CRIMINAL PROCEDURE: A FREE LAW SCHOOL CASEBOOK 2E



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Criminal Procedure-A Free Law School Casebook

Second Edition

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CALI eLangdell Press 2020, 2022

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Dedication

Dedication

We dedicate this book to our students, our colleagues, and our families, as well as to all who support the mission of America's public law schools.

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Acknowledgements

Acknowledgements

From Ben Trachtenberg

First and foremost, I thank Joanna Trachtenberg for marrying me, agreeing to move with me to Missouri, and being a far better spouse than I could possibly deserve. I also thank Akiva and Shoshana Trachtenberg, who remind me of the importance of justice to the world.

I thank Anne Alexander for agreeing to join this project, which I began somewhat impulsively and could never have completed (at least not well and on time) without her assistance.

From Anne Alexander

I am most thankful to my husband Marc, whose support and love keeps me grounded in a way that helps me accomplish my dreams. I also thank our twin daughters, Lilly and Sydney Alexander; their perseverance and search for equality motivate me to ask the hard questions.

Thanks also goes to Ben Trachtenberg, who is a good friend and colleague. May his penchant for pushing me into different projects continue to lead to great unforeseen adventures in our academic careers.

From Ben Trachtenberg & Anne Alexander

We thank the University of Missouri System's Affordable & Open Educational Resources initiative and the UM System's Diversity Equity and Inclusion inclusive teaching incentive, both of which provided funding to support the first edition of this book.

We also thank MU law student research assistants Callie Haslag, who provided support through the Shook, Hardy & Bacon research assistant program, and Samuel Thomas.

The authors give special thanks to research assistant Aaron Wynhausen, who joined this project early in the fall 2018 semester and proofread most of the chapters in the first edition, often under time pressure.

We also thank The Center for Computer-Assisted Legal Instruction (CALI) for publishing the current edition. In particular, Deb Quentel has provided important support.

In addition, we thank faculty colleagues at other law schools who provided feedback on the 2020 edition of this book, generally after assigning the book to their students. Their comments have improved this new edition.

Date & Edition

The first edition of this book was compiled and released for the fall semester of 2018, and the book was used again during the spring 2019 semester. With a brief supplement (and no significant revisions), the book was republished for 2019-2020.

The book was then substantially revised and was released by the CALI eLangdell® Press for use during the 2020-2021 year and beyond. This 2022 edition is an update of the 2020 book. Page numbers in this edition will not match those of previous versions.

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About the Authors



Ben Trachtenberg is the Isidor Loeb Professor of Law at the University of Missouri School of Law. He serves as Associate Dean for Academic Affairs and also as Director of Undergraduate Studies at the MU School of Law.

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In 2012, Professor Trachtenberg received the Gold Chalk Award for excellence in teaching from the MU Graduate Professional Council. In 2014, he won the Provost's Outstanding Junior Faculty Teaching Award, and in 2015, he received the Husch Blackwell Distinguished Faculty Award from the School of Law. In 2018, he received the Provost's Faculty Leadership Award for University Citizenship, and he won the UM System President's Award in that category in 2019. Professor Trachtenberg chaired the MU Faculty Council on University Policy during 2015-2016 and 2016-2017. During 2020 and 2021, he was Special Advisor to the President of the University of Missouri.



Anne Alexander is a Teaching Professor of Law and the Director of Legal Research & Writing at the University of Missouri School of Law. Her process-oriented methodology encourages students to develop their own knowledge about legal analysis and to communicate legal ideas to non-legal audiences. She presents nationally about her teaching techniques.

In 2015, Professor Alexander won the University of Missouri Excellence in Teaching with Technology Award (Graduate School). In 2016, she won the Earnest L. Boyer International Award for Excellence in Teaching, Learning, and Technology and was one of seven recipients of the Innovation Award at the International Conference on College Teaching and Learning. In 2017 and 2019, Professor Alexander was recognized as the Lloyd L Gaines Honoree by the Black Law Student Association; she also received the Provost's Outstanding Junior Faculty Teaching Award. In 2019, she received the Carrie Mae Carroll Award from the Women's Law Association and the Gold Chalk Award for excellence in teaching from the MU Graduate Professional Council

Professor Alexander has a BA in Anthropology and an MS in Education from Indiana University. She graduated *magna cum laude* and Order of the Coif from the University of Missouri School of Law and then worked as an associate attorney at Jenner & Block in Chicago. Prior to attending law school, she was an elementary school teacher.

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1: INTRODUCTION

1.1: Chapter 1 - What Is This Book?

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1.1: Chapter 1 - What Is This Book?

This book introduces criminal procedure law in the United States, with a focus on the “investigation” stage of the criminal justice system. Specifically, the book focuses on legal constraints placed upon police and prosecutors, constraints largely derived from Supreme Court interpretations of the Fourth, Fifth, and Sixth Amendments to the Constitution. Major topics include searches and seizures, warrants and when they are required, interrogations, witness identifications of suspects, and the right to counsel during various stages of investigation and prosecution.

At the end of the semester, students should have a solid foundation in the “black-letter law” of criminal procedure. This material is tested on the bar examination, and it is the sort of information that friends and family will expect lawyers to know, even lawyers who never practice criminal law. For example, a lawyer lacking basic familiarity with the *Miranda* Rule risks looking foolish at Thanksgiving dinner. In addition, the legal issues covered in this book relate to some of the most intense ongoing political and social debates in the country. The law governing stop-and-frisk procedures, for example, is not merely trivia one should learn for an exam. It affects the lives of real people. The reliability of eyewitness identifications affects the likelihood of wrongful convictions, a phenomenon persons of all political persuasions oppose. In short, policing and prosecution affect everyone in America, and an informed citizen—especially a lawyer—should understand the primary arguments raised in major controversies in criminal procedure law.

To be sure, understanding the holdings of major cases is essential to more nuanced participation in these debates, and this book devotes the bulk of its pages to Supreme Court opinions, which your authors have edited for length. (To save space, we have omitted internal citations, as well as portions of court opinions, without using ellipses to indicate our edits.) The book then aims to go beyond the information available in majority opinions, concurrences, and dissents. To do so, it includes supplementary material on developments in law and policy. For example, advances in technology raise questions about precedent concerning what counts as a “search” under Fourth Amendment law. The book also provides perspectives on the practical implications of Supreme Court decisions, perspectives often given scant attention by the Justices. For example, state courts have grappled with scientific evidence about witness reliability that has not yet been addressed in Supreme Court opinions resolving due process challenges related to identifications.

Further, in addition to helping students identify situations in which constitutional rights may have been violated, the book explores what remedies are available for different violations. For a criminal defendant, the most desirable remedy will normally be exclusion of evidence obtained though illegal means—for example, drugs found in a defendant’s car or home during an unlawful search. Contrary to common misconceptions among the general public, however, not all criminal procedure law violations result in the exclusion of evidence. Students will read the leading cases on the exclusionary rule, confronting arguments on when the remedy of exclusion—which quite often requires that a guilty person avoid conviction—is justified by the need to encourage adherence by law enforcement to the rules presented in this book concerning searches, seizures, interrogations, and so on.

Your authors have attempted to create a book that presents material clearly and does not hide the ball. Students who read assigned material should be well prepared for class, armed with knowledge of what rules the Supreme Court has announced, along with the main arguments for and against the Court’s choices.

The remainder of this Introduction consists of further effort by your authors to convince you of the importance of the material presented later in the book. Many students possess this book because they are enrolled in a required course or know that this material is tested on the bar exam. Others of you plan to practice criminal law. Still others study criminal procedure to learn more about important societal controversies. Regardless, your authors do not take your attention for granted.

Why Is Criminal Procedure So Important?

In this 1936 unanimous opinion by Chief Justice Charles Evans Hughes, the Supreme Court reviewed a criminal case from Mississippi. Students will see immediately why the actions of police, prosecutors, and judges upset the Supreme Court Justices.

Supreme Court of the United States

Ed Brown v. Mississippi

Decided Feb. 17, 1936—297 U.S. 278 (1936)

MR. CHIEF JUSTICE HUGHES delivered the [unanimous] opinion of the Court.

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934 and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants' counsel. Defendants then testified that the confessions were false and had been procured by physical torture. The case went to the jury with instructions, upon the request of defendants' counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and that they were not true, they were not to be considered as evidence. On their appeal to the Supreme Court of the State, defendants assigned as error the inadmissibility of the confessions. The judgment was affirmed.

Defendants then moved in the Supreme Court of the State to arrest the judgment and for a new trial on the ground that all the evidence against them was obtained by coercion and brutality known to the court and to the district attorney, and that defendants had been denied the benefit of counsel or opportunity to confer with counsel in a reasonable manner. The motion was supported by affidavits. At about the same time, defendants filed in the Supreme Court a "suggestion of error" explicitly challenging the proceedings of the trial, in the use of the confessions and with respect to the alleged denial of representation by counsel, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. The state court entertained the suggestion of error, considered the federal question, and decided it against defendants' contentions. Two judges dissented. We granted a writ of certiorari.

The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law; and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitutional right.

The opinion of the state court did not set forth the evidence as to the circumstances in which the confessions were procured. That the evidence established that they were procured by coercion was not questioned. The state court said: 'After the state closed its case on the merits, the appellants, for the first time, introduced evidence from which it appears that the confessions were not made voluntarily but were coerced.' There is no dispute as to the facts upon this point, and as they are clearly and adequately stated in the dissenting opinion of Judge Griffith (with whom Judge Anderson concurred), showing both the extreme brutality of the measures to extort the confessions and the participation of the state authorities, we quote this part of his opinion in full, as follows:

"The crime with which these defendants, all ignorant [Black people], are charged, was discovered about 1 o'clock p.m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the state of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

"The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded

by those present; and in this manner the defendants confessed the crime, and, as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.

"Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

"All this having been accomplished, on the next day, that is, on Monday, April 2, when the defendants had been given time to recuperate somewhat from the tortures to which they had been subjected, the two sheriffs, one of the county where the crime was committed, and the other of the county of the jail in which the prisoners were confined, came to the jail, accompanied by eight other persons, some of them deputies, there to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping but averred that he had no personal knowledge of it. He admitted that one of the defendants, when brought before him to confess, was limping and did not sit down, and that this particular defendant then and there stated that he had been strapped so severely that he could not sit down, and, as already stated, the signs of the rope on the neck of another of the defendants were plainly visible to all. Nevertheless the solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise.

"The spurious confessions having been obtained—and the farce last mentioned having been gone through with on Monday, April 2d—the court, then in session, on the following day, Tuesday, April 3, 1934, ordered the grand jury to reassemble on the succeeding day, April 4, 1934, at 9 o'clock, and on the morning of the day last mentioned the grand jury returned an indictment against the defendants for murder. Late that afternoon the defendants were brought from the jail in the adjoining county and arraigned, when one or more of them offered to plead guilty, which the court declined to accept, and, upon inquiry whether they had or desired counsel, they stated that they had none, and did not suppose that counsel could be of any assistance to them. The court thereupon appointed counsel, and set the case for trial for the following morning at 9 o'clock, and the defendants were returned to the jail in the adjoining county about thirty miles away.

"The defendants were brought to the courthouse of the county on the following morning, April 5th, and the so-called trial was opened, and was concluded on the next day, April 6, 1934, and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence, a peremptory instruction to find for the defendants would have been inescapable. The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a [Black man]; not as much as I would have done if it were left to me.' Two others who had participated in these whippings were introduced and admitted it—not a single witness was introduced who denied it. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding."

1. The state stresses the statement in *Twining v. New Jersey*, 211 U.S. 78 (1908), that "exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution," and the statement in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." But the question of the right of the state to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.

The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it

"offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." The state may abolish trial by jury.[1] It may dispense with indictment by a grand jury and substitute complaint or information. But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. The state may not deny to the accused the aid of counsel. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is "but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In *Fisher v. State*, 145 Miss. 116 (1926), the court said: "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country. ... The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed, and the judgment must be reversed.

Notes, Comments, and Questions

As noted in the footnote we added to the *Brown* opinion, the Court included a statement about jury trials that is no longer accurate. States are required to provide trial by jury for crimes punishable by more than six months' imprisonment. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). In 1936, the Supreme Court had not yet "incorporated" many provisions from the Bill of Rights against the states, meaning that the states were free to ignore them. For purposes of this course, students should presume that constitutional provisions apply with equal force against the states and the federal government, unless instructed otherwise. One key criminal procedure provision not incorporated is the right to indictment by a grand jury. *See Hurtado v. California*, 110 U.S. 516 (1884). In *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the Court unanimously held that the Excessive Fines Clause of the Eighth Amendment is incorporated against the states. In *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), the Court held that the Sixth Amendment requires states use only a unanimous jury verdict to convict defendants of serious offenses, setting aside a conviction based on a 10-to-2 vote. This continues the decades-long trend of incorporating the Bill of Rights through the Fourteenth Amendment.

Students may find one procedural aspect of *Brown* particularly upsetting, in addition to the terrible conduct that agents of the state committed against the defendants: After the defendants were convicted, they appealed to the highest court of their state, and the state court *affirmed the convictions*. Two dissenting members of that court set forth at length the terrible conduct—so carefully that the Supreme Court of the United States would later cut and paste much of the dissent. Whatever one's position on theories related to federalism, one cannot avoid the conclusion that at least in this case, a state's justice system was sorely in need of federal supervision. Throughout this course, students will notice an ongoing debate about how much Supreme Court oversight is necessary to protect Americans from police officers, prosecutors, and judges behaving badly. The Court's assessment has changed over time, and justices serving together often disagree.

What to Look for when Reading Cases

As the semester progresses, students will learn to answer two key questions presented in every single criminal procedure case: First, were someone's rights (usually constitutional rights) violated? Second, if so, so what?

Answering the first question requires knowledge of the Supreme Court's decisions interpreting the Fourth, Fifth, and Sixth Amendments to the Constitution, among other provisions. For example, the Court has considered over several cases—decided over several decades—what counts as a "search" for purposes of the Fourth Amendment. It has debated what the Due Process Clauses of the Fifth and Fourteenth Amendments require of police officers conducting interrogations. And it has weighed how to protect the right to counsel guaranteed by the Sixth Amendment to all criminal defendants.

Answering the second question—"So what?"—requires knowledge of the remedies the Supreme Court has provided for violations of the rights of criminal suspects and defendants. For a defendant, the most desirable remedy is often the exclusion of evidence obtained illegally. When the "exclusionary rule" applies, evidence gained during an unlawful search or interrogation, for example, may become unavailable to prosecutors, which may lead to the dismissal of criminal charges. The proper scope of the exclusionary rule has been hotly debated for decades, and even its existence is not taken for granted by everyone on the Supreme Court. When exclusion of evidence is not available, the best remedy may be money damages, although that remedy has its own shortcomings. Students will learn the basics of when various remedies are available for violations of criminal procedure rules.

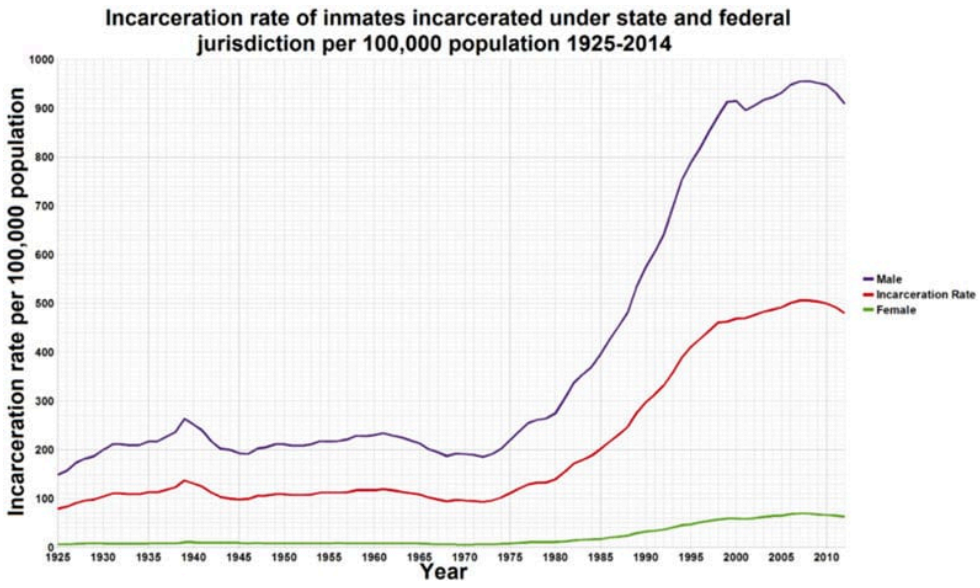
In a sense, the rules governing searches, seizures, interrogations, and so on can be considered the "substantive" law of criminal procedure. These rules constitute the bulk of most criminal procedure courses, and this one is no exception. Questions in this category include: When do police need a warrant? When must police give "*Miranda* warnings"? What must states provide for criminal defendants too poor to hire a lawyer?

