ of searches, ‘pos[e] a greater threat to liberty’ than do suspicion-based ones which ‘affec[t] one person at a time.’”<sup>174</sup> She quoted Chief Justice Taft’s statement from the landmark car search case, *Carroll v. United States*,<sup>175</sup> that it “would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”<sup>176</sup> She then demonstrated that the Framers abhorred blanket searches even more than general searches:

Perhaps most telling of all, as reflected in the text of the Warrant Clause, was the particular way the Framers chose to curb the abuses of general warrants -- and by implication -- *all* general searches -- was not to impose a novel ‘evenhandedness’ requirement. It was to retain the individualized suspicion requirement contained in the typical general warrant and make that requirement meaningful and enforceable, for instance by raising the required level of individualized suspicion to objective probable cause.<sup>177</sup>

Justice O’Connor distinguished the Court’s recent cases upholding even-handed searches on the ground that they were “outside the criminal context [and] in response to the exigencies of modern life.”<sup>178</sup> She explained that the Court had upheld those

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174. *Id.* at 2397 (O’Connor, J., dissenting) (citing *Illinois v. Krull*, 480 U.S. 340, 365 (1987) (O’Connor, J., dissenting)).

175. 267 U.S. 132 (1925).

176. *Vernonia*, 115 S. Ct. at 2398 (O’Connor, J., dissenting) (quoting *Carroll v. United States*, 267 U.S. 132, 153-54 (1925)).

177. *Id.* at 2399 (O’Connor, J., dissenting).

178. *Id.* at 2400 (O’Connor, J., dissenting). *See, e.g.*, *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (customs agents who deal with drugs and carry weapons); *Skinner v. Railway Labor Executives’ Ass’n.*, 489 U.S. 602 (1989) (stating that it is impractical to require individualized suspicion for drug testing in wake of a train accident because of chaotic circumstances at scene); *New York v. Burger*, 482 U.S. 691 (1987) (closely regulated business); *Bell v. Wolfish*, 441 U.S. 520 (1979) (visual body cavity searches of prisoners after contact visits); *Camara v.*

searches “only after first recognizing the Fourth Amendment’s longstanding preference for a suspicion-based search regime,”<sup>179</sup> and only when “an individualized suspicion requirement was often impractical . . . .”<sup>180</sup>

Justice O’Connor believed that the major fault with the majority’s opinion was its failure to “seriously engage[] the practicality” of an individualized suspicion requirement.<sup>181</sup> She pointed out that most of the evidence used by the district court to justify the elimination of individualized suspicion “consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use,” that would have justified a search under *T.L.O.*<sup>182</sup>

That our society, due to its drug culture, has already paid a substantial price in Fourth Amendment liberty and privacy interests has long been apparent. From a dialectic that began with the principle that all warrantless searches and seizures are unconstitutional, subject to but a few exceptions,<sup>183</sup> we have moved from acceptance of an enlarged category of warrantless searches and seizures based on probable cause to searches and seizures based only on reasonable suspicion and to searches and seizures based on no individualized suspicion at all. While some may say that *Vernonia* is not remarkable because it rests on the Court’s belief that public school children have fewer constitutional rights while in school and is thus limited to the school context,<sup>184</sup> I am not as sanguine. Even confined to the public school setting, the decision is yet one more adjustment downward in our national consciousness about the personal

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Municipal Court of San Francisco, 387 U.S. 523 (1967) (area-wide searches of private residences for safety inspection purposes).

179. *Id.* at 2401 (O’Connor, J., dissenting).

180. *Id.* at 2402 (O’Connor, J., dissenting).

181. *Id.* at 2403 (O’Connor, J., dissenting).

182. *Id.* (O’Connor, J., dissenting).

183. *See supra* note 127 and accompanying text.

184. Ira Mickenberg, *Court Settles on Narrower View of 4th Amendment*, NATIONAL LAW JOURNAL, July 31, 1995, p.C8.

dignity that the Framers sought to secure for us. This was well captured, as Justice O'Connor observed, in James Acton's father's testimony at trial: "[suspicionless testing] sends a message to children that are trying to be responsible citizens . . . that they have to prove that they're innocent . . . and I think that kind of sets a bad tone for citizenship."<sup>185</sup>

### III. DOUBLE JEOPARDY

Under the Federal Sentencing Guidelines, a defendant's sentence can be enhanced as a result of uncharged "relevant conduct."<sup>186</sup> What happens if the defendant is subsequently convicted of that uncharged conduct? In *Witte v. United States*<sup>187</sup> the Court, in an opinion by Justice O'Connor, held that the Double Jeopardy Clause is not violated by the subsequent conviction.<sup>188</sup> Justice Stevens was the sole dissenter.<sup>189</sup>

Witte pleaded guilty to a federal marijuana charge.<sup>190</sup> The presentence report calculated his base offense level under the Guidelines by aggregating the total quantity of drugs not only in Witte's offense of conviction but also in uncharged criminal conduct in which he had engaged with several co-conspirators.<sup>191</sup> His sentence was thus greater than had only the drugs involved in his conviction been considered but it was still within the authorized penalty for his offense.

Witte was subsequently indicted for conspiring and attempting to import cocaine.<sup>192</sup> He moved to dismiss the indictment on the ground that the cocaine transaction had been considered as "relevant conduct" at his marijuana sentencing and that he was

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185. *Vernonia*, 115 S. Ct. at 2405 (quoting Trial Transcript at 9).

186. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 1B1.3 (Nov. 1995).

187. 115 S. Ct. 2199 (1995).

188. *Id.* at 2209.

189. *Id.* at 2202.

190. *Id.* at 2203.

191. *Id.*

192. *Id.*

thus being punished twice for the same crime.<sup>193</sup> The district court dismissed the indictment, finding a violation of the Double Jeopardy Clause.<sup>194</sup> The Ninth Circuit reversed, holding that the use of relevant conduct to increase the punishment for a charged offense does not punish the offender for the relevant conduct.<sup>195</sup>

In affirming, the Court agreed with the Ninth Circuit's reliance on *Williams v. Oklahoma*.<sup>196</sup> In *Williams*, the defendant pleaded guilty to murder and was given a life sentence.<sup>197</sup> He was subsequently convicted of kidnapping and sentenced to death after the judge took into account that the kidnapping victim had been murdered.<sup>198</sup> Quoting from *Williams*, Justice O'Connor explained that because Oklahoma law rendered "kidnapping a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnapping crime cannot be said to have resulted in punishing petitioner a second time for the same offense . . . ." <sup>199</sup> In applying this principle in *Witte*, Justice O'Connor held that it makes no difference that in *Williams* the enhancement occurred in the second proceeding whereas in *Witte*, it took place in the first proceeding.<sup>200</sup> She argued that:

the uncharged criminal conduct was used to enhance petitioner's sentence within the range authorized by statute. If use of the murder to justify the death sentence for the kidnapping conviction was not 'punishment' for the murder in *Williams*, it is impossible to conclude that taking account of petitioner's plans to import cocaine in fixing the sentence for the marijuana conviction constituted 'punishment' for the cocaine offenses.<sup>201</sup>

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193. *Id.* at 2203-04.

