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UNITED STATES SUPREME COURT; 1993-1994 TERM

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This article summarizes many of the U.S. Supreme Court's criminal law decisions of the last term.

CONFESSIONS

Miranda

In Stansbury v. California, 114 U.S. 1526 (1994), the police were looking for the murderer of a 10-year old girl. A witness had observed a turquoise car near the location where the body had been found. Other information indicated that the girl had spoken to two different ice cream truck drivers. Stansbury was one. Initially, however, the other driver was the leading suspect. When the police arrived at Stansbury's house, they told him that they were investigating a homicide and that he was a possible witness. He voluntarily agreed to accompany them to the police station.

The investigating detective interviewed Stansbury without first reading *Miranda* warnings. During the interview, Stansbury mentioned that he had returned home after work and left his trailer about midnight in his housemate's turquoise car. When Stansbury admitted to prior convictions for rape, kidnaping, and child molestation, the detective terminated the interview and advised him of his *Miranda* rights.

Stansbury moved to suppress the statements made to the detective prior to the *Miranda* warnings. The trial court ruled that Stansbury was not in custody until he mentioned the turquoise car. At that point the detective had "focused" on him as the assailant. The California Supreme Court affirmed, agreeing that "custody" occurred when the detective focused on Stansbury once the turquoise car was mentioned.

On review, the U.S. Supreme Court reversed. *Miranda* warnings are required only when a suspect is subjected to custodial interrogation. The term "custody" is defined as a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983). Whether the officer "focused" on the suspect is not relevant, unless the officer's subjective view is communicated to the suspect: "It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*." *Stansbury*, 114 S. Ct. at 1529-30.

The custody issue is determined by an objective test: Would a reasonable person believe, based on all the circumstances, that she was under arrest or its equivalent? If the officer's subjective views are communicated to the suspect, that fact along with other factors is relevant to determining "custody." Even, then, the communication is not determinative: "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." *Id.* at 1530. A police officer's statement that the suspect is under arrest is different; such a statement constitutes "custody."

The objective test cuts against the police in some circumstances. For example, an officer's view that a person is not a suspect is also not determinative. Such a subjective view would not matter if the person's freedom had been restricted to such a degree that the person was in effect under arrest.

Waiver of Right to Counsel

In Edwards v. Arizona, 451 U.S. 477 (1981), the Supreme Court held that once a suspect asserts the right to counsel after receiving *Miranda* warnings, the police must cease questioning until counsel is made available or the suspect reintiates the conversation. In Davis v. United States, 55 Crim. L. Rep. 2206 (1994), a suspect waived the right to remain silent and right to counsel when first questioned about a murder. An hour and half into the interview, Davis said, "Maybe I should talk to a lawyer." At this point, the investigators asked Davis if he wanted an attorney present. He said that he was not asking for an attorney and then added: "No, I don't want a lawyer." The interview then continued for another hour. Finally, Davis commented: "I think I want a lawyer before I say anything else." The interrogation ceased. At trial, Davis moved to suppress his statements.

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The lower courts had adopted three different approaches when the police are faced with an ambiguous comment concerning counsel. First, some courts had ruled that *any* comment about counsel, not matter how ambiguous, requires the cessation of questioning. Second, other courts had attempted to define a threshold standard; comments falling short of this threshold did not qualify as an invocation of the right to counsel. Third, still other courts had adopted a "stop and clarify" approach.

On review, the Supreme Court ruled Davis' statements admissible. The Court rejected all these approaches for one more favorable to the police. The Court held that the *Edwards* rule applies only when a suspect "unambiguously" requests counsel. The opinion goes on to note:

> Although the suspect need not 'speak with the discrimination of an Oxford don,' . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the required level of clarity, *Edwards* does not require the officers to stop questioning the suspect. *Id.*

The Court recognized that its requirement of "a clear assertion of the right to counsel might disadvantage some suspects who — because of fear, intimidation, lack of linguistic skills, or a variety of other reasons — will not clearly articulate their right to counsel although they actually want to have a lawyer present." *Id.* The primary protection for these suspects, however, is the *Miranda* warnings themselves. If the suspect waives the right to counsel after receiving the warnings, the police may question that suspect. *Edwards* provides an extra safeguard, but only if the suspect makes an unambiguous request for an attorney. The "need for effective law enforcement" requires a bright line rule for the police.