The remedies are what one might call the "procedural" aspect of criminal procedure law. Questions in this category include: If police executing a search warrant break down someone's door without justification, can the homeowner exclude evidence found during the ensuing search? Does the answer change if the warrant was somehow defective? When can prosecutors use confessions obtained in violation of the *Miranda* Rule? The portion of assigned readings explicitly devoted to remedies is far less than that given to "substantive" criminal procedure rights. Keep in mind, however, that rights without remedies are largely worthless,[2] and those students who one day prosecute crimes or represent defendants will care deeply about the practical consequences of Supreme Court doctrine.

The Scope of the Criminal Justice System

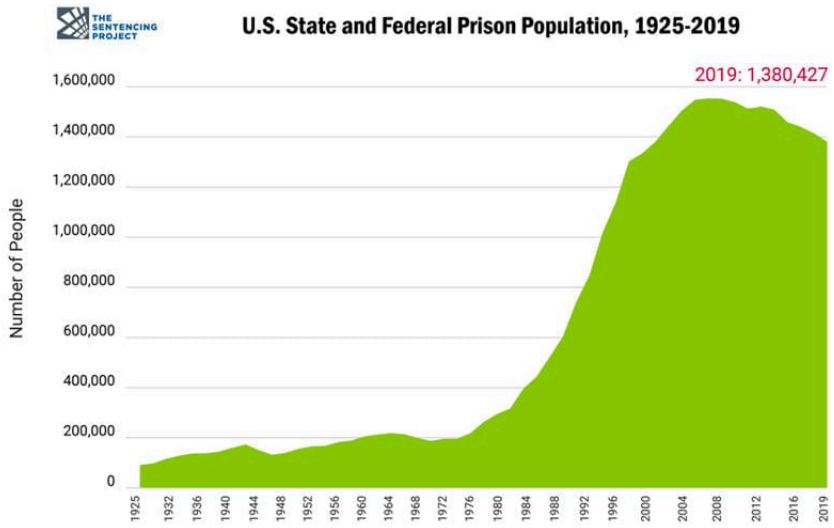
Before returning to the meat of criminal procedure law, let us consider for a moment just how large and important a system is being governed by nine Justices interpreting a handful of ancient clauses.

Beginning around 1970, the United States began a massive increase in incarceration. Between 1980 and 2010, the incarceration rate more than doubled. Despite a small drop in incarceration over the past decade, as of early 2022 the United States incarcerated about 2 million people, including inmates at prisons, local jails, and juvenile facilities, among other places. This chart (released to the public domain via Wikimedia Commons) shows how the incarceration rate (essentially, the number of inmates per 100,000 U.S. residents) was relatively flat for decades through the 1960s, began rising after 1970, and then increased rapidly after 1985. The rate has decreased slightly over the past few years.



The U.S. 2021 incarceration rate was 664 per 100,000 residents, exceeding every other country in the world. The states with the highest incarceration rates in 2021 were Mississippi (1,031), Louisiana (1,094), and Oklahoma (993). The states with the lowest rates were Rhode Island (289), Vermont (288) and Massachusetts (275). Even these states have higher incarceration rates than most countries, including Iran (228), South Africa (248), Israel (234), New Zealand (188), Singapore (185), Poland (188), Jamaica (137), Iraq (126), France (93), and Ireland (72).[3]

The next chart (provided courtesy of The Sentencing Project) shows the raw numbers of prisoners in America. Note that this does not include inmates in jails or juvenile facilities.

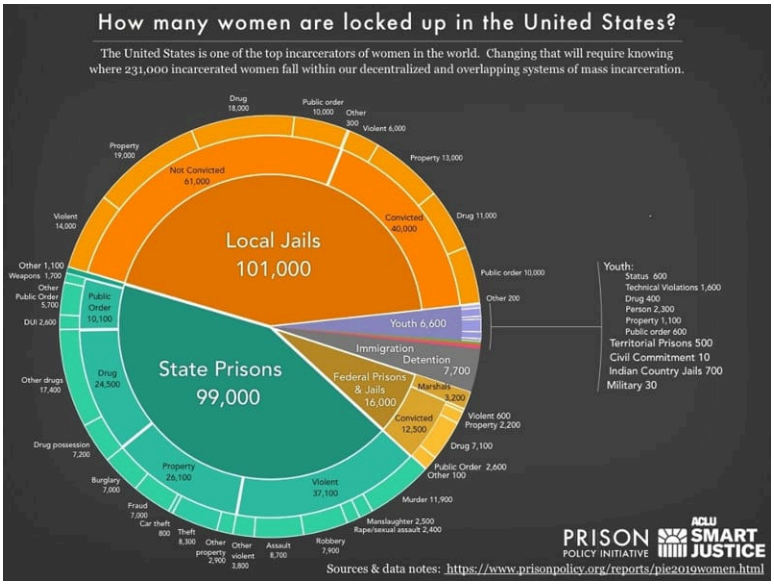


Nationwide, the total prison and jail population as of December 31, 2020 was 1,691,600.[4] In addition, 3,890,400 persons were under supervision—on parole or probation—creating a total correctional system population of 5,500,600.

Because states house the overwhelming bulk of U.S. prisoners, state budgets fund the overwhelming bulk of U.S. correctional expenses. In 1985—just before the American prison population began its sharp increase—states spent a combined $6.7 billion on corrections. By 1990, the cost had risen to $16.9 billion. It was $36.4 billion in 2000, $51.4 billion in 2010, and $56.6 billion in 2019.[5]

The next chart (provided courtesy of the Prison Policy Initiative) shows where incarcerated women are housed and what offenses

led them to confinement.



[The PPI also has a chart entitled "The Whole Pie," which covers *all* incarcerated persons, male and female. Although we lack permission to include the chart in this book, students may (and should) find it online.]

The likelihood of imprisonment is not distributed evenly among different groups of Americans. Women constitute about half of the total U.S. population but only 7 percent of the total prison population. Racial disparities are also stark. In 2020, state and federal prisons housed (out of a total of 1,182,166 inmates) 389,500 Black inmates (33 percent of the total), 358,900 white inmates (30 percent of the total), and 275,300 Hispanic inmates (23 percent of the total).[6] According to Census data taken around the same time (April 1, 2020), 76 percent of Americans described themselves as white alone (no other race), 13 percent as Black or African American alone, 3 percent as two or more races, and 18.5 percent as Hispanic or Latino.[7] Although the demographic definitions—particularly for deciding who counts as Hispanic—used in various surveys are not always identical, the results are clear. Black and Hispanic Americans are significantly overrepresented among prisoners.

Despite the high U.S. incarceration rate, most Americans will never serve time. Instead, the majority of Americans encounter the justice system through their interactions with police officers. U.S. law enforcement agencies employ about 665,000 officers at the local, state, and federal level. That works out to about one officer for every 500 Americans. In 2019, officers performed about 10 million arrests. As was noted for incarceration, arrest rates exhibit disparities by race and sex. Of those arrested in 2019, 69.4 percent were white, and 26.6 percent were black. Males constituted 72.5 percent of those arrested in 2019. Young men are especially likely to be arrested.[8]

When suspects are arrested and prosecuted, states often provide legal counsel because the defendants otherwise could not afford it. The per capita expense on indigent defense varies tremendously among states. For example, in 2017 Wisconsin spent $86 million, or $14.83 per resident. That same year Texas spent $37 million, or $1.31 per resident.

A Few Recent Cases

We will return now to the discussion we set aside after reading *Brown v. Mississippi*.

"Yes, yes," one might say, "the criminal justice system is important. As a nation we spend immense sums on police, prosecution, and prisons. And back in 1934, some goons in Mississippi abused criminal defendants, which required intervention by the Supreme Court. What about today?"

This is a fair question; otherwise, we would not have placed it in the mouths of our hypothetical students. We expect that by the end of the semester, few if any students will question whether police and prosecutors still require judicial oversight. The amount and proper form of that oversight will almost surely remain contested—indeed, the Justices themselves contest these issues every year—but the principle is likely to win near unanimous assent. To assuage skepticism without delay, however, we will present some

evidence now.

In 2013, the State of California freed Kash Delano Register, whom the state had imprisoned for 34 years for a murder he did not commit.[9] Mr. Register had been convicted on the basis of false identification testimony, and the lawyers who won his release produced proof that police and prosecutors had concealed from Register's trial defense team evidence of his innocence, including reports of eyewitnesses who would have contradicted the testimony of prosecution witnesses, along with evidence of how police had used threats of unrelated criminal prosecution to pressure the witnesses against Register. Absent the work of students and faculty at Loyola Law School in Los Angeles, Register might remain incarcerated today. Prosecutors opposed his release until 2013. In 2016, the Los Angeles City Council approved a $16.7 million settlement payment to Register.[10] The city has paid tens of millions of dollars in other recent settlements related to police conduct.[11]

In 2012, the State of Missouri released George Allen, Jr., whom the state had imprisoned for 30 years for a St. Louis rape and murder he did not commit.[12] Although prosecutors could not explain how Allen could have travelled from his University City home to the murder scene—St. Louis was paralyzed that day by a 20-inch snowstorm—a jury eventually convicted Allen on the basis of his confession. Decades after his conviction, new lawyers for Allen—from the Bryan Cave law firm and the Innocence Project—produced evidence that police had elicited a false confession from Allen, who was mentally ill. Missouri courts found that prosecutors withheld exculpatory evidence, including lab results, fingerprint records, and information about bizarre interrogation tactics such as hypnosis of a key witness. Allen died in 2016, and the City of St. Louis and Allen's family settled his civil rights lawsuit in 2018 for $14 million.

The National Registry of Exonerations, maintained by the University of Michigan, lists 3,176 exonerations, representing "more than 27,200 years lost."[13] Because it covers only exonerations, it does not include cases in which misconduct is uncovered in time to prevent a wrongful conviction.

In 2015, the *Wall Street Journal* reported that America's "10 cities with the largest police departments paid out $248.7 million" in 2014 in settlements and court judgements in police misconduct cases.[14] Students should keep in mind that because so much misconduct cannot be remedied through monetary damages, numbers like these understate the problem.

Chicago has settled several multi-million-dollar cases in recent years. Examples include: "A one-time death row inmate brutally beaten by police: $6.1 million. An unarmed man fatally shot by an officer as he lay on the ground: $4.1 million."[15] Another involved an officer who "posted messages on his Facebook page falsely calling [a] teen a drug dealer and criminal" and officers handcuffing this same teen without cause. (Settlement around $500,000.) More recent cases include "a police officer [who] pointed a gun at [the plaintiff's] 3-year-old daughter's chest during a 2013 raid of the family's Chicago home" and a man who spent about 20 years in prison after being framed.[16]

As the *Baltimore Sun* noted—in its 2014 report of how the "city has paid about $5.7 million since 2011 over lawsuits claiming that police officers brazenly beat up alleged suspects"—the "perception that officers are violent can poison the relationship between residents and police."[17] The newspaper observed:

"Over ... four years, more than 100 people have won court judgments or settlements related to allegations of brutality and civil rights violations. Victims include a 15-year-old boy riding a dirt bike, a 26-year-old pregnant accountant who had witnessed a beating, a 50-year-old woman selling church raffle tickets, a 65-year-old church deacon rolling a cigarette and an 87-year-old grandmother aiding her wounded grandson."

In multiple jurisdictions, class action lawsuits about unlawful strip searches have yielded large payments. In 2010, the Cook County (Illinois) Board of Commissioners agreed to a $55 million settlement with suspects stripped-searched at Cook County Jail. New York City reached a $50 million settlement in 2001 and another one for $33 million in 2010, both related to searches in city jails such as Rikers Island. Similar settlements (for smaller amounts) have been reached in places such as Kern County, California; Burlington County, New Jersey; and Washington, D.C. Massachusetts officials settled a suit concerning the Western Massachusetts Regional Women's Correctional Center, agreeing to prohibit male guards from continuing their practice of videotaping the strip searches of female inmates.

Less sensational issues (nonetheless important to those involved) include the ongoing debate over "stop-and-frisk" tactics nationwide, in addition to racial profiling of motorists. These practices affect persons whose involvement with the criminal justice system might otherwise be fairly minimal. In New York City, a federal court found that NYPD officers violated the Fourth Amendment by performing unreasonable searches and seizures and further found that police violated the Equal Protection Clause of Fourteenth Amendment by stopping and frisking New Yorkers in a racially discriminatory manner.[18] In Missouri, annual reports

by the Attorney General regularly find racial disparities in vehicle stops.[19] According to the 2017 report, Black motorists were far more likely to be stopped, despite police finding contraband less often when stopping Black motorists than when stopping white motorists. "African-Americans represent 10.9% of the driving-age population but 18.7% of all traffic stops .... The contraband hit rate for whites was 35.5%, compared with 32.9% for blacks and 27.9% for Hispanics. This means that, on average, searches of African-Americans and Hispanics are less likely than searches of whites to result in the discovery of contraband."

In sum, the incidence of police and prosecutorial misconduct is not limited to dusty case files from the old Confederacy.

Meanwhile, crime remains a serious problem, one America has struggled with since colonial times. Since the 1800s, the United States has had a much higher murder rate than European countries otherwise similar to us in measures of economic power and educational attainment. Then, beginning around 1965, the U.S. homicide rate increased dramatically.[20] Although the increase was not uniform (different decades saw different trends, and different locations experienced trends differently), the United States as a whole suffered a big increase in crime from the mid-1960s through the early-1990s, with the nationwide homicide rate peaking at around 10 per 100,000 persons. Since then, crime has dropped significantly, returning over twenty years to what was observed in the early 1960s.[21] By 2000, the homicide rate had dropped to around 5.5 per 100,000, which is close to the rates observed over the subsequent two decades.[22] (Time will tell whether the rising homicide rates observed during 2020 and 2021—that is, during first years of the COVID pandemic—represent an aberration or a new normal.) In other words, American crime rates remain well above those of Western Europe, Canada, and Australia, but they are far better than American rates of a generation ago. The sharp increase in crime between the 1960s and 1990s may explain in part the rapid increase in American incarceration, as politicians offered "tough-on-crime" solutions. The causes of the huge increase in crime beginning around 1965, as well as of the subsequent decrease, are hotly disputed.[23] In any event, crime remains an important political and social issue in America. Court decisions about how police may behave will be better understood if given broader social context. For example, judicial decisions that prevent the convictions of undisputedly guilty defendants may be unpopular among voters, and voters elect the politicians who appoint and confirm Supreme Court Justices. Further, Justices may recognize their relative lack of expertise in the fields of policing and criminology, and they may hesitate to mandate practices (or to prohibit practices) without thoughtfully considering how their decisions could affect ongoing national efforts to fight crime. The debate over how much the Court should meddle in the affairs of police departments is a thread that runs through the course material.

Outline of the Book

After the first chapter, the book will proceed as follows: First, we will examine the Fourth Amendment, beginning with considering what counts as a "search" in Fourth Amendment cases. After studying the concepts of probable cause and reasonable suspicion, we will discuss warrants, including what police must do to obtain them, when they are required, and when the Supreme Court has said police may conduct searches and seizures without warrants. Having spent about a third of the book on searches, we will turn to seizures, including arrests and "stop and frisk."

Around the halfway point of the book, we will move from the Fourth Amendment and begin our study of interrogations, examining how the Court has used the Fifth, Sixth, and Fourteenth Amendments to regulate police questioning of suspects. This portion of the book will cover the Due Process Clauses, the *Miranda* Rule, and regulations arising from the right to counsel.

Having studied "substantive" criminal procedure rules at some length—learning what the Court has told police officers they can and cannot do—we will turn to the remedies available when these rules are broken. Primarily, we will focus on the exclusionary rule, a judicially-created remedy that prevents prosecutors from using certain evidence obtained illegally. We will also consider when money damages are available as a remedy for violations of criminal procedure rules.

Near the end of the book, we will study the criminal defendant's right to the assistance of counsel, which is guaranteed by the Sixth Amendment. In particular, we will learn when the state must provide counsel and how effective counsel must be to satisfy the constitutional guarantee.

Then we will study identification procedures, including how police can avoid mistaken identifications by victims and other witnesses, along with the limited requirements that have been imposed by the Supreme Court.