194. *Id.* at 2204.

195. *Id.*

196. 358 U.S. 576 (1959).

197. *Id.* at 578.

198. *Id.* at 581.

199. *Witte*, 115 S. Ct. at 2206 (quoting *Williams*, 358 U.S. at 586).

200. *Id.*

201. *Id.*

Moreover, she pointed out, “by authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, our cases necessarily imply that such consideration does not result in ‘punishment’ for such conduct.”<sup>202</sup>

Justice O’Connor also rejected the notion that the Guidelines change the constitutional analysis, holding that “a defendant has not been ‘punished’ any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account.”<sup>203</sup> In each case, “the defendant is still being punished only for the offense of conviction.”<sup>204</sup>

Concurring, Justice Scalia, joined by Justice Thomas, reiterated his view that the Double Jeopardy Clause provides protection only against twice being prosecuted for the same offense, and not for twice being punished.<sup>205</sup>

In dissent, Justice Stevens observed that it is one thing when a sentencing judge reviews an offender’s prior convictions at sentencing and quite another when the offenses considered at sentencing are linked to the offense of conviction.<sup>206</sup> In the first instance, “the judge is not punishing that offender a second time for his past misconduct, but rather is evaluating the nature of his individual responsibility for past acts and the likelihood that he will engage in future misconduct.”<sup>207</sup> In the latter instance, “offenses that are linked to the offense of conviction may affect both the character of the offense and the character of the

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202. Justice O’Connor relied specifically on *McMillan v. Pennsylvania*, 477 U.S. 79, 81 (1986) (upholding Pennsylvania’s Mandatory Minimum Sentencing Act which allowed an enhanced sentence for specified felonies if the court found, “by a preponderance of evidence, that the defendant ‘visibly possessed a firearm’ during the commission of the offense”).

203. *Witte*, 115 S. Ct. at 2207.

204. *Id.*

205. *Id.* at 2209-10.

206. *Id.* at 2211.

207. *Id.* (Stevens, J., dissenting).

offender.”<sup>208</sup> When they affect the character of the offense and not the character of the offender, he reasoned, the Double Jeopardy Clause is implicated because “[a]t that point, the defendant is being punished for having committed the offense at issue, and not for what the commission of that offense reveals about his character.”<sup>209</sup>

With both *Williams* and *McMillan v. Pennsylvania*<sup>210</sup> on the books, the result in *Witte* comes as no surprise. Although Justice Stevens attempted to distinguish both cases,<sup>211</sup> there were no other takers. The result of the case, however, adds yet another layer of concern for defense counsel who must always consider every possibility in advising a client about the wisdom of entering a guilty plea. Justice O’Connor, in a portion of her opinion that represents the view of five Justices, observed that the Sentencing Guidelines provide some protection for a defendant who is convicted of conduct that has been previously used as “relevant conduct” under the Guidelines.<sup>212</sup> Here is what she said and I quote extensively in the hope that defense counsel may benefit from the possibilities that Justice O’Connor identifies:

Because the concept of relevant conduct under the Guidelines is reciprocal, [Section] 5G1.3 operates to mitigate the possibility

208. *Id.* (Stevens, J., dissenting).

209. *Id.* (Stevens, J., dissenting).

210. 477 U.S. 79 (1986).

211. *Witte*, 115 S. Ct. at 2213 (Stevens, J., dissenting). Justice Stevens points out that *Williams v. Oklahoma*, 358 U.S. 576 (1959), was decided before *Benton v. Maryland*, 395 U.S. 784 (1969) which held the Double Jeopardy Clause applicable to the States and applied only a ‘watered down’ version of due process. Also, *Williams* never raised a double jeopardy objection to his kidnapping prosecution -- which would have paralleled *Witte*’s objection. Stevens also thought that *Williams* was wrongly decided. Although he also believed *McMillan* was wrongly decided, he maintained that it did not support the majority’s position because two recent cases, *United States v. Halper*, 490 U.S. 435 (1989) and *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), “emphatically rejected the proposition that punishment under the Double Jeopardy Clause only occurs when a court imposes a sentence for an offense that is proven beyond a reasonable doubt at a criminal trial.” *Witte*, 115 S. Ct. at 2213.

212. *Witte*, 115 S. Ct. at 2208.

that the fortuity of two separate prosecutions will grossly increase a defendant's sentence. If a defendant is serving an undischarged term of imprisonment "result[ing] from offense[s] that have been fully taken into account [as relevant conduct] in the determination of the offense level for the instant offense," [Section] 5G1.3(b) provides that "the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." And where [Section] 5G1.3(b) does not apply, an accompanying policy statement provides, "the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense."<sup>213</sup>

Even if the Sentencing Commission had not formalized sentencing for multiple convictions in this way, district courts under the Guidelines retain enough flexibility in appropriate cases to take into account the fact that conduct underlying the offense at issue has previously been taken into account in sentencing for another offense. As the Commission has explained, "under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists and aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that prescribed.'"<sup>214</sup> This departure power is also available to protect against petitioner's second major practical concern: that a second sentence for the same relevant conduct may deprive him of the effect of a downward departure under [Section] 5K1.1 of the Guidelines for substantial assistance to the Government, which reduced his first sentence significantly. Should petitioner be convicted of the cocaine charges, he will be free to put his argument concerning the unusual facts of this case to the sentencing judge as a basis for discretionary downward departure.<sup>215</sup>

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213. *Id.* (citation omitted).

214. *Id.* (citation omitted).

215. *Id.* at 2208-09.



Whether any defense attorney will feel comfortable with this balm from Justice O'Connor is a question you can answer for yourself.

#### IV. THE *EX POST FACTO* CLAUSE

The Constitution's *Ex Post Facto* Clause<sup>216</sup> has not, in comparison with other provisions of the Constitution that affect criminal justice, received much attention from the Court. Current interest in the Clause's scope is triggered primarily by the enactment of "Megan's Law" type statutes that require convicted sex offenders to notify authorities when they return to a community after having served their sentences.<sup>217</sup> Because those statutes affect the liberty of prisoners whose sex crimes antedated their enactment, they have been challenged as violative of the *Ex Post Facto* Clause. The results have been mixed. The Supreme Court's decision in *California Dept. of Corrections v. Morales*,<sup>218</sup> will not afford those challengers much solace.

Morales was sentenced in 1980 to fifteen years to life for the murder of his wife.<sup>219</sup> This unfortunate woman, Lois Washabaugh, was seventy-five years old when she met Morales, who was serving a life sentence for the 1970 murder of his girlfriend.<sup>220</sup>

Ms. Washabaugh met him because she had begun visiting inmates in California's Soledad Prison after gaining an interest in

216. U.S. CONST. art. I, § 10, cl. 1. This clause states in pertinent part: "No state shall . . . pass any . . . ex post facto Law . . .". *Id.*

217. *See, e.g.*, Sexual Offender Registration Act, N.J. STAT.ANN. § 2C:7-1 et seq. (West 1995); Registration of Sex Offenders, ARIZ. REV. STAT.ANN. § 13-3821 (West 1995); Sex Offender Registration Law, MINN. STAT. § 243.166 (Supp. 1993); Convicted Sex Offender Act, NEB. REV. STAT. § 29-2922 et seq. (Cum. Supp. 1992).