While the Court indicated that a "stop and clarify" rule would often be "good police practice," such a rule is not constitutionally required.

Federal Statute

United States v. Alvarez-Sanchez, 114 S. Ct. 1599 (1994), involved an interpretation of 18 U.S.C. § 3501. During a search of the defendant's residence, local police officers discovered narcotics and counterfeit Federal Reserve Notes. The defendant was arrested on state narcotics charges. Three days later, while the defendant was still in custody, Secret Service agents interviewed him. The defendant waived his *Miranda* rights and admitted that the Notes were counterfeit. He was then arrested on federal charges and presented on the federal complaint.

The defendant argued that the three-day delay between his arrest on state charges and his presentment on federal charges violated § 3501(c) and therefore rendered the confession inadmissible. Congress had adopted § 3501 to modify the "McNabb-Mallory" rule, which was based on Federal Criminal Rule 5(a). That rule required the prompt ("without unnecessary delay") presentment of persons arrested for federal crimes before a magistrate or state judge. The Supreme Court had held in McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), that confessions obtained during an unnecessary delay are generally inadmissible. Congress altered this rule when it adopted § 3501. Subsection (c) provides that confessions obtained within six hours of arrest shall not be inadmissible solely because of a delay in presenting the accused before the magistrate.

The issue that had divided the courts concerned the interval after the six hour "safe harbor" period. Some courts had ruled that confessions obtained after the six-hour interval were automatically inadmissible. Noting that the statute was silent about the post six-hour time frame, other courts had ruled that a delay was only one factor in determining the voluntariness of a confession made in this time frame.

The Supreme Court dodged this issue by ruling that the statute did not apply when a person is arrested on *state* charges. The statute comes into play only when a person is arrested on *federal* charges. In this case, the defendant had confessed before he was arrested for the federal crime.

The Court did acknowledge that a different issue would be raised if the defendant could show that federal and state law enforcement officers colluded by having state police arrest a person for questioning by federal officers. In a 1943 case, the Court had held that a confession obtained in this way was inadmissible. Anderson v. United States, 318 U.S. 350 (1943). This exception, however, did not apply in *Alvarez-Sanchez* because there was no evidence of a collusive arrangement.

The Court also acknowledged that state police officers often are authorized to arrest on federal charges, in which case § 3501 applies: "If a person is arrested and held on a federal charge by 'any' law enforcement officer — federal, state, or local — that person is under 'arrest or other detention' for purposes of §3501(c) and its 6-hour safe harbor period." *Alvarez-Sanchez,* 114 S.Ct. at 1604.

PEREMPTORY CHALLENGES

The Court returned once again to the constitutionality of peremptory challenges. In Batson v. Kentucky, 476 U.S. 79 (1986), the Court had ruled that the Equal Protection Clause governs the exercise of peremptory challenges by a prosecutor in a criminal case. An accused has "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Id.* at 85-86. In a series of later cases, the Court extended this ruling to civil cases, Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), and to the defense, Georgia v. McCollum, 112 S. Ct. 2348 (1992).

These cases, however, involved racial discrimination, and the issue of whether the *Batson* rationale extended to gender had divided the lower courts. In J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994), the Supreme Court answered that question in the affirmative. The case involved a paternity and child support action. The State used 9 of its 10 peremptory strikes to remove male jurors, and the defendant used all but one of his strikes to remove female jurors. As a result, all jurors were female.