As the book ends, we will consider some new challenges presented by terrorism, such as torture, and by technological advances, such as electronic surveillance.

A Note on the Text

Universities exist to promote the search for knowledge and to transmit human knowledge to future generations. Public universities in particular have a tradition of sharing knowledge with the broader populace, not merely their own students, and they also have a tradition of providing excellent education at affordable prices. This book exists to further these important missions of the University of Missouri. Designed by MU professors, it suits the pedagogical preferences of its authors. Available at no cost, it reduces students' cost of attendance.

In addition, this book is available under a Creative Commons license, meaning that anyone—inside or outside the university—can use it to study criminal procedure and can share it at will. Faculty at other universities are free to adopt it, and some have done so.

The project was inspired, in part, by an article one of your authors published in 2016, calling on law schools and law faculty to create free casebooks for students.[24] It turned out that calling upon others to create books did not in itself produce these books. Your authors have since become the change they wished to see in legal education. Because the book is relatively new—and is the first casebook produced by either of your authors—student feedback is especially welcome. Future students will benefit from any improvements.

To increase the book's value as a free resource, the text when possible contains links to sources at which students can learn more at no cost. For example, Supreme Court cases are freely available online, and anyone who wishes to read the full unedited version of any case may do so. (Even when a link has not been provided, when naming cases we usually have included a full citation, which should allow students easy access to free versions of the text.) Your authors have edited cases so that reading assignments would be kept reasonable for a one-semester course; however, there is always more to learn.

In addition, this book aims to go beyond providing a "nutshell" summary of American criminal procedure law. From time to time, particularly when assigned cases raise issues about which there are important ongoing debates in American society, the readings will investigate these issues in greater depth than might be possible were the text confined to opinions written by Supreme Court Justices. More than one hundred years ago, Roscoe Pound—then dean of the University of Nebraska College of Law, later dean at Harvard—published the great legal realist article "Law in Books and Law in Action."[25] If this book is successful, students will spend time considering the practical effects—the law in action—of the opinions contained in Supreme Court reporters.

The Key Constitutional Language

In this course, students will focus on Supreme Court cases arising from a handful of constitutional provisions. Four Amendments to the Constitution of the United States are reprinted here (three in full, one in part) for your convenience:

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process

for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Savvy students will have noticed that the constitutional provisions reprinted above lack definitions for terms such as “unreasonable,” “search,” “seizure,” “probable cause,” “put in jeopardy,” “due process of law,” “confronted with the witnesses against him,” and “Assistance of Counsel.” The remainder of this book is, essentially, a summary of the Supreme Court’s ongoing efforts to provide the missing definitions.

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2: THE FOURTH AMENDMENT

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2.1: Chapter 2 - What Is a Search? The Basics

With the readings for this chapter, we begin our exploration of the Fourth Amendment to the Constitution of the United States. The Fourth Amendment is short, just 54 words, and it reflects the desires of those who wrote and ratified it to protect Americans against unreasonable government intrusion into their lives. The Amendment mentions some of the more important aspects of a person's life—her house, her papers, her effects, even her "person," that is, her body—and declares that government agents may not unreasonably search or seize those things. Here is the text:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

These words have inspired arguments about their meanings. For example, what counts as a "house" and thereby merits protection from unreasonable searches? Is it limited to physical buildings in which people live, or is some area outside the structure included? We will see later that the Court eventually defined the concept of "curtilage," which is an outdoor area that the Court treats as part of the "house."

Over the coming weeks, students will encounter vigorous debate over the meaning of "reasonable." When is it reasonable for a police officer to stop and frisk a pedestrian about whom the officer has suspicion? When is it reasonable for police to search cars without warrants? For now, we will set aside the concept of reasonableness for one simple reason: Before something can be an "unreasonable search," it must first be a "search." The cases assigned for this chapter concern the definition of "search" for purposes of Fourth Amendment jurisprudence. (Similarly, before something can be an "unreasonable seizure," it must first be a "seizure." We will consider the definition of "seizure" later in the semester.)

In the first case, *Katz v. United States*, the Justices attempt to bring their definition of "search" into the modern world.

Supreme Court of the United States

Charles Katz v. United States

Decided Dec. 18, 1967—389 U.S. 347

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute. At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because "[t]here was no physical entrance into the area occupied by [the petitioner]." We granted certiorari in order to consider the constitutional questions thus presented.

The petitioner had phrased those questions as follows:

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."

We decline to adopt this formulation of the issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law

of the individual States.

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead v. United States*, 277 U.S. 438; *Goldman v. United States*, 316 U.S. 129, 134—136, for that Amendment was thought to limit only searches and seizures of tangible property. But "(t)he premise that property interests control the right of the Government to search and seize has been discredited." Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any "technical trespass under ... local property law." Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification ... that is central to the Fourth Amendment," a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

Mr. Justice MARSHALL took no part in the consideration or decision of this case.

Mr. Justice HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the

other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

The critical fact in this case is that "(o)ne who occupies it, (a telephone booth) shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. The point is not that the booth is "accessible to the public" at other times, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.

Finally, I do not read the Court's opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.

Mr. Justice BLACK, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a "search" or "seizure," I would be happy to join the Court's opinion.

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable.

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures ...." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition, the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one "describe" a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says "particularly describing"? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in *Berger*, *supra*, recognized, "an ancient practice which at common law was condemned as a nuisance. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse." There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires and that this Court often has said that the Bill of Rights' safeguards should be given a liberal construction. This principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the "seizure" of conversations. The Fourth Amendment was aimed directly at the abhorred practice of breaking

in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions.

Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual's privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy.

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons I respectfully dissent.

Notes, Comments, and Questions

In *Katz*, the Court made clear that a physical trespass is not essential to a Fourth Amendment search. In subsequent chapters, students will explore the Court's efforts to flesh out this ruling, applying it to contexts such as police officers flying over houses, police officers using thermal imaging devices to examine a home, and police searching garbage left outside for collection.

In our next case, however, the Court reminds readers that although trespass is not necessary to a Fourth Amendment search, it can be sufficient. That is, although the line of cases following *Katz* remains essential reading for a student of criminal procedure, not every Fourth Amendment search necessarily invades a person's reasonable expectation of privacy. Forty-five years after the Court decided *Katz*, the Justices handed down *United States v. Jones*, reiterating the importance of the law of trespass to the Court's vision of the Fourth Amendment.

Supreme Court of the United States

United States v. Antoine Jones

Decided Jan. 23, 2012—565 U.S. 400

Justice SCALIA delivered the opinion of the Court.

We decide whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.

I

In 2004 respondent Antoine Jones, owner and operator of a nightclub in the District of Columbia, came under suspicion of trafficking in narcotics and was made the target of an investigation by a joint FBI and Metropolitan Police Department task force.

[A]gents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements, and once had to replace the device's battery. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4-week period.

The Government ultimately obtained a multiple-count indictment charging Jones with conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base. Before trial, Jones filed a motion to suppress evidence obtained through the GPS device. The District Court granted the motion only in part, suppressing the data obtained while the vehicle was parked in the garage adjoining Jones's residence. It held the remaining data admissible, because "'[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.'"

The Government introduced at trial the GPS-derived locational data, which connected Jones to the alleged conspirators' stash house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base. The jury returned a guilty verdict, and the District Court sentenced Jones to life imprisonment.

The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. The D.C. Circuit denied the Government's petition for rehearing en banc, with four judges dissenting. We granted certiorari.

II

A

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search."

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. *Entick v. Carrington,* 95 Eng. Rep. 807 (C.P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' " with regard to search and seizure. In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

"[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. Thus, in *Olmstead v. United States,* 277 U.S. 438, we held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because "[t]here was no entry of the houses or offices of the defendants."

Our later cases, of course, have deviated from that exclusively property-based approach. In *Katz v. United States,* we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy."

The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy

against government that existed when the Fourth Amendment was adopted." As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Katz* did not repudiate that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between *other* people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no Fourth Amendment violation "unless the conversational privacy of the homeowner himself is invaded." *Alderman v. United States,* 394 U.S. 165, 176 (1969). "[W]e [do not] believe that *Katz,* by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home...." *Id.,* at 180.

More recently, in *Soldal v. Cook County,* 506 U.S. 56 (1992), the Court unanimously rejected the argument that although a "seizure" had occurred "in a 'technical' sense" when a trailer home was forcibly removed, no Fourth Amendment violation occurred because law enforcement had not "invade[d] the [individuals'] privacy." *Katz,* the Court explained, established that "property rights are not the sole measure of Fourth Amendment violations," but did not "snuf[f] out the previously recognized protection for property." As Justice Brennan explained in his concurrence in *Knotts, Katz* did not erode the principle "that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." We have embodied that preservation of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Katz* did not narrow the Fourth Amendment's scope.

The Government contends that several of our post-*Katz* cases foreclose the conclusion that what occurred here constituted a search. It relies principally on two cases in which we rejected Fourth Amendment challenges to "beepers," electronic tracking devices that represent another form of electronic monitoring. The first case, *Knotts,* upheld against Fourth Amendment challenge the use of a "beeper" that had been placed in a container of chloroform, allowing law enforcement to monitor the location of the container. We said that there had been no infringement of Knotts' reasonable expectation of privacy since the information obtained—the location of the automobile carrying the container on public roads, and the location of the off-loaded container in open fields near Knotts' cabin—had been voluntarily conveyed to the public. But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to,* not *substituted for,* the common-law trespassory test. The holding in *Knotts* addressed only the former, since the latter was not at issue. The beeper had been placed in the container before it came into Knotts' possession, with the consent of the then-owner. Knotts did not challenge that installation, and we specifically declined to consider its effect on the Fourth Amendment analysis. *Knotts* would be relevant, perhaps, if the Government were making the argument that what would otherwise be an unconstitutional search is not such where it produces only public information. The Government does not make that argument, and we know of no case that would support it.

The second "beeper" case, *United States v. Karo,* 468 U.S. 705 (1984), does not suggest a different conclusion. There we addressed the question left open by *Knotts,* whether the installation of a beeper in a container amounted to a search or seizure. As in *Knotts,* at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later. Thus, the specific question we considered was whether the installation "*with the consent of the original owner* constitute[d] a search or seizure ... when the container is delivered to a buyer having no knowledge of the presence of the beeper." We held not. The Government, we said, came into physical contact with the container only before it belonged to the defendant Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo's privacy. That conclusion is perfectly consistent with the one we reach here. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location. *Cf. On Lee v. United States,* 343 U.S. 747 (1952) (no search or seizure where an informant, who was wearing a concealed microphone, was invited into the defendant's business). Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing.

The Government also points to our exposition in *New York v. Class,* 475 U.S. 106 (1986), that "[t]he exterior of a car ... is thrust into the public eye, and thus to examine it does not constitute a 'search.'" That statement is of marginal relevance here since, as the Government acknowledges, "the officers in this case did *more* than conduct a visual inspection of respondent's vehicle." By attaching the device to the Jeep, officers encroached on a protected area. In *Class* itself we suggested that this would make a difference, for we concluded that an officer's momentary reaching into the interior of a vehicle did constitute a search.

Finally, the Government's position gains little support from our conclusion in *Oliver v. United States,* 466 U.S. 170 (1984), that officers' information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search even though it was a trespass at common law. Quite simply, an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment. The Government's physical intrusion on such an area—unlike its intrusion on the "effect" at issue here—is of no Fourth Amendment significance.

B

The concurrence begins by accusing us of applying "18th-century tort law." That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply *exclusively Katz*'s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.

The concurrence [by Justice Alito] faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

In fact, it is the concurrence's insistence on the exclusivity of the *Katz* test that needlessly leads us into "particularly vexing problems" in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. We accordingly held in *Knotts* that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4–week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence posits that "relatively short-term monitoring of a person's movements on public streets" is okay, but that "the use of longer term GPS monitoring in investigations *of most offenses*" is no good. That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4–week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. What of a 2–day monitoring of a suspected purveyor of stolen electronics? Or of a 6–month monitoring of a suspected terrorist? We may have to grapple with these "vexing problems" in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

The judgment of the Court of Appeals for the D.C. Circuit is affirmed.

Justice SOTOMAYOR, concurring.

I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area." "[W]hen the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment."

Nonetheless, as Justice ALITO notes, physical intrusion is now unnecessary to many forms of surveillance. With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones. In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance. But "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." As Justice ALITO incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. Under that rubric, I agree with Justice ALITO that, at the very least, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility."

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS

monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society."

I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent "a too permeating police surveillance."

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice ALITO notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

Resolution of these difficult questions in this case is unnecessary, however, because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision. I therefore join the majority's opinion.

Justice ALITO, with whom Justice GINSBURG, Justice BREYER, and Justice KAGAN join, concurring in the judgment.

This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law.

This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.

I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

I

A

The Fourth Amendment prohibits "unreasonable searches and seizures," and the Court makes very little effort to explain how the attachment or use of the GPS device fits within these terms. The Court does not contend that there was a seizure … and here there was none.

The Court does claim that the installation and use of the GPS constituted a search, but this conclusion is dependent on the questionable proposition that these two procedures cannot be separated for purposes of Fourth Amendment analysis. If these two procedures are analyzed separately, it is not at all clear from the Court's opinion why either should be regarded as a search. It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained. And the Court does not contend that the use of the device constituted a search either. On the contrary, the Court accepts the holding in *United States v. Knotts,* 460 U.S. 276, that the use of a surreptitiously planted electronic device to monitor a vehicle's movements on public roads did not amount to a search.

The Court argues—and I agree—that "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" But it is almost impossible to think of late–18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and

remained there for a period of time in order to monitor the movements of the coach's owner?[1]) The Court's theory seems to be that the concept of a search, as originally understood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is incorrect. At common law, any unauthorized intrusion on private property was actionable but a trespass on open fields, as opposed to the "curtilage" of a home, does not fall within the scope of the Fourth Amendment because private property outside the curtilage is not part of a "hous[e]" within the meaning of the Fourth Amendment.

B

The Court's reasoning in this case is very similar to that in the Court's early decisions involving wiretapping and electronic eavesdropping, namely, that a technical trespass followed by the gathering of evidence constitutes a search. In the early electronic surveillance cases, the Court concluded that a Fourth Amendment search occurred when private conversations were monitored as a result of an "unauthorized physical penetration into the premises occupied" by the defendant. *Silverman v. United States,* 365 U.S. 505, 509 (1961). In *Silverman,* police officers listened to conversations in an attached home by inserting a "spike mike" through the wall that this house shared with the vacant house next door. This procedure was held to be a search because the mike made contact with a heating duct on the other side of the wall and thus "usurp[ed] ... an integral part of the premises."

By contrast, in cases in which there was no trespass, it was held that there was no search. Thus, in *Olmstead v. United States,* 277 U.S. 438 (1928), the Court found that the Fourth Amendment did not apply because "[t]he taps from house lines were made in the streets near the houses." Similarly, the Court concluded that no search occurred in *Goldman v. United States,* 316 U.S. 129 (1942), where a "detectaphone" was placed on the outer wall of defendant's office for the purpose of overhearing conversations held within the room.

This trespass-based rule was repeatedly criticized. In *Olmstead,* Justice Brandeis wrote that it was "immaterial where the physical connection with the telephone wires was made."

Katz v. United States, 389 U.S. 347 (1967), finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation. [T]he *Katz* Court, "repudiate[ed]" the old doctrine and held that "[t]he fact that the electronic device employed ... did not happen to penetrate the wall of the booth can have no constitutional significance." What mattered, the Court held, was whether the conduct at issue "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth."

Under this approach, as the Court later put it when addressing the relevance of a technical trespass, "an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation."

[T]he majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory.

III

Disharmony with a substantial body of existing case law is only one of the problems with the Court's approach in this case.

I will briefly note four others. First, the Court's reasoning largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation). Attaching such an object is generally regarded as so trivial that it does not provide a basis for recovery under modern tort law. But under the Court's reasoning, this conduct may violate the Fourth Amendment. By contrast, if long-term monitoring can be accomplished without committing a technical trespass—suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car—the Court's theory would provide no protection.

Second, the Court's approach leads to incongruous results. If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.

In the present case, the Fourth Amendment applies, the Court concludes, because the officers installed the GPS device after respondent's wife, to whom the car was registered, turned it over to respondent for his exclusive use. But if the GPS had been attached prior to that time, the Court's theory would lead to a different result. The Court proceeds on the assumption that respondent "had at least the property rights of a bailee," but a bailee may sue for a trespass to chattel only if the injury occurs during the term of the bailment. So if the GPS device had been installed before respondent's wife gave him the keys, respondent would have no claim for trespass—and, presumably, no Fourth Amendment claim either.