218. 115 S. Ct. 1597 (1995).

219. *Id.* at 1600.

220. *Id.*

prison reform.<sup>221</sup> She married Morales some time after his release to a halfway house in 1980.<sup>222</sup>

At the time Morales murdered his wife, California law provided that prisoners such as Morales were entitled to parole suitability hearings on an annual basis.<sup>223</sup> However, in 1981, the California Legislature changed the law by authorizing the Parole Board, after the prisoner's first parole hearing,

to defer subsequent suitability hearings for up to three years if the prisoner has been convicted of more than one offense which involves the taking of a life and if the Board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the basis for the finding.<sup>224</sup>

Morales became eligible for parole in 1990 and he appeared before the Parole Board in July, 1989.<sup>225</sup> In a decision that did not send shock waves through the state including, I am sure, the defense bar, the Board determined that Morales was unsuitable for parole, citing factors such as the mutilation of his wife before and after he killed her, his record of violence and assaultive behavior, and his commission of the second murder while he was on parole for his first.<sup>226</sup> The Board also determined that it was not reasonable to expect that Morales would become eligible for parole in 1990 or 1991.<sup>227</sup> Consequently, pursuant to the 1981 amendment, it scheduled Morales' next hearing for 1992.<sup>228</sup>

Morales filed a federal habeas corpus petition asserting violation of the *Ex Post Facto* Clause.<sup>229</sup> The district court denied the petition but the Ninth Circuit reversed, holding that "any retrospective law making parole hearings less accessible

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221. *Id.*

222. *Id.* at 1599-1600.

223. *Id.* at 1600.

224. *Id.* (citing CAL. PENAL CODE ANN. § 3041.5(b)(2) (West 1982)).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

would effectively increase the [prisoner's] sentence and violate the *ex post facto* clause."<sup>230</sup>

In a 7-2 decision, with Justice Thomas writing, the Supreme Court reversed.<sup>231</sup> Pointing to precedents dating back many years,<sup>232</sup> Thomas reiterated that the *Ex Post Facto* Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts."<sup>233</sup> The question before the Court was whether the 1981 amendment increases the "punishment" attached to Morales' 1980 murder of his wife.<sup>234</sup> Justice Thomas held that it did not.<sup>235</sup> In arriving at that determination, he had to distinguish three cases upon which Morales relied: *Lindsey v. Washington*,<sup>236</sup> in which a statute was held unconstitutional because it required a judge to impose a maximum fifteen year sentence and superseded a statute that authorized judges to impose an indeterminate sentence not in excess of fifteen years, and *Weaver v. Graham*,<sup>237</sup> and *Miller v. Florida*,<sup>238</sup> two cases in which statutes that changed the substantive "formula" used to calculate the applicable sentencing range were found to violate the *Ex Post Facto* Clause because they increased the "quantum of punishment" to which the defendants were exposed.

That was not the case in *Morales*, concluded Justice Thomas.<sup>239</sup> The 1981 amendment, he pointed out, did not change the substantive formula for securing any reductions to the fifteen to life sentence that was prescribed both before and after the 1981

230. *Id.*

231. *Id.* at 1599.

232. *Id.* at 1601 (citing *Collins v. Youngblood*, 497 U.S. 37 (1990); *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925); *Calder v. Bull*, 3 U.S. (Dall.) 386, 391-92 (1798)).

233. *Id.* (citations omitted).

234. *Id.*

235. *Id.* at 1605.

236. 301 U.S. 397 (1937).

237. 450 U.S. 24 (1981).

238. 482 U.S. 423 (1987).

239. *Morales*, 115 S. Ct. at 1602.

amendment to the parole procedure.<sup>240</sup> Nor did it have any effect on the standards for fixing a prisoner's initial date of eligibility for parole.<sup>241</sup> The only change that the 1981 amendment did make, Justice Thomas observed, is that "it introduced the possibility that after the initial parole hearing, the Board would not have to hold another hearing the very next year, or the year after that, if it found no reasonable probability that respondent would be deemed suitable for parole in the interim period."<sup>242</sup> Therefore, Justice Thomas reasoned, "[r]ather than changing the sentencing range applicable to covered crimes, the 1981 amendment simply 'alters the method to be followed' in fixing a parole release date under identical substantive standards."<sup>243</sup>

Justice Thomas rejected Morales' argument that "the *Ex Post Facto* Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment."<sup>244</sup> The question, he stated, was one of degree and that the Court must decide whether the 1981 amendment "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes."<sup>245</sup> He emphasized that it did not because it "applies only to a class of prisoners for whom the likelihood of release on parole is quite remote,"<sup>246</sup> and that the Parole Board's authority under the amendment is carefully tailored to the legitimate end of relieving the Board from the burdens of conducting parole hearings who have no realistic chance for parole.<sup>247</sup> The *Ex Post Facto* Clause was not violated, Justice Thomas concluded, by legislation that "creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes."<sup>248</sup>

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240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* (citing *Miller v. Florida*, 482 U.S. 423, 433 (1987)).

244. *Id.*

245. *Id.* at 1603 (footnote omitted).

246. *Id.*

247. *Id.* at 1604.

248. *Id.* at 1605.

Justice Stevens, joined by Justice Souter, dissented.<sup>249</sup> His argument rested on four main assertions: (1) the importance which the Framers placed on the *Ex Post Facto* Clause had led the Court to always enforce it scrupulously;<sup>250</sup> (2) a prisoner need not establish that retroactive application of a law authorizing increased punishment actually affected his sentence;<sup>251</sup> (3) retroactive statutes increasing punishment were impermissible if they affected parole or early release, not just initial sentencing;<sup>252</sup> and (4) “an increase in punishment occurs when the State deprives a person of the *opportunity* to take advantage of provisions for early release.”<sup>253</sup> He also disputed that the 1981 amendment was a cost-cutting measure,<sup>254</sup> calling it “vindictive legislation” against a small but unpopular group of prisoners — multiple murderers.<sup>255</sup> And, “the narrower the class burdened by retroactive legislation,” he pointed out, “the greater the danger that the legislation has the characteristic of a bill of attainder.”<sup>256</sup>

Justice Stevens also concluded that whether the 1981 amendment actually increased punishment was not, as the majority determined, “speculative.”<sup>257</sup> In his view, it “runs in the other direction”<sup>258</sup> because “[b]y postponing and reducing the number of parole hearings . . . the amendment will at best leave an inmate in the same position he was in, and will almost inevitably delay the grant of parole in some cases.”<sup>259</sup>

As a purely logical matter, Justice Stevens may have the better of the argument. His analysis of the relevant precedents is more persuasive. To avoid their impact, Justice Thomas had to make a

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249. *Id.*

250. *Id.* at 1606 (Stevens, J., dissenting).