The Court had addressed the gender-jury issue in Taylor v. Louisiana, 419 U.S. 522 (1975), where the Court had ruled that the systematic exclusion of females from the jury pool violated the Sixth Amendment fair cross-section requirement: "Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Id.* at 530. The Court, however, had never applied the fair cross-section requirement to the actual jury selected. As long as females and racial minorities were not excluded from the jury pool, the petit jury seated in a particular case need not reflect racial or gender diversity.

Unlike *Taylor,* however, *Batson* was based on equal protection grounds; it held that the use of peremptories to exclude racial minorities violated the 14th Amendment. In other contexts involving gender-based classifications, the Court had held that an exceedingly persuasive justification was required to survive equal protection scrutiny. The Court had little trouble extending *Batson* to gender discrimination.

The State attempted to justify its exclusion of males on the rationale that men would be more sympathetic than women to a male paternity defendant. This made the Court's decision easy: "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" *J.E.B.*, 114 S.Ct. at 1426.

REASONABLE DOUBT INSTRUCTION

In Victor v. Nebraska, 114 S.Ct. 1239 (1994), the Court reviewed two cases involving jury instructions on the "beyond a reasonable doubt" standard. Although due process requires the prosecution to prove the essential elements of the charged offense beyond a reasonable doubt, it does not require that any particular words be used to convey this standard — so long as "taken as a whole, the instructions correctly conve[y] the concept of reasonable doubt." Holland v. United States, 348 U.S. 121, 140 (1954). The Court has also commented that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Miles v. United States, 103 U.S. 304, 312 (1881). *See also* Hopt v. Utah, 120 U.S. 430, 440-41 (1887) ("The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them.").

In Cage v. Louisiana, 498 U.S. 39 (1990), the Court ruled a jury instruction unconstitutional that included the following passages: (1) "It must be such doubt as would give rise to a grave uncertainty." (2) "It is an actual substantial doubt." (3) "What is required is not an absolute or mathematical certainty, but a moral certainty." According to the Court, these passages watered-down the constitutional standard. The Court wrote:

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than that is required for acquittal under the reasonable doubt standard. When those statements are then considered with the references to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. *Id.* at 41.

California Instruction

One of the cases before the Court involved a California instruction. The defendant challenged several passages: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt." Another passage used the phrase "moral certainty." Chief Justice Shaw's instruction in a 19th Century case was the genesis of this instruction. Commonwealth v. Webster, 59 Mass. 295, 320 (1850). The defendant challenged the terms "moral certainty" and "moral evidence." When *Webster* was decided in 1850, those terms had specific meanings, which were often equated with proof beyond a reasonable doubt. The question was whether a 20th Century jury would understand 19th Century terms.

The Court found the term "moral evidence" unproblematic because it was explained in the instruction. The jury was told to decide the case on the trial evidence and not from any other source. They were also informed that evidence consisted of the testimony of witnesses, writings, material objects, and anything offered to prove a fact.

The term "moral certainty" was more troublesome. The Court was willing to concede that the term, standing alone, "might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt.'" *Victor,* 114 S. Ct. at 1247. Nevertheless, the instruction as a whole sufficiently informed the jury of the constitutional requirement. In particular, the Court rejected the notion that the term was deficient because it cast the standard in terms of probabilities. The Court noted that "the beyond a reasonable doubt standard is itself probabilistic." *Id.* Accordingly, the "problem is not that moral certainty may be understood in terms of probability, but that a jury might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases." *Id.*

The instruction noted that the jurors had to have an "abiding conviction, to a moral certainty." This explanation, plus the remainder of the charge, satisfied the constitutional standard. The Court also commented that it did

> not condone the use of the phrases. As modern dictionary definitions of moral certainty attest, the common meaning of the phrase has changed since it was used in the Webster instructions, and it may continue to do so to the point it conflicts with the [constitutional] standard. *Id.* at 1248.

Nebraska Instruction

The companion case, from Nebraska, contained the following contested passages: "You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt arising from the evidence . . . as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."