Third, under the Court's theory, the coverage of the Fourth Amendment may vary from State to State. If the events at issue here had occurred in a community property State or a State that has adopted the Uniform Marital Property Act, respondent would likely be an owner of the vehicle, and it would not matter whether the GPS was installed before or after his wife turned over the keys. In non-community-property States, on the other hand, the registration of the vehicle in the name of respondent's wife would generally be regarded as presumptive evidence that she was the sole owner.

Fourth, the Court's reliance on the law of trespass will present particularly vexing problems in cases involving surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked. For example, suppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. But may such decisions be followed in applying the Court's trespass theory? Assuming that what matters under the Court's theory is the law of trespass as it existed at the time of the adoption of the Fourth Amendment, do these recent decisions represent a change in the law or simply the application of the old tort to new situations?

IV

A

The *Katz* expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. It involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks. In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.

On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping. After *Katz,* Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law.

B

Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements. In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the movements of motorists who choose to make use of that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen.

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States. For older phones, the accuracy of the location information depends on the density of the tower network, but new "smart phones," which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road. Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

V

In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance. Only an investigation of unusual importance could have justified such an expenditure of law enforcement resources. Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap. In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.

To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.

Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark. Other cases may present more difficult questions. But where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant. We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.

For these reasons, I conclude that the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment. I therefore agree with the majority that the decision of the Court of Appeals must be affirmed.

Notes, Comments, and Questions

Although the *Jones* Court held that *Katz* is not the sole touchstone of Fourth Amendment "search" analysis, it also made clear that *Katz* has not in any way been overruled. When considering whether certain state action constitutes a "search," students should consider both whether it satisfies the criteria set forth in *Katz* and whether it satisfies the more recent standard articulated in *Jones*. A person complaining about state action need not satisfy both standards; either one will do.

As Justice Alito noted in his concurrence, "the regulation of wiretapping has been governed primarily by statute and not by case law." This is the first example of what will become a common theme in the course. Put simply, much of criminal procedure—like criminal law more generally—is not regulated by constitutional law. Witness identification procedures, for example, are largely left to the discretion of police departments, with minimal oversight by courts. Once states meet bare minimum standards for providing the assistance of counsel for indigent defendants, they decide how much additional money to devote to the effort. States decide how many police officers they want to patrol various neighborhoods, how strictly to enforce various criminal laws, and how much to punish convicted defendants. As the semester progresses, students should pay careful attention to the policy decisions *not* dictated by Supreme Court doctrine. Those are decisions that, after students become lawyers, they may have the opportunity to guide.

The majority in *Jones* relies on the trespassory nature of the police contact with the jeep to find a search rather than a *Katz*-style "reasonable expectation of privacy" analysis. As Justice Sotomayor predicted, though, police surveillance of GPS-enabled smartphones without trespassory invasion has quickly become a reality, and police can now access this data without a physical trespass. Moreover, police can obtain GPS information about all cell phone users in a particular area. Consider the "reverse location search warrant." This warrant allows police, without touching anyone's phone, to gather cell phone GPS data on all phones within the vicinity of a crime. Is this tactic a search under *Jones*? Under *Katz*? Why or why not? Consider the reasonable expectations of privacy for private individuals who are in the general locality of a crime by happenstance.

What result if the police do not trespass to place the GPS, but instead local ordinances or state legislation requires vehicles to be outfitted with GPS? Consider a Chicago ordinance that requires all food trucks to be outfitted with GPS and allows the city to access that GPS data for six months without a warrant.

One final note: In 2018, the Supreme Court decided *Carpenter v. United States*, 138 S. Ct. 2206 (2018), a case concerning "whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." Students should consider now (and perhaps write down) how they would answer this question, using the reasoning set forth in *Katz* and *Jones*. In the next few chapters, students will read several cases in which the Court applies the doctrines of *Katz* and *Jones* to different scenarios. Then, in Chapter 5, the Court's decision in *Carpenter* is presented. Will the Court's reasoning match yours?

This page titled 2.1: Chapter 2 - What Is a Search? The Basics is shared under a CC BY-NC-SA 4.0 license and was authored, remixed, and/or curated by Anne M Alexander and Ben Trachtenberg (CALI- The Center for Computer-Assisted Legal Instruction).

2.2: Chapter 3 - What Is a Search? Some Specifics

In the material assigned for this chapter, we begin applying the rules set forth in *Katz* and *Jones* to specific activities. As the cases make clear, the word “search” for purposes of the Fourth Amendment does not have its normal English meaning, that is, something to the effect of “try to find something” or “look for something.” Instead, the Supreme Court has created a legal term of art. Some activities that one might normally describe with the word “search” (such as looking through someone’s garbage in the hope of finding something interesting) turn out not to count as “searches” in Fourth Amendment jurisprudence. Students should consider when reading these cases whether the Court’s reasoning is persuasive. Further, they should consider whether a unifying set of principles can be found that (at least most of the time) allows one to predict whether a given activity will count as a “search.” Absent such a set of principles, it may appear that the Court’s doctrine in this area is somewhat arbitrary.

Supreme Court of the United States

California v. Billy Greenwood

Decided May 16, 1988—486 U.S. 35

Justice WHITE delivered the opinion of the Court.

The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not.

I

In early 1984, Investigator Jenny Stracner of the Laguna Beach Police Department received information indicating that respondent Greenwood might be engaged in narcotics trafficking. Stracner sought to investigate this information by conducting a surveillance of Greenwood’s home.

On April 6, 1984, Stracner asked the neighborhood’s regular trash collector to pick up the plastic garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses. The trash collector cleaned his truck bin of other refuse, collected the garbage bags from the street in front of Greenwood’s house, and turned the bags over to Stracner. The officer searched through the rubbish and found items indicative of narcotics use. She recited the information that she had gleaned from the trash search in an affidavit in support of a warrant to search Greenwood’s home.

Police officers encountered both respondents at the house later that day when they arrived to execute the warrant. The police discovered quantities of cocaine and hashish during their search of the house. Respondents were arrested on felony narcotics charges. They subsequently posted bail.

The police continued to receive reports of many late-night visitors to the Greenwood house. On May 4, Investigator Robert Rahaeuser obtained Greenwood’s garbage from the regular trash collector in the same manner as had Stracner. The garbage again contained evidence of narcotics use.

Rahaeuser secured another search warrant for Greenwood’s home based on the information from the second trash search. The police found more narcotics and evidence of narcotics trafficking when they executed the warrant. Greenwood was again arrested.

II

The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable. Respondents do not disagree with this standard.

They assert, however, that they had, and exhibited, an expectation of privacy with respect to the trash that was searched by the

police: The trash, which was placed on the street for collection at a fixed time, was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others, and deposit at the garbage dump. The trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone.

It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable.

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

Furthermore, as we have held, the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

The judgment of the California Court of Appeal is therefore reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Every week for two months, and at least once more a month later, the Laguna Beach police clawed through the trash that respondent Greenwood left in opaque, sealed bags on the curb outside his home. Complete strangers minutely scrutinized their bounty, undoubtedly dredging up intimate details of Greenwood's private life and habits. The intrusions proceeded without a warrant, and no court before or since has concluded that the police acted on probable cause to believe Greenwood was engaged in any criminal activity.

Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior. I suspect, therefore, that members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public.

I

"A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." Thus, as the Court observes, if Greenwood had a reasonable expectation that the contents of the bags that he placed on the curb would remain private, the warrantless search of those bags violated the Fourth Amendment.

The Framers of the Fourth Amendment understood that "unreasonable searches" of "paper[s] and effects"—no less than "unreasonable searches" of "person[s] and houses"—infringe privacy. As early as 1878, this Court acknowledged that the contents of "[l]etters and sealed packages ... in the mail are as fully guarded from examination and inspection ... as if they were retained by the parties forwarding them in their own domiciles." In short, so long as a package is "closed against inspection," the Fourth Amendment protects its contents, "wherever they may be," and the police must obtain a warrant to search it just "as is required when papers are subjected to search in one's own household."

With the emergence of the reasonable-expectation-of-privacy analysis, see *Katz v. United States*, we have reaffirmed this fundamental principle. Accordingly, we have found a reasonable expectation of privacy in the contents of a 200-pound "double-locked footlocker," a "comparatively small, unlocked suitcase," a "totebag," and "packages wrapped in green opaque plastic,"

Our precedent, therefore, leaves no room to doubt that had respondents been carrying their personal effects in opaque, sealed plastic bags—identical to the ones they placed on the curb—their privacy would have been protected from warrantless police intrusion. So far as Fourth Amendment protection is concerned, opaque plastic bags are every bit as worthy as "packages wrapped in green opaque plastic" and "double-locked footlocker[s]."

II

Respondents deserve no less protection just because Greenwood used the bags to discard rather than to transport his personal effects. Their contents are not inherently any less private, and Greenwood's decision to discard them, at least in the manner in which he did, does not diminish his expectation of privacy.

A trash bag, like any of the above-mentioned containers, "is a common repository for one's personal effects" and, even more than many of them, is "therefore ... inevitably associated with the expectation of privacy." A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" which the Fourth Amendment is designed to protect.

In evaluating the reasonableness of Greenwood's expectation that his sealed trash bags would not be invaded, the Court has held that we must look to "understandings that are recognized and permitted by society." Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers to discover some detail of our personal lives. That was, quite naturally, the reaction to the sole incident on which the Court bases its conclusion that "snoops" and the like defeat the expectation of privacy in trash. When a tabloid reporter examined then-Secretary of State Henry Kissinger's trash and published his findings, Kissinger was "really revolted" by the intrusion and his wife suffered "grave anguish." The public response roundly condemning the reporter demonstrates that society not only recognized those reactions as reasonable, but shared them as well. Commentators variously characterized his conduct as "a disgusting invasion of personal privacy," and contrary to "the way decent people behave in relation to each other."

Had Greenwood flaunted his intimate activity by strewing his trash all over the curb for all to see, or had some nongovernmental intruder invaded his privacy and done the same, I could accept the Court's conclusion that an expectation of privacy would have been unreasonable. Similarly, had police searching the city dump run across incriminating evidence that, despite commingling with the trash of others, still retained its identity as Greenwood's, we would have a different case. But all that Greenwood "exposed ... to the public," were the exteriors of several opaque, sealed containers. Until the bags were opened by police, they hid their contents from the public's view every bit as much as did Chadwick's double-locked footlocker and Robbins' green, plastic wrapping. Faithful application of the warrant requirement does not require police to "avert their eyes from evidence of criminal activity that could have been observed by any member of the public." Rather, it only requires them to adhere to norms of privacy that members of the public plainly acknowledge.

The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone. "What a person ... seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected." We have therefore repeatedly rejected attempts to justify a State's invasion of privacy on the ground that the privacy is not absolute.

Nor is it dispositive that "respondents placed their refuse at the curb for the express purpose of conveying it to a third party, ... who might himself have sorted through respondents' trash or permitted others, such as the police, to do so." In the first place, Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance commanded him to do so and prohibited him from disposing of it in any other way. Unlike in other circumstances where privacy is compromised, Greenwood could not "avoid exposing personal belongings ... by simply leaving them at home." More importantly, even the voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of a privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the "express purpose" of entrusting it to the postal officer or a private carrier; those bailees are just as likely as trash collectors (and certainly have greater incentive) to "sor[t] through" the personal effects entrusted to them, "or permi[t] others, such as police to do so." Yet, it has been clear for at least 110 years that the possibility of such an intrusion does not justify a warrantless search by police in the first instance.

III

In holding that the warrantless search of Greenwood's trash was consistent with the Fourth Amendment, the Court paints a grim picture of our society. It depicts a society in which local authorities may command their citizens to dispose of their personal

effects in the manner least protective of the "sanctity of [the] home and the privacies of life," and then monitor them arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual's expectation of privacy in the most private of personal effects sealed in an opaque container and disposed of in a manner designed to commingle it imminently and inextricably with the trash of others. The American society with which I am familiar "chooses to dwell in reasonable security and freedom from surveillance," and is more dedicated to individual liberty and more sensitive to intrusions on the sanctity of the home than the Court is willing to acknowledge.

I dissent.

Notes, Comments, and Questions

The *Greenwood* Court determined there was no search because there was no objective expectation of privacy in trash placed by the curb; the narcotics evidence in that trash was readily accessible to the public, placed at the curb for conveyance to a third party, and police are not expected to "avert their eyes" from publicly observable criminal behavior. Should there be a different outcome if the illegality of the contents is not so readily observable?

Consider the case of a tax preparer suspected of defrauding the government. The IRS agents collect his curbside trash for weeks only to discover the trash bags are filled with documents shredded into 5/32 inch strips. After reconstructing the documents (take a moment to consider the time and effort necessary to do so), the IRS has sufficient probable cause for a search warrant. Search or no search? Why or why not?

Consider police who extract DNA evidence from curbside trash. Does a defendant have a reasonable expectation of privacy in his DNA evidence on cups, bottles, or condoms placed in the trash on the curb? Several recent murders have been solved using a combination genetic ancestry research (to narrow the suspect pool) and DNA from trash to zero in on the defendant. [ABC News]

When interpreting its own law (such as a state constitution), a state court can recognize a "search" where courts applying the federal constitution would not. What are some arguments for and against states using different definitions of "search" than the Supreme Court has used when interpreting the Fourth Amendment? *See State v. Morris*, 680 A.2d 90, 92–93 (Vt 1996) ("One may accept the possibility that one's garbage is susceptible to invasion by raccoons or other scavengers, and yet at the same time reasonably expect that the government will not systematically examine one's trash bags in the hopes of finding evidence of criminal conduct.").

* * *

In *Katz*, the Court decided that not all Fourth Amendment "searches" involve physical intrusion into an area in which someone enjoys a reasonable expectation of privacy. In the next case, the Court applies this principle to the use of thermal imaging technology.

Supreme Court of the United States

Danny Lee Kyllo v. United States

Decided June 11, 2001—533 U.S. 27

Justice SCALIA delivered the opinion of the Court.

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.

I

In 1991 Agent William Elliott of the United States Department of the Interior came to suspect that marijuana was being grown in the home belonging to petitioner Danny Kyllo, part of a triplex on Rhododendron Drive in Florence, Oregon. Indoor marijuana growth typically requires high-intensity lamps. In order to determine whether an amount of heat was emanating from petitioner's home consistent with the use of such lamps, at 3:20 a.m. on January 16, 1992, Agent Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex. Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool,

white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was. Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. Petitioner was indicted on one count of manufacturing marijuana. He unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea.

The Court of Appeals for the Ninth Circuit remanded the case for an evidentiary hearing regarding the intrusiveness of thermal imaging. On remand the District Court found that the Agema 210 "is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house"; it "did not show any people or activity within the walls of the structure"; "[t]he device used cannot penetrate walls or windows to reveal conversations or human activities"; and "[n]o intimate details of the home were observed." Based on these findings, the District Court upheld the validity of the warrant that relied in part upon the thermal imaging, and reaffirmed its denial of the motion to suppress. A divided Court of Appeals initially reversed, but that opinion was withdrawn and the panel (after a change in composition) affirmed, with Judge Noonan dissenting. The court held that petitioner had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home and even if he had, there was no objectively reasonable expectation of privacy because the imager "did not expose any intimate details of Kyllo's life," only "amorphous 'hot spots' on the roof and exterior wall." We granted certiorari.

II

"At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.

On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. Visual surveillance was unquestionably lawful because "'the eye cannot by the laws of England be guilty of a trespass.'" We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property, but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in *California v. Ciraolo,* 476 U.S. 207 (1986), "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."

One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a "search" despite the absence of trespass, is not an "unreasonable" one under the Fourth Amendment. But in fact we have held that visual observation is no "search" at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional. In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz v. United States*. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless "the individual manifested a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search.

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical,* we noted that we found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened." 476 U.S. 227 (1986).

III

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.

The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists,* and that is acknowledged to be *reasonable.* To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area" constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

The Government maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz,* where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.

The Government also contends that the thermal imaging was constitutional because it did not "detect private activities occurring in private areas." The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.

Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle; it would be impractical in application, failing to provide "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment." To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up "intimate" details—and thus would be unable to know in advance whether it is constitutional.

We have said that the Fourth Amendment draws "a firm line at the entrance to the house." That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.

The judgment of the Court of Appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

Justice STEVENS, with whom THE CHIEF JUSTICE, Justice O'CONNOR, and Justice KENNEDY join, dissenting.