251. *Id.* at 1607 (Stevens, J., dissenting).

252. *Id.* (Stevens, J., dissenting).

253. *Id.* (Stevens, J., dissenting).

254. *Id.* at 1609 (Stevens, J., dissenting).

255. *Id.* at 1608 (Stevens, J., dissenting).

256. *Id.* (Stevens, J., dissenting) (footnote omitted).

257. *Id.* at 1611 (Stevens, J., dissenting).

258. *Id.* (Stevens, J., dissenting).

259. *Id.* (Stevens, J., dissenting).

slight adjustment through excision of the “disadvantage” language of the earlier cases, and cast his analysis in terms of “degree.”<sup>260</sup> Stevens seems accurate in concluding that, under the 1981 amendment, some prisoners will be disadvantaged because, under the prior statute, one or more might have been paroled earlier. As a practical matter, however, the facts of the case made that concept difficult to embrace -- other than as a purely hypothetical construct. The prospect that Morales, or multiple murderers like him, would see the street earlier but for the 1981 amendment might strike some as a laughable proposition.

Not so laughable is a recent across the board increase in the security classifications of Maryland prisoners serving life sentences.<sup>261</sup> In the first decision to apply *Morales*, the federal district court for Maryland held that a new classification scheme adopted by prison authorities violated the *Ex Post Facto* Clause because unlike the parole scheme alteration challenged in *Morales*, the impact on the prisoners, although lifers, was not speculative.<sup>262</sup> Under Maryland’s new classification scheme, lifers can no longer be granted pre-release security.<sup>263</sup> Without that classification, they can no longer participate in work-release programs. Since existing Parole Commission policy requires work-release as a prerequisite for parole, lifers are now precluded from ever being granted parole.<sup>264</sup> Although the court acknowledged that lifers are only rarely granted parole, that opportunity “did exist for lifers who displayed an exceptional attitude and who compiled an excellent record while incarcerated.”<sup>265</sup> By shutting down that possibility, the court concluded, the new classification scheme snuffed out the “[h]ope and the longing for reward for one’s efforts [which] lie at the

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260. *Id.* at 1603.

261. *Knox v. Lanham*, 895 F. Supp. 750 (D. Md. 1995).

262. *Id.* at 758.

263. *Id.*

264. *Id.*

265. *Id.*

heart of the human condition.”<sup>266</sup> Whether, if appealed, this case will not be controlled by *Morales* remains to be seen.

## V. HABEAS CORPUS

Two features characterize the Court’s recent habeas corpus jurisprudence: the intricate nature of the cases and the coalescence, of a Court majority to fend off further major substantive onslaughts on the Great Writ. In *O’Neal v. McAninch*,<sup>267</sup> the Court split 6-3 in what was a rather strange case factually. The petitioner filed a federal habeas petition challenging his state court conviction for murder and other crimes.<sup>268</sup> The district court agreed with several of his claims of constitutional trial error.<sup>269</sup> The Sixth Circuit disagreed with the district court except for one issue – possible jury confusion caused by a trial court instruction as to the state of mind required for conviction combined with a related statement by the prosecutor.<sup>270</sup> The court of appeals applied the harmless error standard appropriate to federal habeas corpus cases decreed two years in *Brecht v. Abrahamson*:<sup>271</sup> “whether the error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’”<sup>272</sup> However, Justice Breyer, writing for the Court, construed the court of appeals’ opinion as follows: “rather than ask directly whether the record’s facts satisfied this

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266. *Id.*

267. 115 S. Ct. 992 (1995).

268. *Id.* at 994.

269. *Id.*

270. *Id.*

271. 113 S. Ct. 1710 (1993).

272. *O’Neal*, 115 S. Ct. at 994 (quoting *Brecht*, 113 S. Ct. at 1712). *Brecht* had lowered the harmless error standard for federal habeas courts by holding that federal constitutional error can be deemed harmless even if the habeas court would not hold the error harmless beyond a reasonable doubt as required by *Chapman v. California*, 368 U.S. 18, 21-24 (1967), for state court review of the same error.

standard, the court seemed to refer to a burden of proof.”<sup>273</sup>  
This meant that

[a]s a practical matter, . . . if a judge is in grave doubt about the effect on the jury of this kind of error, the petitioner must lose. Thus, O’Neal might have lost in the Court of Appeals, not because the judges concluded that the error *was* harmless, but because the record of the trial left them in grave doubt about the effect of the error.<sup>274</sup>

Having read the court of appeals’ opinion in this fashion, Justice Breyer held that “[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had a ‘substantial and injurious effect or influence in determining the jury’s verdict,’ that error is not harmless.”<sup>275</sup> This result, he explained, was compelled by precedent.<sup>276</sup> The decision on which *Brecht* was based, *Kotteakos v. United States*,<sup>277</sup> stated, in the context of direct review of non-constitutional errors, that “if one is left in grave doubt, the conviction cannot stand.”<sup>278</sup>

One problem with this approach was that *Brecht* itself stated that habeas petitioners “are not entitled to habeas relief based on trial error unless *they* can establish that it resulted in ‘actual prejudice.’”<sup>279</sup> Justice Breyer averted this by pointing out that the passage was not supported by Justice Stevens and thus did not command a majority of the *Brecht* Court; it was also inconsistent with the *Kotteakos* rule itself.<sup>280</sup>

Justice Breyer also brushed aside the argument that habeas corpus proceedings, being civil proceedings, placed on habeas petitioners the burden of proof normally carried by civil suit

273. *O’Neal*, 115 S. Ct. at 994.

274. *Id.*

275. *Id.*

276. *Id.* at 995.

277. 328 U.S. 750 (1946).

278. *Id.* at 765.

279. *O’Neal*, 115 S. Ct at 995-96 (quoting *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1721 (1993)).

280. *Id.* at 996.



plaintiffs. Habeas proceedings were different, he observed, because of the stakes involved.<sup>281</sup> Moreover, he maintained, civil cases involving “grave doubt” are in accord with the majority’s rule.<sup>282</sup>

In addition, Justice Breyer argued that giving the benefit of the doubt to the habeas petitioner in this kind of close case serves “the basic purposes underlying the writ of habeas corpus.”<sup>283</sup> When the final conclusion about harmlessness is difficult to draw, coming down in favor of the writ “both protects individuals from unconstitutional convictions and helps to guarantee the integrity of the criminal process by assuring that trials are fundamentally fair.”<sup>284</sup>

Justice Thomas, joined in dissent by Chief Justice Rehnquist and Justice Scalia, agreed with the State that absent a finding that the error was harmful, the statutory basis for habeas relief has not been triggered.<sup>285</sup> The habeas petitioner should bear the burden of showing that the error caused his custody, just as a civil plaintiff must show that the defendant’s conduct caused harm, Thomas argued. Placing the burden on the petitioner is also appropriate, he said, in light of the strong protections the criminal justice system affords against convicting the innocent and the affront to state interests that habeas review represents.