The defendant argued that the phrase "beyond a *substantial* doubt" created a lower standard than "beyond a reasonable doubt." Here, again, the Court found the phrase "somewhat problematic" but nevertheless upheld the conviction. Other parts of the instruction provided an alternative definition: a reasonable doubt is one that would cause a reasonable person to hesitate to act. This formulation had been approved repeatedly by the Court. *See Holland,* 348 U.S. at 140.

INSANITY DEFENSE

Shannon v. United States, 55 Crim. L. Rep. 2213 (1994), raised a question concerning the Insanity Defense Reform Act of 1984, the federal statute passed by Congress after the acquittal of John Hinckley for the attempted assassination of President Reagan. Shannon argued that the Act required an instruction on the consequences of a verdict of "not guilty by reason of insanity [NGI]." He also argued that such an instruction, if not required by the Act, should be mandated under the common law because jurors may erroneously believe that a defendant found NGI will be immediately released into society.

The Act, for the first time, created a comprehensive pro-

cedure for dealing with the insanity defense in federal courts. Congress (1) changed the substantive test for insanity, (2) required the accused to establish insanity by clear and convincing evidence, (3) recognized a special verdict of "not guilty by reason of insanity," and (4) created a comprehensive civil commitment procedure.

The Supreme Court ruled that an instruction on the consequences of a NGI verdict is not required. Nothing in the Act requires the instruction. Nor did the Court believe that the instruction should be adopted under its supervisory authority. Providing jurors sentencing information "invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *Id.* at 2215. In other context, the courts presume that the jury will follow its instructions. Finally, such an instruction may prove counterproductive. The only "consequence" that is clear is the requirement of a "dangerousness" hearing within forty days. "Instead of encouraging a juror to return an NGI verdict, as Shannon predicts, such information might have the opposite effect — that is, a juror might vote to convict in order to eliminate the possibility that a dangerous defendant could be released after 40 days or less." *Id.* at 2217.

The Court, however, recognized a limited exception: "If, for example, a witness or prosecutor states in the presence of the jury that a particular defendant would 'go free' if found NGI, it may be necessary for the district court to intervene with an instruction to counter such a misstatement." *Id.*

SENTENCING: UNCOUNSELED CONVICTIONS

In Nichols v. United States, 114 S.Ct. 1921 (1994), the Supreme Court ruled that a sentencing court may use a defendant's prior uncounseled misdemeanor conviction, where no prison term was imposed, "to enhance punishment at a subsequent conviction." *Id.* at 1928. This holding overruled Baldasar v. Illinois, 446 U.S. 222 (1980).

Nichols pleaded guilty to possession of cocaine with the intent to distribute. Under the Sentencing Guidelines, he had amassed three criminal history points for a 1983 felony drug conviction. He was assessed another point for a 1983 state misdemeanor conviction for driving under the influence (DUI); he was not represented by counsel and received only a fine for this offense. This additional point raised Nichols' Criminal History Category to category III and resulted in a maximum sentence, which was 25 months longer than it would have been had the misdemeanor not been included. The Supreme Court affirmed Nichols' conviction.

Nichols argued that the use of the uncounseled misdemeanor conviction violated the Sixth Amendment right to counsel as construed in *Baldasar.* The right to counsel applies in misdemeanor cases only if actual incarceration is imposed. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). In *Baldasar* the Court ruled that an uncounseled misdemeanor conviction could not be used to enhance punishment, even though constitutionally valid, because no incarceration was imposed. This result was somewhat anomalous; a constitutionally valid conviction could not be used for sentencing.

In *Nichols,* the Court overruled *Baldasar,* noting that sentencing procedures have traditionally been "recognized as less exacting than the process of establishing guilt." *Nichols,* 114 S. Ct. at 1927. Indeed, sentencing courts have not only taken into consideration a defendant's prior convictions "but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior." *Id.* at 1928. The constitutionality of considering such previous conduct is well-established. *See* Williams v. New York, 337 U.S. 241 (1949); McMillan v. Pennsylvania, 477 U.S. 79 (1986). Thus, a sentencing court could constitutionally enhance Nichols' sentence based on evidence of the previous DUI offense, even without a conviction. If this is so, then it must be "constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proven beyond a reasonable doubt." *Nichols,* 114 S.Ct. at 1928.