There is, in my judgment, a distinction of constitutional magnitude between "through-the-wall surveillance" that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand. The Court has crafted a rule that purports to deal with direct observations of the inside of the home, but the case before us merely involves indirect deductions from "off-the-wall" surveillance, that is, observations of the exterior of the home. Those observations were made with a fairly primitive thermal imager that gathered data exposed on the outside of petitioner's home but did not invade any constitutionally protected interest in privacy. Moreover, I believe that the supposedly "bright-line" rule the Court has created in response to its concerns about future technological developments is unnecessary, unwise, and inconsistent with the Fourth Amendment.

I

There is no need for the Court to craft a new rule to decide this case, as it is controlled by established principles from our Fourth Amendment jurisprudence. One of those core principles, of course, is that "searches and seizures *inside a home* without a warrant are presumptively unreasonable." But it is equally well settled that searches and seizures of property in plain view are presumptively reasonable. "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" That is the principle implicated here.

While the Court "take[s] the long view" and decides this case based largely on the potential of yet-to-be-developed technology that might allow "through-the-wall surveillance," this case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home. All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others. As still images from the infrared scans show, no details regarding the interior of petitioner's home were revealed. Unlike an x-ray scan, or other possible "through-the-wall" techniques, the detection of infrared radiation emanating from the home did not accomplish "an unauthorized physical penetration into the premises," nor did it "obtain information that it could not have obtained by observation from outside the curtilage of the house."

Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.

Thus, the notion that heat emissions from the outside of a dwelling are a private matter implicating the protections of the Fourth Amendment (the text of which guarantees the right of people "to be secure *in* their ... houses" against unreasonable searches and seizures (emphasis added)) is not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building. A subjective expectation that they would remain private is not only implausible but also surely not "one that society is prepared to recognize as 'reasonable.'"

To be sure, the homeowner has a reasonable expectation of privacy concerning what takes place within the home, and the Fourth Amendment's protection against physical invasions of the home should apply to their functional equivalent. But the equipment in this case did not penetrate the walls of petitioner's home, and while it did pick up "details of the home" that were exposed to the public, it did not obtain "any information regarding the *interior* of the home." In the Court's own words, based on what the thermal imager "showed" regarding the outside of petitioner's home, the officers "concluded" that petitioner was engaging in illegal activity inside the home. It would be quite absurd to characterize their thought processes as "searches," regardless of whether they inferred (rightly) that petitioner was growing marijuana in his house, or (wrongly) that "the lady of the house [was taking] her daily sauna and bath." In either case, the only conclusions the officers reached concerning the interior of the home were at least as indirect as those that might have been inferred from the contents of discarded garbage, or, as in this case, subpoenaed utility records. For the first time in its history, the Court assumes that an inference can amount to a Fourth Amendment violation.

Notwithstanding the implications of today's decision, there is a strong public interest in avoiding constitutional litigation over the monitoring of emissions from homes, and over the inferences drawn from such monitoring. Just as "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public,"

so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. In my judgment, monitoring such emissions with "sense-enhancing technology," and drawing useful conclusions from such monitoring, is an entirely reasonable public service.

On the other hand, the countervailing privacy interest is at best trivial. After all, homes generally are insulated to keep heat in, rather than to prevent the detection of heat going out, and it does not seem to me that society will suffer from a rule requiring the rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat, and wishes to conceal that production from outsiders, to make sure that the surrounding area is well insulated. The interest in concealing the heat escaping from one's house pales in significance to "the chief evil against which the wording of the Fourth Amendment is directed," the "physical entry of the home."

Since what was involved in this case was nothing more than drawing inferences from off-the-wall surveillance, rather than any "through-the-wall" surveillance, the officers' conduct did not amount to a search and was perfectly reasonable.

II

Instead of trying to answer the question whether the use of the thermal imager in this case was even arguably unreasonable, the Court has fashioned a rule that is intended to provide essential guidance for the day when "more sophisticated systems" gain the "ability to 'see' through walls and other opaque barriers." The newly minted rule encompasses "obtaining [1] by sense-enhancing technology [2] any information regarding the interior of the home [3] that could not otherwise have been obtained without physical intrusion into a constitutionally protected area ... [4] at least where (as here) the technology in question is not in general public use." In my judgment, the Court's new rule is at once too broad and too narrow, and is not justified by the Court's explanation for its adoption. As I have suggested, I would not erect a constitutional impediment to the use of sense-enhancing technology unless it provides its user with the functional equivalent of actual presence in the area being searched.

Despite the Court's attempt to draw a line that is "not only firm but also bright," the contours of its new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is "in general public use." Yet how much use is general public use is not even hinted at by the Court's opinion, which makes the somewhat doubtful assumption that the thermal imager used in this case does not satisfy that criterion. In any event, putting aside its lack of clarity, this criterion is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.

The application of the Court's new rule to "any information regarding the interior of the home," is unnecessarily broad. If it takes sensitive equipment to detect an odor that identifies criminal conduct and nothing else, the fact that the odor emanates from the interior of a home should not provide it with constitutional protection. The criterion, moreover, is too sweeping in that information "regarding" the interior of a home apparently is not just information obtained through its walls, but also information concerning the outside of the building that could lead to (however many) inferences "regarding" what might be inside. Under that expansive view, I suppose, an officer using an infrared camera to observe a man silently entering the side door of a house at night carrying a pizza might conclude that its interior is now occupied by someone who likes pizza, and by doing so the officer would be guilty of conducting an unconstitutional "search" of the home.

Because the new rule applies to information regarding the "interior" of the home, it is too narrow as well as too broad. Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home. If such equipment did provide its user with the functional equivalent of access to a private place—such as, for example, the telephone booth involved in *Katz,* or an office building—then the rule should apply to such an area as well as to a home.

The final requirement of the Court's new rule, that the information "could not otherwise have been obtained without physical intrusion into a constitutionally protected area," also extends too far as the Court applies it. As noted, the Court effectively treats the mental process of analyzing data obtained from external sources as the equivalent of a physical intrusion into the home. As I have explained, however, the process of drawing inferences from data in the public domain should not be characterized as a search.

III

Although the Court is properly and commendably concerned about the threats to privacy that may flow from advances in the technology available to the law enforcement profession, it has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has

endeavored to craft an all-encompassing rule for the future. It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints.

I respectfully dissent.

Notes, Comments, and Questions

The *Kyllo* majority reasoned in 2001 (in a case about police conduct that occurred in 1991) that the use of thermal imaging constituted a search because the technology was "not in general public use."

Today, however, the general public has many uses for thermal imaging, from HVAC performance testing to hunting to wildlife rescue to evaluating the performance of kitchen devices.

Agema Infrared Systems, the Swedish corporation that manufactured the "Agema Thermovision 210" at issue in *Kyllo*, was acquired by FLIR Systems Inc. in 1998. Headquartered in Oregon, FLIR now sells a $200 thermal imaging camera (the "FLIR ONE") that can attach to a smartphone, with fancier versions available for higher prices. According to the FLIR product page, one can use the FLIR ONE to "[f]ind problems around the home fast, like where you're losing heat, how your insulation's holding up, electrical problems, and water damage – all of which are point-and-shoot easy to find." It also suggests, "See in the dark and explore the natural world safely with the FLIR ONE. Watch animals in their natural habitat and even use it to find your lost pet ... or what they might have left behind in the yard." Another suggested use from the advertisement: "Detecting tiny variations in heat means that you can see in total darkness, create new kinds of art, and discover new things about your world every day... or help your child with their science fair experiment."

Consider a police officer who uses such a device to investigate a suspected drug-grower's home. He sees images consistent with growing drugs. He shows the images to a judge, who grants a search warrant. Officers find drugs in the house, and prosecutors have charged the owner with drug crimes. Search or no search? Why or why not?

In January 2020, the City Counsel of Bessemer, Michigan voted to purchase "an odor-detecting device as a means of addressing growing complaints about marijuana odor." The device is called a "Nasal Ranger," and the company that sells it describes it as "the 'state-of-the-art' in field olfactometry for confidently measuring and quantifying odor strength in the ambient air." According to St. Croix Sensory, Inc., "The portable Nasal Ranger Field Olfactometer determines ambient odor Dilution-to-Threshold (D/T) concentration objectively with your trained nose." If a Bessmer police officer stands on a public sidewalk and uses the Nasal Ranger to detect marijuana odors emanating from a house, is that a search? Why or why not?

* * *

In his majority opinion in *United States v. Jones*, Justice Scalia distinguished the facts before the Court in that case from those of a previous case—involving a "beeper"—upon which the government attempted to rely in its effort to justify placing a GPS device on a vehicle. Here is the "beeper" case.

Supreme Court of the United States

United States v. Leroy Carlton Knotts

Decided March 2, 1983—460 U.S. 276

REHNQUIST, Justice.

A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver. In this case, a beeper was placed in a five gallon drum containing chloroform purchased by one of respondent's codefendants. By monitoring the progress of a car carrying the chloroform Minnesota law enforcement agents were able to trace the can of chloroform from its place of purchase in Minneapolis, Minnesota to respondent's secluded cabin near Shell Lake, Wisconsin. The issue presented by the case is whether such use of a beeper violated respondent's rights secured by the Fourth Amendment to the United States Constitution.

I

Respondent and two codefendants were charged in the United States District Court for the District of Minnesota with conspiracy to manufacture controlled substances, including but not limited to methamphetamine.

Suspicion attached to this trio when the 3M Company, which manufactures chemicals in St. Paul, notified a narcotics investigator for the Minnesota Bureau of Criminal Apprehension that Armstrong, a former 3M employee, had been stealing chemicals which could be used in manufacturing illicit drugs. Visual surveillance of Armstrong revealed that after leaving the employ of 3M Company, he had been purchasing similar chemicals from the Hawkins Chemical Company in Minneapolis. The Minnesota narcotics officers observed that after Armstrong had made a purchase, he would deliver the chemicals to codefendant Petschen.

With the consent of the Hawkins Chemical Company, officers installed a beeper inside a five gallon container of chloroform, one of the so-called "precursor" chemicals used to manufacture illicit drugs. Hawkins agreed that when Armstrong next purchased chloroform, the chloroform would be placed in this particular container. When Armstrong made the purchase, officers followed the car in which the chloroform had been placed, maintaining contact by using both visual surveillance and a monitor which received the signals sent from the beeper.

Armstrong proceeded to Petschen's house, where the container was transferred to Petschen's automobile. Officers then followed that vehicle eastward towards the state line, across the St. Croix River, and into Wisconsin. During the latter part of this journey, Petschen began making evasive maneuvers, and the pursuing agents ended their visual surveillance. At about the same time officers lost the signal from the beeper, but with the assistance of a monitoring device located in a helicopter the approximate location of the signal was picked up again about one hour later. The signal now was stationary and the location identified was a cabin occupied by respondent near Shell Lake, Wisconsin. The record before us does not reveal that the beeper was used after the location in the area of the cabin had been initially determined.

Relying on the location of the chloroform derived through the use of the beeper and additional information obtained during three days of intermittent visual surveillance of respondent's cabin, officers secured a search warrant. During execution of the warrant, officers discovered a fully operable, clandestine drug laboratory in the cabin. In the laboratory area officers found formulas for amphetamine and methamphetamine, over $10,000 worth of laboratory equipment, and chemicals in quantities sufficient to produce 14 pounds of pure amphetamine. Under a barrel outside the cabin, officers located the five gallon container of chloroform.

After his motion to suppress evidence based on the warrantless monitoring of the beeper was denied, respondent was convicted for conspiring to manufacture controlled substances. He was sentenced to five years imprisonment. A divided panel of the United States Court of Appeals for the Eighth Circuit reversed the conviction, finding that the monitoring of the beeper was prohibited by the Fourth Amendment because its use had violated respondent's reasonable expectation of privacy, and that all information derived after the location of the cabin was a fruit of the illegal beeper monitoring. We granted certiorari, and we now reverse the judgment of the Court of Appeals.

II

The governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways. We have commented more than once on the diminished expectation of privacy in an automobile:

"One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."

A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned:

"Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to

be reached on proper showing. The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the "open fields."

Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Respondent specifically attacks the use of the beeper insofar as it was used to determine that the can of chloroform had come to rest on his property at Shell Lake, Wisconsin. He repeatedly challenges the "use of the beeper to determine the location of the chemical drum at Respondent's premises[;]" he states that "[t]he government thus overlooks the fact that this case involves the sanctity of Respondent's residence, which is accorded the greatest protection available under the Fourth Amendment."

We think that respondent's contentions to some extent lose sight of the limited use which the government made of the signals from this particular beeper. As we have noted, nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the drum containing the chloroform had ended its automotive journey at rest on respondent's premises in rural Wisconsin. Admittedly, because of the failure of the visual surveillance, the beeper enabled the law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car. This fact, along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin.

We thus return to the question posed at the beginning of our inquiry in discussing *Katz, supra;* did monitoring the beeper signals complained of by respondent invade any legitimate expectation of privacy on his part? For the reasons previously stated, we hold they did not. Since they did not, there was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment. The judgment of the Court of Appeals is therefore

Reversed.

Justice STEVENS, with whom Justice BRENNAN, and Justice MARSHALL join, concurring in the judgment.

Since the respondent in this case has never questioned the installation of the radio transmitter in the chloroform drum, I agree that it was entirely reasonable for the police officers to make use of the information received over the airwaves when they were trying to ascertain the ultimate destination of the chloroform. I do not join the Court's opinion, however, because it contains two unnecessarily broad dicta: one distorts the record in this case, and both may prove confusing to courts that must apply this decision in the future.

First, the Court implies that the chloroform drum was parading in "open fields" outside of the cabin, in a manner tantamount to its public display on the highways. The record does not support that implication.

Second, the Court suggests that the Fourth Amendment does not inhibit "the police from augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them." But the Court held to the contrary in *Katz v. United States*. Although the augmentation in this case was unobjectionable, it by no means follows that the use of electronic detection techniques does not implicate especially sensitive concerns.

Accordingly, I concur in the judgment.

* * *

The ubiquitous use of mobile phones, by which users not only have conversations but also transmit all sorts of sensitive data,

has raised important questions about when the government may intercept information transmitted by phone users. This is not, however, a new issue. More than four decades ago, police obtained certain information from a suspect's telephone company, and prosecutors used that information against the defendant at trial. Here is the resulting Fourth Amendment case.

Supreme Court of the United States

Michael Lee Smith v. Maryland

Decided June 20, 1979—442 U.S. 735

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents the question whether the installation and use of a pen register[1] constitutes a "search" within the meaning of the Fourth Amendment.

I

On March 5, 1976, in Baltimore, Md., Patricia McDonough was robbed. She gave the police a description of the robber and of a 1975 Monte Carlo automobile she had observed near the scene of the crime. After the robbery, McDonough began receiving threatening and obscene phone calls from a man identifying himself as the robber. On one occasion, the caller asked that she step out on her front porch; she did so, and saw the 1975 Monte Carlo she had earlier described to police moving slowly past her home. On March 16, police spotted a man who met McDonough's description driving a 1975 Monte Carlo in her neighborhood. By tracing the license plate number, police learned that the car was registered in the name of petitioner, Michael Lee Smith.

The next day, the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at petitioner's home. The police did not get a warrant or court order before having the pen register installed. The register revealed that on March 17 a call was placed from petitioner's home to McDonough's phone. On the basis of this and other evidence, the police obtained a warrant to search petitioner's residence. The search revealed that a page in petitioner's phone book was turned down to the name and number of Patricia McDonough; the phone book was seized. Petitioner was arrested, and a six-man lineup was held on March 19. McDonough identified petitioner as the man who had robbed her.

Petitioner was indicted in the Criminal Court of Baltimore for robbery. By pretrial motion, he sought to suppress "all fruits derived from the pen register" on the ground that the police had failed to secure a warrant prior to its installation. The trial court denied the suppression motion, holding that the warrantless installation of the pen register did not violate the Fourth Amendment. Petitioner then waived a jury, and the case was submitted to the court on an agreed statement of facts. The pen register tape (evidencing the fact that a phone call had been made from petitioner's phone to McDonough's phone) and the phone book seized in the search of petitioner's residence were admitted into evidence against him. Petitioner was convicted, and was sentenced to six years. He appealed to the Maryland Court of Special Appeals, but the Court of Appeals of Maryland issued a writ of certiorari to the intermediate court in advance of its decision in order to consider whether the pen register evidence had been properly admitted at petitioner's trial.

The Court of Appeals affirmed the judgment of conviction, holding that "there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the fourth amendment is implicated by the use of a pen register installed at the central offices of the telephone company." Because there was no "search," the court concluded, no warrant was needed. Certiorari was granted.