It is difficult to think of a Supreme Court decision with less pragmatic consequence than this one. It came about only because the Court construed the court of appeals’ opinion as one in which the judges below were in “grave doubt” or in “virtual equipoise” about the effect of the state trial court’s error. But for one instance,<sup>286</sup> I have never known a judge to declare him or herself in “equipoise.” Judges will continue to decide in habeas

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281. *Id.*

282. *Id.* at 996-97.

283. *Id.* at 997.

284. *Id.* (citation omitted).

285. *Id.* at 999.

286. That instance occurred at the end of a non-jury criminal trial at which a Justice of the New York Supreme Court of rather colorful mien declared himself “hung.” (Leff, J., N.Y. Sup. Ct.).

proceedings, even close ones, whether the error was harmless or not.

However, *O'Neal* has considerable symbolic significance. It is another decision in which a majority has retarded the erosive process that has marked much of the Court's habeas jurisprudence over the last fifteen years. While in contrast with the Court's major substantive regressions of recent years, there is little substantive harvest in *O'Neal*; the language and spirit of the majority opinion reflects a deeper appreciation of the Great Writ than we are accustomed to from the Court. That the Court's newest member, Justice Breyer, is so disposed augurs well for those who believe that further dismantling of habeas corpus protections is undesirable.

In *Schlup v. Delo*,<sup>287</sup> a 5-4 majority did render a significant doctrinal decision that is favorable to habeas petitioners. The case required an elaboration of the "miscarriage of justice" exception to the rules against federal habeas courts' consideration of procedurally barred claims. In an opinion by Justice Stevens, the Court held that habeas petitioners who allege constitutional violations in the proceedings leading up to their convictions and who claim to be actually innocent have a lesser burden to carry than those who claim only to be "innocent" of the death penalty.<sup>288</sup> What must be shown, the majority held, is that "a constitutional violation has probably resulted in the conviction of one who is actually innocent."<sup>289</sup> In other words, the petitioner "must show that no reasonable juror would have convicted him in the light of the new evidence," rather than prove it by the more demanding "clear and convincing" standard applied by the lower court.<sup>290</sup>

Lloyd Schlup was convicted of murder and sentenced to death for his alleged part in the stabbing of a fellow prison inmate.<sup>291</sup> At trial, he claimed that the state's witnesses had misidentified

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287. 115 S. Ct. 851 (1995).

288. *Id.* at 861.

289. *Id.* at 864 (citations omitted).

290. *Id.* at 865 (citations omitted).

291. *Id.* at 854.

him.<sup>292</sup> He presented evidence that he was in the prison dining room some distance from the scene of the stabbing more than a minute before corrections officers left the dining room to respond to a distress call.<sup>293</sup> The exact time at which the distress call was made became a key issue at trial.<sup>294</sup> Schlup was convicted and his conviction was affirmed on appeal.<sup>295</sup> He also was unsuccessful in his first federal habeas petition.<sup>296</sup>

Schlup filed a second habeas petition in which he claimed to be innocent, alleged that his attorney had rendered ineffective assistance by failing to interview witnesses who could have provided favorable evidence on the timing and identification issues, and asserted that the prosecution withheld such evidence in violation of *Brady v. Maryland*.<sup>297</sup>

Because Schlup's habeas petition was a successive one, his claims were barred absent a showing of cause and prejudice pursuant to *Wainwright v. Sykes*.<sup>298</sup> Schlup did not show cause and the Eighth Circuit held that he also did not make the showing necessary for consideration of the barred claims under the "fundamental miscarriage of justice" exception to the cause and prejudice requirement.

Justice Stevens held that the court of appeals applied the wrong formulation of the miscarriage of justice standard. He distinguished the case from *Herrera v. Collins*,<sup>299</sup> in which a death row inmate had also put forth a claim of actual innocence. Both Herrera and Schlup brought forth new evidence to show their innocence. However, Schlup made a "procedural" claim in that he attacked the fairness of the prior proceedings; in contrast, Herrera made the "substantive" claim that executing an innocent person would violate the Eighth Amendment. Justice Stevens

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292. *Id.* at 854-857.

293. *Id.* at 855.

294. *Id.*

295. *Id.* at 856.

296. *Id.* at 856-57.

297. 373 U.S. 83 (1963). See *infra* note 307 and accompanying text.

298. 433 U.S. 72 (1977).

299. 506 U.S. 390 (1993).

wrote that because Schlup “accompanie[d] his claim of innocence with an assertion of constitutional error at trial,”<sup>300</sup> his conviction “may not be entitled to the same degree of respect”<sup>301</sup> as Herrera’s. Justice Stevens compared the burdens on Schlup and Herrera:

In *Herrera* (on the assumption that petitioner’s claim was, in principle, well founded), the evidence of innocence would have had to be strong enough to make his execution ‘constitutionally intolerable’ *even if* his conviction was the product of a fair trial. For Schlup, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was the product of a fair trial.<sup>302</sup>

Justice Stevens acknowledged the development of the rules disfavoring review, on federal habeas corpus, of claims raised in second and subsequent petitions. He noted that those rules reflect concerns for comity but he also pointed out that equitable concerns have led the Court to recognize an exception for “fundamental miscarriages of justice,”<sup>303</sup> an exception linked explicitly to claims of actual innocence.

The Eighth Circuit’s error, Justice Stevens stated, was in applying the standard set forth in *Sawyer v. Whitley*.<sup>304</sup> In that case, in which the petitioner claimed to be actually innocent of the death penalty, i.e. that death was not the proper penalty, the miscarriage of justice doctrine requires the petitioner to “show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.”<sup>305</sup> The balance of competing interests is different, Stevens explained, when the argument is that constitutional error resulted in the conviction of one who is actually innocent. Substantial claims of this kind are “extremely

300. *Schlup*, 115 S. Ct. at 861.

301. *Id.*

302. *Id.* at 861-62 (emphasis in original).

303. *Id.* at 864.

304. 505 U.S. 333 (1992).

305. *Schlup*, 115 S. Ct. at 865 (quoting *Sawyer*, 505 U.S. at 336).

rare” and thus pose fewer threats to scarce judicial resources and the interests in finality and comity than claims going to the sentence alone.<sup>306</sup> “Of greater importance,” he said, “the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent.”<sup>307</sup> The proper standard for such a case comes not from *Sawyer* but from *Murray v. Carrier*,<sup>308</sup> and requires only a showing that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.”<sup>309</sup>

Justice Stevens explained further that the *Murray* standard differs from that which applies to claims of insufficient evidence. The petitioner “must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.”<sup>310</sup> This is more than a showing of “prejudice” under *Wainwright v. Sykes*,<sup>311</sup> but less exacting than *Sawyer*’s clear and convincing evidence test. In arriving at a decision, Stevens said the habeas court is to consider not only the evidence introduced at trial but also relevant evidence that was excluded or unavailable at that time.<sup>312</sup> In essence, the habeas court’s job is “to make a probabilistic determination about what reasonable, properly instructed jurors would do.”<sup>313</sup> If the new evidence calls into question the credibility of the witnesses who testified at trial, the court will have to make credibility assessments.