The Court summarized its holding as follows:

> [W]e hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction. *Id.*

This ruling is not limited to federal sentencing. It also applies to state sentencing, including recidivist statutes.

DOUBLE JEOPARDY

In Montana Department of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994), the Supreme Court held that Montana's Dangerous Drug Tax Act violated the Double Jeopardy Clause because it permitted double punishment for the same conduct.

The Act imposed a tax "on the possession and storage of dangerous drugs." The tax was to be "collected only after any state or federal fines or forfeitures have been satisfied." However, taxpayers must file a return within 72 hours of their arrest. There is no obligation to file a return until an arrest is made.

The Kurths were convicted for cultivating marijuana on their ranch and for possession of hashish oil and drug paraphernalia. Two members of the Kurth family received prison sentences, while four received suspended or deferred sentences. The Department of Revenue additionally sought $900,000 in taxes, interest, and penalties on the marijuana plants. The Kurths subsequently filed for Chapter 11 bankruptcy and alleged that the tax violated double jeopardy principles. The bankruptcy judge agreed, as did the district court, which concluded that the Act "simply punishes the Kurths a second time for the same criminal conduct." The Court of Appeals affirmed but refused to hold the tax facially unconstitutional. The Montana Supreme Court reached a different conclusion in other cases. The U.S. Supreme Court granted certiorari to resolve these inconsistent decisions.

In United States v. Halper, 490 U.S. 435 (1989), the defendant was convicted and sentenced for 65 separate violations of the criminal false claims statute. In each instance, he had claimed $12 for $3 services. In a subsequent civil proceeding, a $2,000 penalty for each false claim was authorized. The Supreme Court found the resulting $130,000 penalty double punishment, rejecting the argument that the Double Jeopardy Clause applied only to criminal proceedings. In the Court's view, a legislatively designated "civil penalty" could violate the Fifth Amendment. Although *Halper* did not involve a tax, the Court stated that "a tax is not immune from double jeopardy scrutiny simply because it is a tax." *Kurth,* 114 S.Ct. at 1946.

Generally, the unlawfulness of an activity does not prevent its taxation. A drug tax could be collected if the tax-

payer had not been previously punished, or if it was imposed in the criminal proceeding. The inquiry focused on whether the Montana statute was punishment disguised as a tax. The Act did not function as a tax because its primary goal was to punish and deter certain behavior rather than to collect revenue and because it "is conditioned on the commission of a crime." *Id.* at 1947. The Court distinguished the Act from legitimate taxes, such as those on tobacco, by noting that the justifications for that type of tax, such as
creating employment, satisfying consumer demand, and providing tax revenues, were not present in this instance.

DETAINERS

In Reed v. Farley, 129 L.Ed.2d 277 (1994), the Supreme Court decided that a state court's failure to observe the 120-day rule of the Interstate Agreement on Detainers [IAD] is not cognizable in federal habeas corpus when the defendant did not object to the trial date at the time it was set and suffered no prejudice.

Indiana took custody of Reed pursuant to the IAD, which requires that a prisoner be tried within 120 days of arrival in the receiving jurisdiction or else the charges are dismissed with prejudice. However, the IAD does allow for extensions upon a showing of "good cause." The trial judge, unaware of the 120-day limit, scheduled Reed's trial for a date that was after the tolling period. Reed never objected to the trial date until after the 120-day limit had expired. The state courts refused to grant him relief on the grounds that Reed should have objected prior to the tolling date and because they believed that he was aware of the violation prior to the tolling.