II

A

In determining whether a particular form of government-initiated electronic surveillance is a "search" within the meaning of the Fourth Amendment, our lodestar is *Katz v. United States,* 389 U.S. 347 (1967).

Consistently with *Katz,* this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two

discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy"—whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable'"—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances.

B

In applying the *Katz* analysis to this case, it is important to begin by specifying precisely the nature of the state activity that is challenged. The activity here took the form of installing and using a pen register. Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his "property" was invaded or that police intruded into a "constitutionally protected area." Petitioner's claim, rather, is that, notwithstanding the absence of a trespass, the State, as did the Government in *Katz*, infringed a "legitimate expectation of privacy" that petitioner held. Yet a pen register differs significantly from the listening device employed in *Katz,* for pen registers do not acquire the *contents* of communications. This Court recently noted:

"Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed—a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers."

Given a pen register's limited capabilities, therefore, petitioner's argument that its installation and use constituted a "search" necessarily rests upon a claim that he had a "legitimate expectation of privacy" regarding the numbers he dialed on his phone.

This claim must be rejected. First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud and preventing violations of law." Electronic equipment is used not only to keep billing records of toll calls, but also "to keep a record of all calls dialed from a telephone which is subject to a special rate structure." Pen registers are regularly employed "to determine whether a home phone is being used to conduct a business, to check for a defective dial, or to check for overbilling." Although most people may be oblivious to a pen register's esoteric functions, they presumably have some awareness of one common use: to aid in the identification of persons making annoying or obscene calls. Most phone books tell subscribers, on a page entitled "Consumer Information," that the company "can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls." Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

Petitioner argues, however, that, whatever the expectations of telephone users in general, he demonstrated an expectation of privacy by his own conduct here, since he "us[ed] the telephone *in his house* to the exclusion of all others." But the site of the call is immaterial for purposes of analysis in this case. Although petitioner's conduct may have been calculated to keep the *contents* of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed. Regardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could make no conceivable difference, nor could any subscriber rationally think that it would.

Second, even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not "one that society is prepared to recognize as 'reasonable.'" This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.

This analysis dictates that petitioner can claim no legitimate expectation of privacy here. When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator,

he could claim no legitimate expectation of privacy. We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate.

We therefore conclude that petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not "legitimate." The installation and use of a pen register, consequently, was not a "search," and no warrant was required. The judgment of the Maryland Court of Appeals is affirmed.

Mr. Justice POWELL took no part in the consideration or decision of this case.

Mr. Justice STEWART, with whom Mr. Justice BRENNAN joins, dissenting.

I am not persuaded that the numbers dialed from a private telephone fall outside the constitutional protection of the Fourth and Fourteenth Amendments.

In *Katz v. United States,* the Court acknowledged the "vital role that the public telephone has come to play in private communication[s]." The role played by a private telephone is even more vital, and since *Katz* it has been abundantly clear that telephone conversations carried on by people in their homes or offices are fully protected.

Nevertheless, the Court today says that those safeguards do not extend to the numbers dialed from a private telephone, apparently because when a caller dials a number the digits may be recorded by the telephone company for billing purposes. But that observation no more than describes the basic nature of telephone calls. A telephone call simply cannot be made without the use of telephone company property and without payment to the company for the service. The telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment. Yet we have squarely held that the user of even a public telephone is entitled "to assume that the words he utters into the mouthpiece will not be broadcast to the world."

The central question in this case is whether a person who makes telephone calls from his home is entitled to make a similar assumption about the numbers he dials. What the telephone company does or might do with those numbers is no more relevant to this inquiry than it would be in a case involving the conversation itself. It is simply not enough to say, after *Katz,* that there is no legitimate expectation of privacy in the numbers dialed because the caller assumes the risk that the telephone company will disclose them to the police.

I think that the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in *Katz.* It seems clear to me that information obtained by pen register surveillance of a private telephone is information in which the telephone subscriber has a legitimate expectation of privacy. The information captured by such surveillance emanates from private conduct within a person's home or office—locations that without question are entitled to Fourth and Fourteenth Amendment protection. Further, that information is an integral part of the telephonic communication that under *Katz* is entitled to constitutional protection, whether or not it is captured by a trespass into such an area.

The numbers dialed from a private telephone—although certainly more prosaic than the conversation itself—are not without "content." Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

I respectfully dissent.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

The Court concludes that because individuals have no actual or legitimate expectation of privacy in information they voluntarily relinquish to telephone companies, the use of pen registers by government agents is immune from Fourth Amendment scrutiny. I respectfully dissent.

Applying the standards set forth in *Katz v. United States,* the Court first determines that telephone subscribers have no subjective expectations of privacy concerning the numbers they dial. To reach this conclusion, the Court posits that individuals somehow infer from the long-distance listings on their phone bills, and from the cryptic assurances of "help" in tracing obscene calls included in "most" phone books, that pen registers are regularly used for recording local calls. But even assuming, as I do not, that individuals "typically know" that a phone company monitors calls for internal reasons, it does not follow that they expect this

information to be made available to the public in general or the government in particular. Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.

The crux of the Court's holding, however, is that whatever expectation of privacy petitioner may in fact have entertained regarding his calls, it is not one "society is prepared to recognize as 'reasonable'." In so ruling, the Court determines that individuals who convey information to third parties have "assumed the risk" of disclosure to the government. This analysis is misconceived in two critical respects.

Implicit in the concept of assumption of risk is some notion of choice. At least in the third-party consensual surveillance cases, which first incorporated risk analysis into Fourth Amendment doctrine, the defendant presumably had exercised some discretion in deciding who should enjoy his confidential communications. By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of "assuming" risks in contexts where, as a practical matter, individuals have no realistic alternative.

More fundamentally, to make risk analysis dispositive in assessing the reasonableness of privacy expectations would allow the government to define the scope of Fourth Amendment protections. For example, law enforcement officials, simply by announcing their intent to monitor the content of random samples of first-class mail or private phone conversations, could put the public on notice of the risks they would thereafter assume in such communications. Yet, although acknowledging this implication of its analysis, the Court is willing to concede only that, in some circumstances, a further "normative inquiry would be proper." No meaningful effort is made to explain what those circumstances might be, or why this case is not among them.

In my view, whether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society. By its terms, the constitutional prohibition of unreasonable searches and seizures assigns to the judiciary some prescriptive responsibility. As Mr. Justice Harlan, who formulated the standard the Court applies today, himself recognized: "[s]ince it is the task of the law to form and project, as well as mirror and reflect, we should not ... merely recite ... risks without examining the desirability of saddling them upon society." In making this assessment, courts must evaluate the "intrinsic character" of investigative practices with reference to the basic values underlying the Fourth Amendment. And for those "extensive intrusions that significantly jeopardize [individuals'] sense of security ... more than self-restraint by law enforcement officials is required."

The use of pen registers, I believe, constitutes such an extensive intrusion. To hold otherwise ignores the vital role telephonic communication plays in our personal and professional relationships, as well as the First and Fourth Amendment interests implicated by unfettered official surveillance. Privacy in placing calls is of value not only to those engaged in criminal activity. The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts. Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society. Particularly given the Government's previous reliance on warrantless telephonic surveillance to trace reporters' sources and monitor protected political activity, I am unwilling to insulate use of pen registers from independent judicial review.

Just as one who enters a public telephone booth is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world," so too, he should be entitled to assume that the numbers he dials in the privacy of his home will be recorded, if at all, solely for the phone company's business purposes. Accordingly, I would require law enforcement officials to obtain a warrant before they enlist telephone companies to secure information otherwise beyond the government's reach.

Notes, Comments, and Questions

For nearly forty years, the third-party disclosure doctrine stood as a broad general rule. The advance of technology, however, has raised questions about the doctrine. Consider, for example, the sort of data commonly transmitted by mobile phones. A person using GPS mapping on a phone is transmitting her location to a third party. Consider too the use of email, whether on a phone or on a computer. When someone sends email, the sender knows (at least at some basic level) that the contents of the message are transmitted to a third party before reaching the intended recipient. (Indeed, many third parties are likely involved.)

Does a person who sends email despite knowing that messages travel via third-party servers (for example, on Gmail) forfeit any reasonable expectation of privacy with respect to the content of the messages?

Imagine that a phone company routinely retains data concerning the locations of customers' mobile phones. If police contact a phone company and obtain the location data for a particular customer's phone from the previous month, is that a "search" or not? (We will confront this issue again in Chapter 5. Jot down your answer now, along with your reasoning, so that you can compare it with the reasoning used by the Court.)

* * *

In the next chapter, we will study the concept of "open fields," to which the majority and dissent referred in *Knotts*. We will also consider police use of aerial surveillance, which required further elaboration of the Court's definition of "search."

Then, in Chapter 5, during which we will wrap up our discussion of "what is a search," we will consider (1) more recent judicial analysis inspired by modern phone technology and (2) police use of dogs.

This page titled 2.2: Chapter 3 - What Is a Search? Some Specifics is shared under a CC BY-NC-SA 4.0 license and was authored, remixed, and/or curated by Anne M Alexander and Ben Trachtenberg (CALI- The Center for Computer-Assisted Legal Instruction).

2.3: Chapter 4 - What Is a Search?- More Specifics

The Fourth Amendment protects the people's "persons, houses, papers, and effects." While this language is quite broad, it does not include everything someone might possess or wish to protect from intrusion. For example, if one owns agricultural land far from any "house," that land is not a person, a house, a paper, or an effect. Police searches of such land, therefore, are not "searches" regulated by the Fourth Amendment. In the next two cases, the Court attempts to define the barrier separating the "curtilage" (an area near a house that is treated as a "house" for Fourth Amendment purposes) from the "open fields" (which enjoy no Fourth Amendment protection).

Supreme Court of the United States

Ray Oliver v. United States

Decided April 17, 1984 – 466 U.S. 170

Justice POWELL delivered the opinion of the Court.

The "open fields" doctrine, first enunciated by this Court in *Hester v. United State*s, 265 U.S. 57 (1924), permits police officers to enter and search a field without a warrant. We granted certiorari to clarify confusion that has arisen as to the continued vitality of the doctrine.

I

Acting on reports that marihuana was being raised on the farm of petitioner Oliver, two narcotics agents of the Kentucky State Police went to the farm to investigate. Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper. At that point, someone standing in front of the camper shouted: "No hunting is allowed, come back up here." The officers shouted back that they were Kentucky State Police officers, but found no one when they returned to the camper. The officers resumed their investigation of the farm and found a field of marihuana over a mile from petitioner's home.

Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance." After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field. Applying *Katz v. United State*s, the court found that petitioner had a reasonable expectation that the field would remain private because petitioner "had done all that could be expected of him to assert his privacy in the area of farm that was searched." He had posted "No Trespassing" signs at regular intervals and had locked the gate at the entrance to the center of the farm. Further, the court noted that the field itself is highly secluded: it is bounded on all sides by woods, fences, and embankments and cannot be seen from any point of public access. The court concluded that this was not an "open" field that invited casual intrusion.

The Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court. The court concluded that *Katz*, upon which the District Court relied, had not impaired the vitality of the open fields doctrine of *Hester*. Rather, the open fields doctrine was entirely compatible with *Katz*' emphasis on privacy. The court reasoned that the "human relations that create the need for privacy do not ordinarily take place" in open fields, and that the property owner's common-law right to exclude trespassers is insufficiently linked to privacy to warrant the Fourth Amendment's protection. We granted certiorari.

II

The rule announced in *Hester v. United State*s was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

Nor are the open fields "effects" within the meaning of the Fourth Amendment. In this respect, it is suggestive that James

Madison's proposed draft of what became the Fourth Amendment preserves "[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures...." Although Congress' revisions of Madison's proposal broadened the scope of the Amendment in some respects, the term "effects" is less inclusive than "property" and cannot be said to encompass open fields. We conclude, as did the Court in deciding *Hester v. United States*, that the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.

III

This interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Since *Katz v. United States*, the touchstone of [Fourth] Amendment analysis has been the question whether a person has a "constitutionally protected reasonable expectation of privacy." The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.'"

A

No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion. These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.

In this light, the rule of *Hester v. United States* that we reaffirm today may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."

In contrast, open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. [P]etitioner Oliver concede[s] that the public and police lawfully may survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

The historical underpinnings of the open fields doctrine also demonstrate that the doctrine is consistent with respect for "reasonable expectations of privacy." As Justice Holmes observed in *Hester*, the common law distinguished "open fields" from the "curtilage," the land immediately surrounding and associated with the home. The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. Conversely, the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields.

We conclude, from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.

B

Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Under this approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy. The lawfulness of a search would turn on "'[a] highly sophisticated set of

rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions ....'" This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances.

IV

Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate. "'The premise that property interests control the right of the Government to search and seize has been discredited.'" "[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon."

The common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful. The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

V

We conclude that the open fields doctrine, as enunciated in *Hester*, is consistent with the plain language of the Fourth Amendment and its historical purposes. Moreover, Justice Holmes' interpretation of the Amendment in *Hester* accords with the "reasonable expectation of privacy" analysis developed in subsequent decisions of this Court. We therefore affirm *Oliver v. United States*.

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

[P]olice officers, ignoring clearly visible "No Trespassing" signs, entered upon private land in search of evidence of a crime. At a spot that could not be seen from any vantage point accessible to the public, the police discovered contraband, which was subsequently used to incriminate the owner of the land. [P]olice [did not] have a warrant authorizing their activities.

The Court holds that police conduct of this sort does not constitute an "unreasonable search" within the meaning of the Fourth Amendment. The Court reaches that startling conclusion by two independent analytical routes. First, the Court argues that, because the Fourth Amendment by its terms renders people secure in their "persons, houses, papers, and effects," it is inapplicable to trespasses upon land not lying within the curtilage of a dwelling. Second, the Court contends that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." Because I cannot agree with either of these propositions, I dissent.

I

The first ground on which the Court rests its decision is that the Fourth Amendment "indicates with some precision the places and things encompassed by its protections," and that real property is not included in the list of protected spaces and possessions. This line of argument has several flaws. Most obviously, it is inconsistent with the results of many of our previous decisions, none of which the Court purports to overrule. For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation. Nor can it plausibly be argued that an office or commercial establishment is covered by the plain language of the Amendment; yet we have held that such premises are entitled to constitutional protection if they are marked in a fashion that alerts the public to the fact that they are private.

Indeed, the Court's reading of the plain language of the Fourth Amendment is incapable of explaining even its own holding in this case. The Court rules that the curtilage, a zone of real property surrounding a dwelling, is entitled to constitutional protection. We are not told, however, whether the curtilage is a "house" or an "effect"—or why, if the curtilage can be incorporated into the list of things and spaces shielded by the Amendment, a field cannot.

II

The second ground for the Court's decision is its contention that any interest a landowner might have in the privacy of his woods and fields is not one that "society is prepared to recognize as 'reasonable.'" The mode of analysis that underlies this assertion is certainly more consistent with our prior decisions than that discussed above. But the Court's conclusion cannot withstand scrutiny.

A

We have frequently acknowledged that privacy interests are not coterminous with property rights. However, because "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual's expectations of privacy are reasonable." Indeed, the Court has suggested that, insofar as "[o]ne of the main rights attaching to property is the right to exclude others, ... one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."

It is undisputed that Oliver owned the land into which the police intruded. That fact alone provides considerable support for their assertion of legitimate privacy interests in their woods and fields. But even more telling is the nature of the sanctions that Oliver could invoke, under local law, for violation of their property rights. In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass. Thus, positive law not only recognizes the legitimacy of Oliver's insistence that strangers keep off [his] land, but subjects those who refuse to respect [his] wishes to the most severe of penalties—criminal liability. Under these circumstances, it is hard to credit the Court's assertion that Oliver's expectations of privacy were not of a sort that society is prepared to recognize as reasonable.

* * *

In *United States v. Dunn*, decided three years after *Oliver v. United States*, the Court applied the principles set forth in *Oliver* to new facts.

Supreme Court of the United States

United States v. Ronald Dunn

Decided March 3, 1987 – 480 U.S. 294

Justice WHITE delivered the opinion of the Court.

We granted the Government's petition for certiorari to decide whether the area near a barn, located approximately 50 yards from a fence surrounding a ranch house, is, for Fourth Amendment purposes, within the curtilage of the house. The Court of Appeals for the Fifth Circuit held that the barn lay within the house's curtilage, and that the District Court should have suppressed certain evidence obtained as a result of law enforcement officials' intrusion onto the area immediately surrounding the barn. We conclude that the barn and the area around it lay outside the curtilage of the house, and accordingly reverse the judgment of the Court of Appeals.