Justice O’Connor concurred briefly, noting that under the majority opinion, the burden on the petitioner is higher than what is required to show prejudice under the *Strickland* standard.<sup>314</sup>

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306. *Id.*

307. *Id.* at 866 (citations omitted).

308. 477 U.S. 478 (1986).

309. *Schlup*, 115 S. Ct. at 867 (citations omitted).

310. *Id.*

311. 433 U.S. 72 (1977).

312. *Id.*

313. *Schlup*, 115 S. Ct. at 868.

314. *Id.* at 869-70 (referring to *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (the standard for prejudice requires only “a reasonable probability

She also pointed out that the Court did not decide whether the miscarriage of justice exception is a discretionary remedy or whether abuse of discretion is the proper standard of appellate review. O'Connor concluded that the lower court's ruling was quintessentially an abuse of discretion because it had based its judgment on an erroneous rule of law by applying the *Sawyer v. Whitley* standard.

Chief Justice Rehnquist dissented, joined by Justices Kennedy and Thomas.<sup>315</sup> He argued that the Court should have applied *Sawyer* and that it erred further by adopting a watered down version of the *Murray* standard.<sup>316</sup> The confusion, he claimed, came from the majority's mixing of "a quintessential charge to a finder of fact," the "more likely than not" component of the test, with "a quintessential conclusion of law" -- the "no reasonable juror would have convicted" component.<sup>317</sup>

Justice Scalia also dissented, joined by Justice Thomas.<sup>318</sup> He was distressed that the majority decided the case by focusing on fairness rather than by reference to the language of 28 U.S.C. § 2244, which addresses second and subsequent habeas petitions.<sup>319</sup> The statute, Scalia argued, contains no authority for

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that absent the errors, the factfinder would had have a reasonable doubt respecting guilt"))).

315. *Schlup*, 115 S. Ct. at 870.

316. *Id.* at 873 (Rehnquist, J., dissenting).

317. *Id.* (Rehnquist, J., dissenting).

318. *Id.* at 874.

319. *Id.* at 875 (Scalia, J., dissenting). Section 2244(b) provides:

When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not in an earlier

the result reached by the majority. By ignoring the statute, the Court's decision amounts to a directive that federal courts must, in certain circumstances, consider barred claims.

Of the habeas corpus decisions rendered during the Term, none produced as much vitriol from the dissenters as did *Kyles v. Whitley*.<sup>320</sup> Justice Scalia proclaimed that “[t]he greatest puzzle of [this] decision is what could have caused *this* capital case to be singled out for favored treatment.”<sup>321</sup> His distress undoubtedly resulted from the fact that the case does not break significant new ground, either in habeas corpus jurisprudence or in *Brady v. Maryland*<sup>322</sup> doctrine. Whether his protest is warranted depends on whether he is correct that for it to command the Court's time and attention, even a capital case must have broader constitutional significance to the nation than did this one.

The nub of the case was whether Kyles' Louisiana murder conviction should be overturned on federal habeas because state prosecutors withheld information that could have been favorable to him. Kyles was convicted of shooting a woman in a grocery store parking lot in New Orleans.<sup>323</sup> The perpetrator drove off in the woman's car.<sup>324</sup> Some forty-eight hours later, “Beanie” Walton contacted the police and told them that he believed that a car he bought from Kyles belonged to the deceased.<sup>325</sup> In a subsequent interview, Beanie suggested that the police search Kyles' trash for the victim's purse.<sup>326</sup> The police did so on the next scheduled trash pickup day and incriminating evidence was found.<sup>327</sup> Beanie also told the police that the murder weapon

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application deliberately withheld the newly asserted ground or otherwise abused the writ.

*Id.*

320. 115 S. Ct. 1555 (1995).

321. *Id.* at 1577 (Scalia, J., dissenting) (emphasis in original).

322. 373 U.S. 83 (1963).

323. *Whitley*, 115 S. Ct. at 1560.

324. *Id.*

325. *Id.* at 1561.

326. *Id.* at 1562.

327. *Id.* at 1563.

would be found in Kyles' apartment, and it was.<sup>328</sup> A number of eyewitnesses identified Kyles as the victim's assailant but there were discrepancies in their testimony.<sup>329</sup>

The evidence withheld by the prosecution included contemporaneous statements taken by police from eyewitnesses, records of Beanie's initial call to the police and of a subsequent conversation he had with two officers, a signed statement he gave still later, an internal police memo calling for the seizure of Kyles' trash, and evidence linking Beanie to other crimes.<sup>330</sup> Beanie's story, which changed a number of times during the investigation stage, changed yet again in an interview conducted by the prosecutor after Kyles' first trial ended in a hung jury. The prosecutor's notes of that interview were not disclosed to the defense. It was the defense theory that Beanie, who never testified was, in fact, the murderer.

*Brady* held that, as a matter of due process, the prosecution has the duty to disclose to the defense evidence that is "material" and favorable to the accused.<sup>331</sup> In *United States v. Bagley*,<sup>332</sup> the Court stated that favorable evidence is material, and constitutional error results from its suppression, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."<sup>333</sup>

Writing for the 5-4 majority, Justice Souter focused on four aspects of materiality that were germane. First, he pointed out that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal."<sup>334</sup> Second, *Bagley* does not call for a "sufficiency of evidence" test -- the

328. *Id.* at 1562.

329. *Id.* at 1560-61.

330. *Id.* at 1562.

331. *Brady*, 373 U.S. at 87.

332. 473 U.S. 667 (1985).

333. *Id.* at 682. In addition, "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*

334. *Whitley*, 115 S. Ct. at 1566.



“defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not be enough left to convict.”<sup>335</sup> Third, “once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless error review.”<sup>336</sup> The court of appeals had assumed the contrary and Justice Souter pointed out that the harmless error standard now applicable on federal habeas review as per *Brecht v. Abrahamson*,<sup>337</sup> had previously been proposed as a materiality standard under *Brady* but had been rejected by the Court as insufficiently demanding.<sup>338</sup> Last, Justice Souter emphasized that materiality is defined “in terms of suppressed evidence considered collectively, not item-by-item.”<sup>339</sup>

Applying these principles to the evidence withheld by the prosecution, Justice Souter demonstrated how it could have been used by the defense to cast doubt on the prosecution’s case. (And here I am moving very skimpily given the extensive factual nature of the case). He pointed out how the state’s best eyewitness, who testified he had seen the actual shooting, could have been impeached with the description he initially gave of the perpetrator, which matched Beanie, rather than Kyles, in terms of weight, height, and build. Access to the initial statement of a second eyewitness could have persuaded the jury that Beanie’s much more detailed and positive trial testimony was the result of coaching.

Justice Souter further pointed out that Beanie’s undisclosed statements “would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well.”<sup>340</sup> He reasoned that the defense would have been able to trip Beanie up on almost

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335. *Id.*

336. *Id.*

337. 113 S. Ct. 1710 (1993).

338. *Whitley*, 115 S. Ct. at 1567.