Although the IAD is a voluntary interstate agreement, it is also a law of the United States subject to habeas review. The Supreme Court's precedent had held that the IAD "is a congressionally sanctioned interstate compact within the Compact Clause, US Const, Art I, § 10, cl 3, and thus is a federal law subject to federal construction." Carchman v. Hash, 473 U. S. 716 (1985). Moreover, "habeas review is available to check violations of federal laws when the error qualifies as 'a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure.'" *Reed,* 129 L. Ed.2d at 288, *citing* Hill v. United States, 368 U.S. 424, 428 (1962); *accord* United States v. Timmreck, 441 U.S. 780 (1979); Davis v. United States, 417 U.S. 333 (1974). This was not, however, such a case:

> When a defendant obscures Article IV(c)'s time prescription and avoids clear objection until the clock has run, cause for collateral review scarcely exists. An unwitting judicial slip of the kind involved here ranks with the nonconstitutional lapses we have held not cognizable in a post-conviction proceeding. *Id.* at 288-89.

The Court also rejected Reed's argument that the 54-day delay violated his Sixth Amendment right to a speedy trial, especially in light of the fact that Reed sought an extension during those 54 days to better prepare his defense. Additionally, "[a] showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here." *Id.* at 291.

CAPITAL PUNISHMENT

Instruction on Prior Death Sentence

In Romano v. Oklahoma, 114 S.Ct. 2004 (1994), the Court upheld the admission of evidence regarding Romano's death sentence from an earlier case during the sentencing phase of his murder trial.

Romano was separately tried and convicted for two capital murders. The death sentence was imposed in the first trial (Thompson). During the sentencing phase of the second trial (Sarfaty), the state offered evidence of the earlier death sentence to show that Romano was a violent felon and would be a continuing threat to society. These factors were aggravating circumstances under the Oklahoma death penalty law. The second jury also imposed the death sentence. Romano objected, claiming that the evidence of his first death sentence diminished the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The Supreme Court disagreed.

In *Caldwell,* the jury was misled and its sense of responsibility undermined when the prosecutor and the trial judge told the jurors not to view themselves as sentencing a man to death because a death sentence would be appealed and re-examined by the state supreme court. The U.S. Supreme Court held that these remarks "precluded the jury from properly performing its responsibility to make an individualized determination of the appropriateness of the death penalty." *Id.* at 330-31. The Court subsequently narrowed the holding of *Caldwell*: "To establish a *Caldwell* violation, a defendant must necessarily show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989); *see also* Darden v. Wainwright, 477 U.S. 168 (1986).

The *Romano* Court found that the evidence did not "contravene the principle established in *Caldwell*" because the jury was not misled as to its responsibility in the sentencing phase: "The evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury's role in the sentencing process. The trial court's instructions, moreover, emphasized the importance of the jury's role." *Romano,* 114 S.Ct. at 2011. That the evidence was irrelevant as a matter of state law did not render its admission federal constitutional error.

The Court also rejected Romano's request that it "fashion general evidentiary rules, under the guise of the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings." *Id.* at 2011. Romano argued that the introduction of irrelevant evidence (the death sentence) rendered his sentencing "unreliable" and therefore violative of the Eight Amendment. However, the Court held that since the irrelevant evidence was not prejudicial, and because the jury instructions were proper, there was no Eighth Amendment violation. The Court further declined to create evidentiary rules: "We have not done so in the past ... and will not do so today." *Id.*

Nor did this evidence violate the Due Process Clause. The standard of due process review in capital cases is whether the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The *Romano* Court held that since the jury could just as easily have been influenced not to impose the death sentence by the remarks, there was no violation of due process.

Jury Instruction on Parole Ineligibility

In Simmons v. South Carolina, 129 L..Ed.2d 133 (1994), the Supreme Court ruled that where a state seeks the death penalty based on the defendant's "future dangerous-

ness" and state law prohibits release on parole, due process requires that the jury be informed that the accused is ineligible for parole.

Simmons, who was convicted of beating an elderly woman to death, had recently pleaded guilty to multiple counts of burglary and sexual assault (all involving elderly women). These convictions rendered him parole ineligible if convicted of another violent crime. During sentencing, the state sought the death penalty based upon the aggravating circumstance that Simmons posed a future danger to society. The defendant attempted to counter this point by arguing that he was a danger only to elderly women whom he was not likely to meet in prison. When the jury asked if the imposition of a life sentence included a possibility of parole, the trial judge instructed it to consider life imprisonment in its "plain and ordinary meaning." The U.S. Supreme Court reversed, finding a due process violation.