I

Respondent Ronald Dale Dunn and a codefendant, Robert Lyle Carpenter, were convicted by a jury of conspiring to manufacture phenylacetone and amphetamine, and to possess amphetamine with intent to distribute. Respondent was also convicted of manufacturing these two controlled substances and possessing amphetamine with intent to distribute. The events giving rise to respondent's apprehension and conviction began in 1980 when agents from the Drug Enforcement Administration (DEA) discovered that Carpenter had purchased large quantities of chemicals and equipment used in the manufacture of amphetamine and phenylacetone. DEA agents obtained warrants from a Texas state judge authorizing installation of miniature electronic transmitter tracking devices, or "beepers," in an electric hot plate stirrer, a drum of acetic anhydride, and a container holding phenylacetic acid, a precursor to phenylacetone. All of these items had been ordered by Carpenter. On September 3, 1980, Carpenter took possession of the electric hot plate stirrer, but the agents lost the signal from the "beeper" a few days later. The agents were able to track the "beeper" in the container of chemicals, however, from October 27, 1980, until November 5, 1980, on which date Carpenter's pickup truck, which was carrying the container, arrived at respondent's ranch. Aerial photographs of the ranch property showed Carpenter's truck backed up to a barn behind the ranch house. The agents also began receiving

transmission signals from the “beeper” in the hot plate stirrer that they had lost in early September and determined that the stirrer was on respondent’s ranch property.

Respondent’s ranch comprised approximately 198 acres and was completely encircled by a perimeter fence. The property also contained several interior fences, constructed mainly of posts and multiple strands of barbed wire. The ranch residence was situated ½ mile from a public road. A fence encircled the residence and a nearby small greenhouse. Two barns were located approximately 50 yards from this fence. The front of the larger of the two barns was enclosed by a wooden fence and had an open overhang. Locked, waist-high gates barred entry into the barn proper, and netting material stretched from the ceiling to the top of the wooden gates.

On the evening of November 5, 1980, law enforcement officials made a warrantless entry onto respondent’s ranch property. A DEA agent accompanied by an officer from the Houston Police Department crossed over the perimeter fence and one interior fence. Standing approximately midway between the residence and the barns, the DEA agent smelled what he believed to be phenylacetic acid, the odor coming from the direction of the barns. The officers approached the smaller of the barns—crossing over a barbed wire fence—and, looking into the barn, observed only empty boxes. The officers then proceeded to the larger barn, crossing another barbed wire fence as well as a wooden fence that enclosed the front portion of the barn. The officers walked under the barn’s overhang to the locked wooden gates and, shining a flashlight through the netting on top of the gates, peered into the barn. They observed what the DEA agent thought to be a phenylacetone laboratory. The officers did not enter the barn. At this point the officers departed from respondent’s property, but entered it twice more on November 6 to confirm the presence of the phenylacetone laboratory.

On November 6, 1980, at 8:30 p.m., a Federal Magistrate issued a warrant authorizing a search of respondent’s ranch. DEA agents and state law enforcement officials executed the warrant on November 8, 1980. The officers arrested respondent and seized chemicals and equipment, as well as bags of amphetamines they discovered in a closet in the ranch house.

The District Court denied respondent’s motion to suppress all evidence seized pursuant to the warrant and respondent [was] convicted. [T]he Court of Appeals reversed respondent’s conviction. The court concluded that the search warrant had been issued based on information obtained during the officers’ unlawful warrantless entry onto respondent’s ranch property and, therefore, all evidence seized pursuant to the warrant should have been suppressed. Underpinning this conclusion was the court’s reasoning that “the barn in question was within the curtilage of the residence and was within the protective ambit of the fourth amendment.” The Government thereupon submitted a petition for certiorari [questioning] whether the barn lay within the curtilage of the house. We granted the petition and now reverse.

II

The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself. The concept plays a part, however, in interpreting the reach of the Fourth Amendment.

Drawing upon the Court’s own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home’s curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a “correct” answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home’s “umbrella” of Fourth Amendment protection. Applying these factors to respondent’s barn and to the area immediately surrounding it, we have little difficulty in concluding that this area lay outside the curtilage of the ranch house.

First. The record discloses that the barn was located 50 yards from the fence surrounding the house and 60 yards from the house itself. Standing in isolation, this substantial distance supports no inference that the barn should be treated as an adjunct of the house.

Second. It is also significant that respondent’s barn did not lie within the area surrounding the house that was enclosed by a fence. Viewing the physical layout of respondent’s ranch in its entirety, it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house. Conversely, the barn—the front portion itself enclosed by a fence—and the area immediately surrounding it, stands out as a

distinct portion of respondent's ranch, quite separate from the residence.

Third. It is especially significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home. The aerial photographs showed that the truck Carpenter had been driving that contained the container of phenylacetic acid was backed up to the barn, "apparently," in the words of the Court of Appeals, "for the unloading of its contents." When on respondent's property, the officers' suspicion was further directed toward the barn because of "a very strong odor" of phenylacetic acid. As the DEA agent approached the barn, he "could hear a motor running, like a pump motor of some sort ...." Furthermore, the officers detected an "extremely strong" odor of phenylacetic acid coming from a small crack in the wall of the barn. Finally, as the officers were standing in front of the barn, immediately prior to looking into its interior through the netting material, "the smell was very, very strong ... [and the officers] could hear the motor running very loudly." When considered together, the above facts indicated to the officers that the use to which the barn was being put could not fairly be characterized as so associated with the activities and privacies of domestic life that the officers should have deemed the barn as part of respondent's home.

Fourth. Respondent did little to protect the barn area from observation by those standing in the open fields. Nothing in the record suggests that the various interior fences on respondent's property had any function other than that of the typical ranch fence; the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas.

III

Respondent submits an alternative basis for affirming the judgment below, one that was presented to but ultimately not relied upon by the Court of Appeals. Respondent asserts that he possessed an expectation of privacy, independent from his home's curtilage, in the barn and its contents, because the barn is an essential part of his business.

We may accept, for the sake of argument, respondent's submission that his barn enjoyed Fourth Amendment protection and could not be entered and its contents seized without a warrant. But it does not follow on the record before us that the officers' conduct and the ensuing search and seizure violated the Constitution. It follows that no constitutional violation occurred here when the officers crossed over respondent's ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the locked front gate of the barn. As previously mentioned, the officers never entered the barn, nor did they enter any other structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn.

Under *Oliver* and *Hester,* there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields. Similarly, the fact that the objects observed by the officers lay within an area that we have assumed, but not decided, was protected by the Fourth Amendment does not affect our conclusion. The Fourth Amendment "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Here, the officers' use of the beam of a flashlight, directed through the essentially open front of respondent's barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment.

The officers lawfully viewed the interior of respondent's barn, and their observations were properly considered by the Magistrate in issuing a search warrant for respondent's premises. Accordingly, the judgment of the Court of Appeals is reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

The Government agents' intrusions upon Ronald Dunn's privacy and property violated the Fourth Amendment for two reasons. First, the barnyard invaded by the agents lay within the protected curtilage of Dunn's farmhouse. Second, the agents infringed upon Dunn's reasonable expectation of privacy in the barn and its contents. Our society is not so exclusively urban that it is unable to perceive or unwilling to preserve the expectation of farmers and ranchers that barns and their contents are protected from (literally) unwarranted government intrusion.

The Court states that curtilage questions are often resolved through evaluation of four factors. The Court applies this test and concludes that Dunn's barn and barnyard were not within the curtilage of his dwelling. This conclusion overlooks the role a barn plays in rural life and ignores extensive authority holding that a barn, when clustered with other outbuildings near the residence, is part of the curtilage.

State and federal courts have long recognized that a barn, like many other outbuildings, is "a domestic building constituting an

integral part of that group of structures making up the farm home." Consequently, the general rule is that the "[c]urtilage includes all outbuildings used in connection with a residence, such as garages, sheds, [and] *barns* ... connected with and in close vicinity of the residence."

The overwhelming majority of state courts have consistently held that barns are included within the curtilage of a farmhouse. Federal courts, too, have held that barns, like other rural outbuildings, lie within the curtilage of the farmhouse. Thus, case law demonstrates that a barn is an integral part of a farm home and therefore lies within the curtilage. The Court's opinion provides no justification for its indifference to the weight of state and federal precedent.

The Fourth Amendment prohibits police activity which, if left unrestricted, would jeopardize individuals' sense of security or would too heavily burden those who wished to guard their privacy. In this case, in order to look inside respondent's barn, the DEA agents traveled a one-half mile off a public road over respondent's fenced-in property, crossed over three additional wooden and barbed wire fences, stepped under the eaves of the barn, and then used a flashlight to peer through otherwise opaque fishnetting. For the police habitually to engage in such surveillance—without a warrant—is constitutionally intolerable. Because I believe that farmers' and ranchers' expectations of privacy in their barns and other outbuildings are expectations society would regard as reasonable, and because I believe that sanctioning the police behavior at issue here does violence to the purpose and promise of the Fourth Amendment, I dissent.

Notes, Comments, and Questions

In both *Oliver* and *Dunn*, police walked onto someone's land without permission. In describing the "open fields doctrine," the *Oliver* Court stated: "The "open fields" doctrine, first enunciated by this Court in *Hester v. United States*, 265 U.S. 57 (1924), permits police officers to enter and search a field without a warrant."

Consider whether that statement is truly accurate. Is it truly lawful for police to wander uninvited on the open fields of suspects? Perhaps it would be more accurate to state: "Police should not do this, but if they do, the Fourth Amendment has nothing to say about it." The *Hester* case cited by the Court in *Oliver* may provide a clue. In the syllabus, the Court describes police witnesses who "held no warrant and were trespassers on the land." By definition, trespassers are violating the law. We do not call it a "trespass" when someone walks on the property of another to visit as an invited guest, or to knock on the door and leave literature about religion or politics, or to execute a valid search warrant.

If officers who find useful (and admissible) evidence while trespassing in the open fields of suspects are breaking the law, should they be punished? Is it plausible to believe that they will be? If, as seems more likely, police departments would laud such behavior rather than condemning it, does that raise questions about the sensibility of the open fields doctrine?

At common law, the crimes of arson and burglary (which are both crimes against the dwelling), defined "house" as both a dwelling house and buildings located within the curtilage. Fourth Amendment law essentially imports this principle.

So what is curtilage? Curtilage is: "The land or yard adjoining a house, usually within an enclosure. Under the Fourth Amendment, the curtilage is an area usually protected from warrantless searches." *Black's Law Dictionary* (11th ed. 2019).

Some students may wonder if *United States v. Jones*, 565 U.S. 400 (2012), which was decided well after *Dunn* and *Oliver*, invalidates the open fields doctrine. The answer is no. Yes, *Jones* does reiterate the importance of trespass to Fourth Amendment law. And yes, officers who wander uninvited on the "open fields" of suspects likely commit trespass as defined by state law. Nonetheless, according to cases like *Dunn* and *Oliver*, the open fields are not among the "persons, houses, papers, and effects" protected by the Fourth Amendment. While *Jones* affects how courts will decide whether police have acted improperly with respect to someone's "house," the case does not affect how "house" is defined. The "open fields" remain excluded from Fourth Amendment protection.

Because the Court treats the curtilage surrounding a home as part of a "house" for Fourth Amendment purposes, police officers normally cannot walk on to curtilage and look around with neither permission nor a warrant. In response to this restriction, police have flown over houses and curtilage, using their eyes and cameras to gain information relevant to criminal investigations.

The next two cases consider whether the Fourth Amendment applies when police observe the curtilage from the air.

Supreme Court of the United States

California v. Ciraolo

Decided May 19, 1986 – 476 U.S. 207

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home.

I

On September 2, 1982, Santa Clara Police received an anonymous telephone tip that marijuana was growing in respondent's backyard. Police were unable to observe the contents of respondent's yard from ground level because of a 6-foot outer fence and a 10-foot inner fence completely enclosing the yard. Later that day, Officer Shutz, who was assigned to investigate, secured a private plane and flew over respondent's house at an altitude of 1,000 feet, within navigable airspace; he was accompanied by Officer Rodriguez. Both officers were trained in marijuana identification. From the overflight, the officers readily identified marijuana plants 8 feet to 10 feet in height growing in a 15- by 25-foot plot in respondent's yard; they photographed the area with a standard 35mm camera.

On September 8, 1982, Officer Shutz obtained a search warrant on the basis of an affidavit describing the anonymous tip and their observations; a photograph depicting respondent's house, the backyard, and neighboring homes was attached to the affidavit as an exhibit. The warrant was executed the next day and 73 plants were seized; it is not disputed that these were marijuana.

After the trial court denied respondent's motion to suppress the evidence of the search, respondent pleaded guilty to a charge of cultivation of marijuana. The California Court of Appeal reversed, however, on the ground that the warrantless aerial *observation* of respondent's yard which led to the issuance of the warrant violated the Fourth Amendment. That court held first that respondent's backyard marijuana garden was within the "curtilage" of his home, under *Oliver v. United States*. The court emphasized that the height and existence of the two fences constituted "objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard."

Examining the particular method of surveillance undertaken, the court then found it "significant" that the flyover "was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within [respondent's] curtilage." It held this focused observation was "a direct and unauthorized intrusion into the sanctity of the home" which violated respondent's reasonable expectation of privacy. The California Supreme Court denied the State's petition for review.

We granted the State's petition for certiorari. We reverse.

The State argues that respondent has "knowingly exposed" his backyard to aerial observation, because all that was seen was visible to the naked eye from any aircraft flying overhead. The State analogizes its mode of observation to a knothole or opening in a fence: if there is an opening, the police may look.

The California Court of Appeal accepted the analysis that unlike the casual observation of a private person flying overhead, this flight was focused specifically on a small suburban yard, and was not the result of any routine patrol overflight. Respondent contends he has done all that can reasonably be expected to tell the world he wishes to maintain the privacy of his garden within the curtilage without covering his yard. Such covering, he argues, would defeat its purpose as an outside living area; he asserts he has not "knowingly" exposed himself to aerial views.

II

The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?

Clearly—and understandably—respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits. It can reasonably be assumed that the 10-foot fence was placed to conceal the marijuana crop from at least street-level views. So far as the normal sidewalk traffic was concerned, this fence served that purpose, because

respondent “took normal precautions to maintain his privacy.”

Yet a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus. Whether respondent therefore manifested a subjective expectation of privacy from *all* observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits, is not entirely clear in these circumstances. Respondent appears to challenge the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation.

We turn, therefore, to the second inquiry under *Katz, i.e.,* whether that expectation is reasonable. In pursuing this inquiry, we must keep in mind that “[t]he test of legitimacy is not whether the individual chooses to conceal assertedly ‘private’ activity,” but instead “whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.”

Respondent argues that because his yard was in the curtilage of his home, no governmental aerial observation is permissible under the Fourth Amendment without a warrant. At common law, the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. The claimed area here was immediately adjacent to a suburban home, surrounded by high double fences. This close nexus to the home would appear to encompass this small area within the curtilage. Accepting, as the State does, that this yard and its crop fall within the curtilage, the question remains whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable.

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent’s expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

Reversed.

Justice POWELL, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

Concurring in *Katz v. United States,* Justice Harlan warned that any decision to construe the Fourth Amendment as proscribing only physical intrusions by police onto private property “is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.” Because the Court today ignores that warning in an opinion that departs significantly from the standard developed in *Katz* for deciding when a Fourth Amendment violation has occurred, I dissent.

The Court [holds] that respondent’s expectation of privacy in the curtilage of his home, although reasonable as to intrusions on the ground, was unreasonable as to surveillance from the navigable airspace. In my view, the Court’s holding rests on only one obvious fact, namely, that the airspace generally is open to all persons for travel in airplanes. The Court does not explain why this single fact deprives citizens of their privacy interest in outdoor activities in an enclosed curtilage.

The Court’s holding must rest solely on the fact that members of the public fly in planes and may look down at homes as they fly over them. The Court does not explain why it finds this fact to be significant. One may assume that the Court believes that citizens bear the risk that air travelers will observe activities occurring within backyards that are open to the sun and air. This risk, the Court appears to hold, nullifies expectations of privacy in those yards even as to purposeful police surveillance from the air.

This line of reasoning is flawed. First, the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to

protect against. It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards. Therefore, contrary to the Court's suggestion, people do not "'knowingly expos[e]'" their residential yards "'to the public'" merely by failing to build barriers that prevent aerial surveillance.