339. *Id.*

340. *Id.* at 1571.

any important thing that he said and even if Beanie had not been called to testify, the defense could have capitalized by showing the “remarkably uncritical attitude” the police displayed toward Beanie.<sup>341</sup> Concluding that the physical evidence against Kyles was inconclusive, Justice Souter held that the Court could not be confident that the jury’s verdict would have been the same had the withheld evidence been disclosed.<sup>342</sup>

Justice Stevens, joined by Justices Ginsburg and Breyer, concurred in Justice Souter’s opinion,<sup>343</sup> but he also felt compelled to respond to Justice Scalia’s vehement criticism of the decision to grant certiorari. He explained that even though no “newly minted rule of law”<sup>344</sup> emerged from the Court’s labors (although it presented “an important legal issue”),<sup>345</sup> the case merited review for at least three reasons. First, the jury’s inability to reach a verdict in the first trial provided “strong reason to believe the significant errors that occurred at the second trial were prejudicial.”<sup>346</sup> Second, cases with this much undisclosed exculpatory evidence are extremely rare.<sup>347</sup> Third, Justice Souter’s “independent review of the case left me with the same degree of doubt about petitioner’s guilt expressed by the dissenting judge [in the court below].”<sup>348</sup> Also, that this is a capital case cannot be ignored, Stevens said, and while he wished that “such review were unnecessary,” he could not “agree that our position in the judicial hierarchy makes it inappropriate.”<sup>349</sup>

The question that remains is how significant is the decision in *Kyles*. The legal principle announced is that in determining whether evidence withheld by the prosecution is “material” under *Brady*, the effect of all suppressed evidence favorable to the

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341. *Id.*

342. *Id.* at 1575.

343. *Id.* at 1576.

344. *Id.* at 1576 (Stevens, J., concurring).

345. *Id.* (Stevens, J., concurring).

346. *Id.* (Stevens, J., concurring).

347. *Id.* at 1576.

348. *Id.* (Stevens, J., concurring).

349. *Id.* (Stevens, J., concurring).

accused must be considered cumulatively, rather than on an item-by-item basis.<sup>350</sup> However, this principle had already been enunciated in *Bagley*, and it is not even clear that the court of appeals had failed to apply it to the facts in *Kyles*. In a constitutional sense, we can accept the Court's ruling as a reiteration of *Bagley* but for little else. The true significance of the case, for me, is that five justices refused to allow a capital verdict to stand when they harbored serious doubt about the defendant's guilt. To demand of a Supreme Court justice that he or she turn a blind eye in such a circumstance purely for institutional reasons strikes me as both unreasonable and unnecessary. It is not a stain on the Court's escutcheon to occasionally intervene, at least in a capital case, when it believes that a grievous injustice has been done, although righting it breaks little or no new constitutional ground. Justice Scalia has mentioned previously that he does not lose sleep over capital cases. However, some of us do lose sleep precisely because we know Justice Scalia's sleep is untroubled. *Kyles* suggests that five of the justice's colleagues also do not sleep well at certain times. For the nation, that does not strike me as a bad thing.

In *Garlotte v. Fordice*,<sup>351</sup> the Court held that a prisoner challenging his conviction can meet the federal habeas corpus statute's "custody" requirement<sup>352</sup> even if he has served the sentence imposed for it as long as he is still serving other sentences that run consecutively to the one is challenged.

Fordice pleaded guilty in state court to a marijuana offense and two counts of murder.<sup>353</sup> The court sentenced him to three years on the marijuana count and two life sentences on the murder count, concurrent with each other but consecutive to the marijuana sentence.<sup>354</sup> The court specified that the three-year sentence would run first, to be followed by the concurrent life

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350. *Id.* at 1560.

351. 115 S. Ct. 1948 (1995).

352. 28 U.S.C. § 2254(a).

353. *Garlotte*, 115 S. Ct. at 1950.

354. *Id.*

terms.<sup>355</sup> Fordice challenged his marijuana conviction but by the time he had exhausted his state remedies, he had already commenced serving his life sentences.<sup>356</sup> The Fifth Circuit held that he was no longer in custody under the marijuana conviction and thus could not attack it on federal habeas.<sup>357</sup>

Writing for a 7-2 majority, Justice Ginsburg concluded that Fordice was “in custody” for habeas purposes.<sup>358</sup> She began her analysis by stating the rule in *Peyton v. Rowe*<sup>359</sup> -- prisoners incarcerated under consecutive state court sentences can apply for federal habeas relief from sentences they have not yet begun to serve, and that consecutive sentences should be treated as a continuous series.<sup>360</sup> She then observed that *Fordice* is “*Peyton*’s complement, or *Peyton* in reverse.”<sup>361</sup> She explained that the case is similar to *Peyton* because the challenged conviction adversely affects Fordice’s release, and just as *Peyton* did not “disaggragate” the sentence, “we will not now adopt a different construction simply because the sentence imposed under the challenged conviction lies in the past rather than in the future.”<sup>362</sup>

Justice Ginsburg noted also that at least one reason for making no distinction is that state law would sometimes makes it difficult “to determine when one sentence ends and a consecutive sentence begins.”<sup>363</sup> She noted further that the Court’s ruling would not encourage prisoners to delay filing petitions because of procedural rules and prisoners’ natural inclination to secure release as soon as possible.<sup>364</sup>

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355. *Id.*

356. *Id.*

357. 29 F.3d 216, 217 (1994).

358. *Garlotte*, 115 S. Ct. at 1952.

359. 391 U.S. 54 (1968).

360. *Garlotte*, 115 S. Ct. at 1949.

361. *Id.*

362. *Id.* at 1952.

363. *Id.* at 1952 n.5.

364. *Id.*

Justice Thomas, joined by Chief Justice Rehnquist, dissented.<sup>365</sup> He argued that the practical consideration underlying *Peyton* — the need to allow claims to be brought before they grow stale — is not present in the reverse-*Peyton* context.<sup>366</sup> He preferred the rule of *Maleng v. Cook*<sup>367</sup> in which the Court held that expired convictions may not be challenged on habeas grounds.<sup>368</sup>

As a practical matter, the impact of the ruling should not be especially burdensome to the federal courts. And given the ever narrowing category of available substantive relief on federal habeas, the significance of the case dims further. However, the case is noteworthy as yet another indication of the Court's reluctance, with its newly minted centrist justices, to seize every opportunity to reduce habeas access, as would Justice Thomas and the Chief Justice.

## VI. PLEA BARGAINING

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) prohibit the use at trial of statements made by a defendant during plea negotiations.<sup>369</sup> In *United States v. Mezzanatto*,<sup>370</sup> the Court had to reconcile the strong policy behind these rules with its own liberal waiver-inclined

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365. *Id.*

366. *Id.* at 1953 (Thomas, J., dissenting).

367. 490 U.S. 488 (1989).

368. *Id.* Justice Ginsburg distinguished *Maleng* on the ground that it did not involve consecutive sentences. *Garlotte*, 115 S. Ct. at 1952. In *Maleng*, the petitioner was a federal prisoner who was yet to serve sentences imposed for state convictions. 490 U.S. at 489. On habeas, he challenged a much earlier conviction that had been used to enhance the state sentences he faced when his federal term ended. *Id.* at 489-90. The *Maleng* Court held that the potential use of a "fully expired" conviction to enhance a sentence for subsequent offenses does not suffice to render a person "in custody" within the meaning of the habeas statute. *Id.* at 493.