"Future dangerousness" is a legitimate factor of jury consideration in a capital murder trial. Jurek v. Texas, 428 U.S. 262 (1976); California v. Ramos, 463 U.S. 992 (1983). Nevertheless, "a person may not be executed 'on the basis of information which he had no opportunity to deny or explain' because due process guarantees a defendant the right to rebut or explain aggravating factors alleged by the prosecution." *Simmons*, 129 L. Ed.2d at 143.

The Court wrote that "there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole." *Id.* at 142. The Court further noted that "[a]n instruction directing juries that life imprisonment should be understood in its 'plain and ordinary' meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment'." *Id.* at 146. Consequently, "[t]he trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause." *Id.* at 142-43.

Vagueness of Aggravating Factors

In Tuilaepa v. California, 129 L.Ed.2d 750 (1994), the Supreme Court rejected the defendant's argument that California's sentencing factors are unconstitutionally vague.

In order to sentence a defendant to death in California, the trier of fact must return a first degree murder verdict and also find one or more of 19 special circumstances enumerated in the California death penalty statute. Then, in the penalty phase, numerous other factors must be considered.

While robbing a bar, Tuilaepa shot and killed Melvin Whiddon. He was convicted of first degree murder with the special circumstance of murder while committing a robbery. During the penalty phase, the judge instructed the jury to consider various factors but did not provide a method or standard for weighing and evaluating any of them. Tuilaepa argued that the following factors were unduly vague: (1) the circumstances of the crime, (2) whether the defendant had a previous history of violent crime, and (3) the defendant's age at the time of the crime.

Capital punishment jurisprudence addresses two different aspects of the decisionmaking process: (1) the eligibility decision and (2) the selection decision. The eligibility issue deals with whether the defendant's crime is such that the death penalty is a proportionate punishment. Coker v. Georgia, 433 U.S. 584 (1977). Accordingly, a capital defendant must be convicted of murder with a finding of at least one aggravating circumstance at either the guilt or penalty phase. However, the aggravating circumstance may not be unconstitutionally vague. *See* Godfrey v. Georgia, 446 U.S. 420 (1980) (Georgia aggravating circumstance that offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" held to be unconstitutionally vague in a murder case).

In the sentencing phase, the trier of fact decides whether to impose a death sentence on a defendant who may legally be executed. Of particular importance in this phase is "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa*, 129 L.Ed.2d at 760, *citing* Zant v. Stephens, 462 U.S. 862, 879 (1983). Indeed, the sentencing phase adds a subjective perspective to the objective view taken in the eligibility proceeding.

A vague circumstance may threaten the neutrality of the sentencing process and encourage bias and arbitrary decision: "A vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman v. Georgia*." *Id.* at 761. However, a factor is not unconstitutional if it has some "common-sense core of meaning ... that criminal juries should be capable of understanding." Jurek v. Texas, 428 U.S. 262 (1976) (White, J., concurring).

Tuilaepa did not challenge the eligibility requirements for imposition of the death sentence. Rather, he argued that the circumstances of the crime, his prior criminal history, and his age at the time of commission are unconstitutionally vague factors. The Supreme Court disagreed: "The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." *Tuilaepa*, 129 L.Ed.2d at 762. Similarly, the defendant's prior history of violent crime is important in deciding capital punishment. This factor was not vague because it asked jurors to review tangible and ascertainable "matters of historical fact." *Id.* The Court used the same rationale to explain that age is a relevant and tangible factor to be considered by a jury. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982).

Finally, the Court rejected Tuilaepa's argument that the instructions were deficient because no basis for weighing these factors was provided. Jurors need not be instructed on how to evaluate facts in a capital sentencing decision. California v. Ramos, 463 U.S. 992, 1008-09 n.22 (1983) ("the fact that the jury is given no specific guidance on how the commutation factor is to figure into its determination presents no constitutional problem."). Once the defendant is eligible for the death penalty, it is within the discretion of the sentencer to decide what factors are determinative of a death sentence: the "sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *Tuilaepa*, 129 L.Ed.2d at 764, *citing Zant,* 462 U.S. at 875.

Double Jeopardy

Schiro v. Farley, 114 S.Ct. 783 (1994), raised a double jeopardy issue in the context of a death penalty proceeding.

the same victim): (1) knowingly killing, (2) killing while committing rape, and (3) killing while committing sexually deviate behavior. He did not contest the killing but argued insanity or guilty but mentally ill. These choices, plus lesser included offenses, gave the jury ten possible verdict options. The jury found Schiro guilty of "killing while committing rape" and made no findings on the other verdict options. At the sentencing phase, the state sought capital punishment based on the aggravating factor that Schiro had committed an intentional murder while committing rape. The jury recommended against capital punishment in light of mitigating evidence. However, in Indiana, the court is not bound by the jury's recommendation, and the judge imposed the death penalty.

Schiro argued that the jury's failure to convict on the first count ("knowingly killing") operated as an acquittal of intentional murder and therefore could not be used as an aggravating factor. The U.S. Supreme Court rejected this double jeopardy argument.

The Double Jeopardy Clause protects against a second prosecution after initial acquittal or conviction and also against multiple punishments. North Carolina v. Pearce, 395 U.S. 711 (1969). Schiro argued that the sentencing phase of his prosecution should have been considered as a successive prosecution after the jury recommendation was rejected. The Court disagreed, citing Stroud v. United States, 251 U.S. 15 (1919), in which the Court had held that a defendant could be resentenced after retrial when his original murder conviction had been overturned on appeal. Also, a second sentencing hearing may be held when the initial hearing was improperly based. Lockhart v. Nelson, 488 U.S. 33 (1988). The Court noted "[i]f a second sentencing proceeding ordinarily does not violate the double jeopardy clause, we fail to see how an initial sentencing proceeding could do so." *Schiro,* 114 S.Ct. at 789.

The Court also distinguished Bullington v. Missouri, 451 U.S. 430 (1981). Bullington was convicted of capital murder, but the jury refused to impose the death penalty. When his conviction was overturned, he was retried and the state again sought the death penalty. As a general rule, the Double Jeopardy Clause does not prohibit a harsher penalty on retrial following a successful appeal. *Bullington*, however, recognized a limited exception in capital cases — the first jury's failure to impose the death penalty is considered an acquittal on that issue. Nevertheless, *Bullington* was not controlling because the "State did not reprosecute Schiro for intentional murder, nor did it force him to submit to a second death penalty hearing. It simply conducted a single sentencing hearing in the course of a single prosecution." *Schiro*, 114 S.Ct. at 790.

Schiro also argued that the state was "collaterally estopped" from seeking the death sentence since the jury had "acquitted" him of the "intentional murder" aggravating circumstance. The collateral estoppel doctrine, however, requires the defendant to "demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." Dowling v. United States, 493 U.S. 342, 350 (1990) (defendant did not meet his burden because there was more than one basis on which the jury could have reached its conclusion). In this case, the jury could very well have believed that it could only return one verdict, especially since each side made this point during closing arguments. Additionally, the instructions did not "differentiate between the two ways of proving 'murder' under Indiana law" and "the jury verdict did not necessarily depend upon a finding that Schiro lacked an intent to kill." Finally, the Court noted that even Schiro's attorney seemed to believe that intent was not an issue since he never argued that Schiro lacked the intent to kill: "In view of Schiro's confession to the killing, the instruction requiring the jury to find intent to kill, and the uncertainty as to whether the jury believed it could return more than one verdict, we find that Schiro has not met his [burden] ...." *Schiro,* 114 S. Ct. at 792.