369. See FED. R. EVID. 410; FED. R. CRIM. PROC. 11(e)(6).

370. 115 S. Ct. 797 (1995).

jurisprudence. By a 7-2 vote, with Justice Thomas writing for the Court, the waiver jurisprudence prevailed.

Faced with various drug charges, Mezzanatto entered into plea negotiations and acceded to the prosecution's insistence that any statement he made during those negotiations could be used for impeachment purposes if the case went to trial.<sup>371</sup> Dissatisfied with the course of the negotiations, the government ended them, but not before Mezzanatto admitted some involvement in the crimes charged.<sup>372</sup> At trial, Mezzanatto testified and was impeached with the statements he made during plea negotiations.<sup>373</sup>

On appeal, Mezzanatto argued that the plea negotiation statements were inadmissible under Federal Rule of Evidence 410 and Rule 11(e)(6) of the Federal Rules of Criminal Procedure. Rule 410 provides that evidence of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty"<sup>374</sup> are "not admissible against the defendant who . . . was a participant in the plea discussions."<sup>375</sup> Rule 11 (e)(6) is virtually identical. The Ninth Circuit agreed with Mezzanatto's argument, holding that it would not "write in a waiver in a waiverless rule."<sup>376</sup>

Justice Thomas, writing for the majority, held that the Ninth Circuit's approach was at odds with the Supreme Court's waiver

371. *Id.* at 800.

372. *Id.*

373. *Id.*

374. FED. R. EVID. 410.

375. *Id.*

376. *United States v. Mezzanatto*, 998 F.2d 1452, 1456 (9th Cir.), *rev'd*, 115 S. Ct. 797 (1995). In the circuit court, the government asserted that since a defendant can waive certain constitutional rights, such as the right to an appeal, then he "should be able to waive the right to exclude plea negotiation statements." *Id.* at 1455-56. The Ninth Circuit reasoned that "[t]o equate the waiver of these rules with that of an asserted constitutional protection is a false equality. Judicially created waivers of the latter are the result of the inescapable feature of the courts interpreting the Constitution by defining the right asserted." *Id.* at 1456.

jurisprudence as expressed “in the context of a broad array of constitutional and statutory provisions.”<sup>377</sup> Thomas emphasized that waiver is generally permissible unless expressly prohibited. This is especially so, he pointed out, in the context of evidentiary rules, where waiver is a common and valuable part of everyday trial practice.<sup>378</sup> Trading away the right to object to the admission of evidence allows parties to obtain advantages that would otherwise be unavailable.<sup>379</sup> To prevail here, Mezzanatto would have to identify “some affirmative basis for concluding that the plea statement rules depart from the presumption of waivability.”<sup>380</sup>

Mezzanatto put forth three arguments: that the rules establish a “guarantee to fair procedure”<sup>381</sup> that is unwaivable, that allowing waiver will discourage defendants from entering into plea discussions, and that allowing waiver permits prosecutorial overreaching and abuse.<sup>382</sup> As to the first argument, Justice Thomas conceded that some evidentiary provisions “may be so fundamental to the fact-finding process that they may never be waived,” but the rule against admitting plea negotiation statements is not one of them.<sup>383</sup> Here, he pointed out, enforcement of the waiver enhanced the truth-seeking process. Thomas also agreed that the purpose of the rules is to encourage plea bargaining but he insisted that there is no basis in this case for concluding that waiver will interfere with this goal; incentives for prosecutors as well as defendants must be considered and barring waivers might discourage prosecutors from plea-

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377. *Mezzanatto*, 115 S. Ct. at 801 (stating “a party may waive any provision . . . of a statute intended for his benefit”) (quoting *Shute v. Thompson*, 82 U.S. (15 Wall.) 151 (1872)). *See also* *Peretz v. United States*, 501 U.S. 923, 936 (1991) (holding “[t]he most basic rights of criminal defendants are . . . subject to waiver”).

378. *Mezzanatto*, 115 S. Ct. at 802.

379. *Id.*

380. *Mezzanatto*, 115 S. Ct. at 803.

381. *Id.*

382. *Id.* at 804-05.

383. *Id.* at 803.

bargaining.<sup>384</sup> Agreeing also that there might be some potential for abuse by allowing waiver, Thomas concluded that most prosecutors can be trusted to follow the rules faithfully, and cases of abuse can be handled individually.<sup>385</sup>

It is important to note that while Justice Thomas' opinion contains no express limitation on the use of plea negotiation statements to impeach, three members of the seven-member majority -- Justices Ginsburg, O'Connor, and Breyer -- emphasized in concurrence that the only issue in this case was the admission of plea negotiation statements for impeachment, and that the issue of whether such statements could be used by the government in its case-in-chief was not before the Court.<sup>386</sup>

Justice Souter dissented, joined by Justice Stevens.<sup>387</sup> He argued that the majority's decision "is at odds with the intent of Congress and will render the Rules largely dead letters."<sup>388</sup> As he read the legislative history, the rules created more than just a personal, waivable right. Rather, they are "meant to serve the interest of the federal judicial system . . . by creating the conditions understood by Congress to be effective in promoting reasonable plea agreements . . ." <sup>389</sup> -- an interest that would not be served by allowing waiver. He also believed that the almost universal practice by which prosecutors extract waivers has caused the "exception" to "swallow the rule."<sup>390</sup>

I find it difficult to decide whether the majority or the dissent is correct. The dissent is strong on statutory construction, because the policy behind the rules is very strong. On the other hand, if one can waive virtually every constitutional right, it seems hard to defend the proposition that a statutory right cannot also be waived. Clearly, the decision strengthens the prosecution's hand by providing it with a Damocletian sword to suspend over a

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384. *Id.* at 804-05.

385. *Id.* at 806.

386. *Id.* at 806.

387. *Id.*

388. *Id.* (Souter, J., dissenting).

389. *Id.* at 808 (Souter, J., dissenting).

390. *Id.* at 808-09 (Souter, J., dissenting).



defendant's head during the plea bargaining process. And it has often been said that the true value of the sword of Damocles is not that it falls, but that it hangs.

#### CONCLUSION

For a term which has engendered questions as to whether the Court's "center" of a year ago has "held," the Court's criminal law decisions do not contribute much to the debate. While important in their own right, they were not blockbusters. Although some decisions revealed a closely divided court, the differences amongst the Justices were generally predictable in that they were largely consistent with prior voting patterns. Among the exceptions to predictability, I would list Justice Breyer's votes, since it was his first year, and the slight adjustment to the left by Justice O'Connor, especially in her *Vernonia* dissent. The Warren Court's criminal law revolution has been arrested for some time now. But for a few surprises, such as the Court's recent hostility to criminal forfeiture, the criminal law work of the Court for the past several years has remained less than remarkable. This term was not significantly different.