Since respondent had a reasonable expectation of privacy in his yard, aerial surveillance undertaken by the police for the purpose of discovering evidence of crime constituted a "search" within the meaning of the Fourth Amendment. The indiscriminate nature of aerial surveillance, illustrated by Officer Shutz' photograph of respondent's home and enclosed yard as well as those of his neighbors, poses "far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." Therefore, I would affirm the judgment of the California Court of Appeal ordering suppression of the marijuana plants. I dissent.

* * *

In the next case, the Court applies the rule set forth in *Ciraolo*, which concerned fixed-wing aircraft, to police use of helicopters.

Supreme Court of the United States

Florida v. Michael Riley

Decided Jan. 23, 1989 – 488 U.S. 445

Justice WHITE announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY join.

On certification to it by a lower state court, the Florida Supreme Court addressed the following question: "Whether surveillance of the interior of a partially covered greenhouse in a residential backyard from the vantage point of a helicopter located 400 feet above the greenhouse constitutes a 'search' for which a warrant is required under the Fourth Amendment." The court answered the question in the affirmative, and we granted the State's petition for certiorari challenging that conclusion.

Respondent Riley lived in a mobile home located on five acres of rural property. A greenhouse was located 10 to 20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some translucent and some opaque. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing. A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a "DO NOT ENTER" sign.

This case originated with an anonymous tip to the Pasco County Sheriff's office that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not see the contents of the greenhouse from the road, he circled twice over respondent's property in a helicopter at the height of 400 feet. With his naked eye, he was able to see through the openings in the roof and one or more of the open sides of the greenhouse and to identify what he thought was marijuana growing in the structure. A warrant was obtained based on these observations, and the ensuing search revealed marijuana growing in the greenhouse. Respondent was charged with possession of marijuana under Florida law. The trial court granted his motion to suppress; the Florida Court of Appeals reversed but certified the case to the Florida Supreme Court, which quashed the decision of the Court of Appeals and reinstated the trial court's suppression order.

We agree with the State's submission that our decision in *California v. Ciraolo* controls this case.

In this case, as in *Ciraolo,* the property surveyed was within the curtilage of respondent's home. Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation. Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air. Under the holding in *Ciraolo,* Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet or, as the Florida Supreme Court seemed to recognize, at an altitude of 500 feet, the lower limit of the navigable airspace for such an aircraft. Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, "private and commercial flight [by helicopter] in the public airways is routine" in this country, and there is no indication that such flights are unheard of in Pasco County, Florida. Riley could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft.

Nor on the facts before us, does it make a difference for Fourth Amendment purposes that the helicopter was flying at 400 feet when the officer saw what was growing in the greenhouse through the partially open roof and sides of the structure. We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft. Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more. This is not to say that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law. But it is of obvious importance that the helicopter in this case was *not* violating the law, and there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude. Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment.

Justice O'CONNOR, concurring in the judgment.

I concur in the judgment reversing the Supreme Court of Florida because I agree that police observation of the greenhouse in Riley's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of privacy "that society is prepared to recognize as 'reasonable.'" I write separately, however, to clarify the standard I believe follows from *California v. Ciraolo*. In my view, the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Ciraolo's expectation of privacy was unreasonable not because the airplane was operating where it had a "right to be," but because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude. Although "helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft," there is no reason to assume that compliance with FAA regulations alone determines "'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" Because the FAA has decided that helicopters can lawfully operate at virtually any altitude so long as they pose no safety hazard, it does not follow that the expectations of privacy "society is prepared to recognize as 'reasonable'" simply mirror the FAA's safety concerns.

In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *Ciraolo* is not whether the helicopter was where it had a right to be under FAA regulations. Rather, consistent with *Katz,* we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not "one that society is prepared to recognize as 'reasonable.'" Thus, in determining "'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment,'" it is not conclusive to observe, as the plurality does, that "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." Nor is it conclusive that police helicopters may often fly at 400 feet. If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.

Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because Riley introduced no evidence to the contrary before the Florida courts, I conclude that Riley's expectation that his curtilage was protected from naked-eye aerial observation from that altitude was not a reasonable one. However, public use of altitudes lower than that—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations.

Justice BRENNAN, with whom Justice MARSHALL and Justice STEVENS, join, dissenting.

The Court holds today that police officers need not obtain a warrant based on probable cause before circling in a helicopter 400 feet above a home in order to investigate what is taking place behind the walls of the curtilage. I cannot agree that the Fourth Amendment to the Constitution tolerates such an intrusion on privacy and personal security.

The opinion for a plurality of the Court reads almost as if *Katz v. United States* had never been decided. Notwithstanding the disclaimers of its final paragraph, the opinion relies almost exclusively on the fact that the police officer conducted his

surveillance from a vantage point where, under applicable Federal Aviation Administration regulations, he had a legal right to be.

The plurality undertakes no inquiry into whether low-level helicopter surveillance by the police of activities in an enclosed backyard is consistent with the "aims of a free and open society." Instead, it summarily concludes that Riley's expectation of privacy was unreasonable because "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." This observation is, in turn, based solely on the fact that the police helicopter was within the airspace within which such craft are allowed by federal safety regulations to fly. It is a curious notion that the reach of the Fourth Amendment can be so largely defined by administrative regulations issued for purposes of flight safety.[1]

The question before us must be not whether the police were where they had a right to be, but whether public observation of Riley's curtilage was so commonplace that Riley's expectation of privacy in his backyard could not be considered reasonable. To say that an invasion of Riley's privacy from the skies was not impossible is most emphatically not the same as saying that his expectation of privacy within his enclosed curtilage was not "one that society is prepared to recognize as 'reasonable.'"

Perhaps the most remarkable passage in the plurality opinion is its suggestion that the case might be a different one had any "intimate details connected with the use of the home or curtilage [been] observed." What, one wonders, is meant by "intimate details"? If the police had observed Riley embracing his wife in the backyard greenhouse, would we then say that his reasonable expectation of privacy had been infringed? Where in the Fourth Amendment or in our cases is there any warrant for imposing a requirement that the activity observed must be "intimate" in order to be protected by the Constitution?

It is difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the Fourth Amendment's protection does not turn on whether the activity disclosed by a search is illegal or innocuous. But we dismiss this as a "drug case" only at the peril of our own liberties. Justice Frankfurter once noted that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people," *United States v. Rabinowitz,* 339 U.S. 56 (1950) (dissenting opinion), and nowhere is this observation more apt than in the area of the Fourth Amendment, whose words have necessarily been given meaning largely through decisions suppressing evidence of criminal activity. The principle enunciated in this case determines what limits the Fourth Amendment imposes on aerial surveillance of any person, for any reason. If the Constitution does not protect Riley's marijuana garden against such surveillance, it is hard to see how it will prohibit the government from aerial spying on the activities of a law-abiding citizen on her fully enclosed outdoor patio. As Professor Amsterdam has eloquently written: "The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not." 58 Minn. L. Rev. 349, 403.

The issue in this case is, ultimately, "how tightly the Fourth Amendment permits people to be driven back into the recesses of their lives by the risk of surveillance." The Court today approves warrantless helicopter surveillance from an altitude of 400 feet. The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's:

"The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said. ... In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows." *Nineteen Eighty-Four* (1949).

Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent.

Notes, Comments, and Questions

Supreme Court precedent strongly suggests that as long as police pilots obey the law (such as FAA regulations on minimum altitudes), the "reasonable expectation of privacy test" will not prevent police from flying over a home. Justice O'Connor's concurrence argues that legality is not everything, and her vote was necessary to assemble a majority of votes to affirm the conviction in *Riley*. Nonetheless, it is difficult to see how a lower court could hold that flights similar to those in *Ciraolo* and *Riley*—which the Supreme Court deemed not to be "searches"—have somehow violated the Fourth Amendment, at least under *Katz*. (Because *Ciraolo* and *Riley* were decided before the Court reinvigorated trespass-based Fourth Amendment analysis in *Jones*, new arguments may be available under that case's reasoning.)

Diligent defense counsel may wish to examine whether state or local laws restrict overflights more strictly than FAA regulations. Especially as remote-controlled helicopters (*a.k.a.* "drones") become widely available at low prices, police can easily fly camera-toting aircraft over the homes of suspects. If a municipality prohibits such conduct by the general public, then perhaps police who violate local ordinances will also violate reasonable expectations of privacy.

What are the limits for observations from the air? Consider an officer who uses a drone equipped with a video camera to monitor a suspect through his bedroom window. There is nothing to suggest that drones flying in neighborhoods are sufficiently rare; a drone with streaming video can be purchased for about $60 at Target. Search or no search? Why or why not? Does the outcome change if there is a local ordinance limiting the public's use of drones to public spaces?

Students interested in the law regulating drones (also known as "unmanned aircraft") can find information on the website of Jonathan Rupprecht, a Florida lawyer specializing in drones. He has collected various sources of drone law, including federal statutes, federal regulations (issued by several agencies, not solely by the Federal Aviation Administration), and state laws. As Rupprecht observes, it remains undecided how much of state drone law will be preempted by federal law.

Additionally, students can look at CALI's lesson Drones: Unmanned Aircraft Systems, to learn more about the legal aspects of drones in both military and civilian settings.

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2.4: Chapter 5 - What Is a Search?- Wrapping Up

For Chapter 3, we read *Smith v. Maryland*, in which the Court decided in 1979 that installation and use of a "pen register" to learn what numbers a suspect called from his home telephone was not a Fourth Amendment "search." Nearly 40 years later, the Court considered whether the holding of *Smith* allowed the government to gather a suspect's cell phone records to learn where that suspect has been. The question sharply divided the Court. Chief Justice Roberts wrote for a five-Justice majority. Each Justice who dissented wrote his own dissenting opinion. The dissents and the majority opinion combined to fill 119 pages in the Court's slip opinion.

Supreme Court of the United States

Timothy Carpenter v. United States

Decided June 22, 2018 – 138 S. Ct. 2206

Chief Justice ROBERTS delivered the opinion of the Court.

This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements.

I

A

There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called "cell sites." Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their network and applying "roaming" charges when another carrier routes data through their cell sites. In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI.

B

In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T-Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to

compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion.

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the ... robbery was at the exact time of the robbery." Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as "a means of establishing communication," the court concluded that the resulting business records are not entitled to Fourth Amendment protection. We granted certiorari.

II

A

The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was "the first act of opposition to the arbitrary claims of Great Britain" and helped spark the Revolution itself.

For much of our history, Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area." More recently, the Court has recognized that "property rights are not the sole measure of Fourth Amendment violations." In *Katz v. United States*, we established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain expectations of privacy as well.

Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance."

We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."

B

The case before us involves the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls. This sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.

The first set of cases addresses a person's expectation of privacy in his physical location and movements. The Court [has] concluded that "augment[ed]" visual surveillance [does] not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Since the movements of the vehicle and its final destination [are] "voluntarily conveyed to anyone who wanted to look," [defendant] could not assert a privacy interest in the information obtained.

In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares with others. We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

III

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.

We decline to extend [the third-party principle] to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.

A

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." For that reason, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period."

Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." These location records "hold for many Americans the 'privacies of life.'" And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* or the car in *Jones,* a cell phone—almost a "feature of human anatomy,"—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With

access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention [policies] of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. Unlike with the GPS device in *Jones,* police need not even know in advance whether they want to follow a particular individual, or when.

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements.

B

The Government's primary contention to the contrary is that the third-party doctrine governs this case. In its view, cell-site records are fair game because they are "business records" created and maintained by the wireless carriers. The Government recognizes that this case features new technology, but asserts that the legal question nonetheless turns on a garden-variety request for information from a third-party witness.

The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between limited types of personal information and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely."

Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements.

Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future."

We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice KENNEDY, with whom Justice THOMAS and Justice ALITO join, dissenting.

This case involves new technology, but the Court's stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.

The new rule the Court seems to formulate puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. And it places undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation. Adherence to this Court's longstanding precedents and analytic framework would have been the proper and prudent way to resolve this case.

The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. This is true even when the records contain personal and sensitive information. So when the Government uses a subpoena to obtain, for example, bank records, telephone records, and credit card statements from the businesses that create and keep these records, the Government does not engage in a search of the business's customers within the meaning of the Fourth Amendment.

In this case petitioner challenges the Government's right to use compulsory process to obtain a now-common kind of business record: cell-site records held by cell phone service providers. The Government acquired the records through an investigative process enacted by Congress. Upon approval by a neutral magistrate, and based on the Government's duty to show reasonable necessity, it authorizes the disclosure of records and information that are under the control and ownership of the cell phone service provider, not its customer.

Cell-site records are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process.

In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. According to today's majority opinion, the Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy. But, in the Court's view, the Government crosses a constitutional line when it obtains a court's approval to issue a subpoena for more than six days of cell-site records in order to determine whether a person was within several hundred city blocks of a crime scene. That distinction is illogical and will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations.

Justice THOMAS, dissenting.

[Justice Thomas raised two primary arguments in his dissent. First, he noted that the "property" at issue belonged to MetroPCS and Sprint, and that Carpenter accordingly had no ground upon which to object to a search of the property. Second, he argued that the Court should reject entirely the "reasonable expectation of privacy" test, which Justice Thomas wrote has served "to distort Fourth Amendment jurisprudence."]

Justice ALITO, with whom Justice THOMAS joins, dissenting.

I share the Court's concern about the effect of new technology on personal privacy, but I fear that today's decision will do far more harm than good. The Court's reasoning fractures two fundamental pillars of Fourth Amendment law, and in doing so, it guarantees a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement has rightfully come to rely.

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent. Unless it is somehow restricted to the particular situation in the present case, the Court's move will cause upheaval. Must every grand jury subpoena *duces tecum* be supported by probable cause? If so, investigations of terrorism, political corruption, white-collar crime, and many other offenses will be stymied. And what about subpoenas and other document-production orders issued by administrative agencies?

Second, the Court allows a defendant to object to the search of a third party's property. This also is revolutionary. The Fourth Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects" (emphasis added), not the persons, houses, papers, and effects of others. Until today, we have been careful to heed this fundamental feature of the Amendment's text.

By departing dramatically from these fundamental principles, the Court destabilizes long-established Fourth Amendment doctrine. We will be making repairs—or picking up the pieces—for a long time to come.

Although the majority professes a desire not to "'embarrass the future,'" we can guess where today's decision will lead.

One possibility is that the broad principles that the Court seems to embrace will be applied across the board. All subpoenas *duces tecum* and all other orders compelling the production of documents will require a demonstration of probable cause, and individuals will be able to claim a protected Fourth Amendment interest in any sensitive personal information about them that is collected and owned by third parties. Those would be revolutionary developments indeed.

The other possibility is that this Court will face the embarrassment of explaining in case after case that the principles on which today's decision rests are subject to all sorts of qualifications and limitations that have not yet been discovered. If we take this latter course, we will inevitably end up "mak[ing] a crazy quilt of the Fourth Amendment."

The desire to make a statement about privacy in the digital age does not justify the consequences that today's decision is likely to produce.

Justice GORSUCH, dissenting.

[Justice Gorsuch echoed some of the arguments raised by Justice Thomas concerning the wisdom of the "reasonable expectation of privacy" test. He then suggested that Carpenter might have prevailed on a different theory, based on the trespass test reinvigorated by *United States v. Jones* (2012) and *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (part of the reading for our next chapter). Under this theory, perhaps Carpenter had standing to object to a search of property held by MetroPCS and Sprint. One often retains rights to property deposited with a third party; recall the concept of a "bailment." Because Justice Gorsuch "reluctantly" concluded that Carpenter "forfeited perhaps his most promising line of argument" by not raising it, Justice Gorsuch could not concur in the judgment (in favor of Carpenter) and instead dissented.]

Notes, Comments, and Questions

In Chapter 2, students were encouraged to consider how the doctrines set forth in *Katz* and *Jones* would resolve the question presented in *Carpenter*. Now, having read *Carpenter*, students should review their analysis. Did the Court reach the result you expected? If not, why do you think the Court's reasoning differed from yours?

As Justice Sotomayor noted in her concurrence in *United States v. Jones* (Chapter 2), technological advances will demand continued attention from the Court. Students should also consider when and how the legislative and executive branches of the federal government (as well as the states) should regulate privacy related to smart phones and other technological marvels.

In many cities, drivers can use an app called "ParkMobile" to pay for parking, saving them the trouble of finding change for parking meters. The app allows users to look up their parking "history," which is a list of times and places of prior transactions. Imagine that after a bank robbery, police contact ParkMobile corporate headquarters and obtain a list of all users who parked within a mile of the bank within an hour of the robbery. Search or no search? Why or why not? Now, imagine instead that police suspect a particular person of robbing the bank, and police contact ParkMobile to obtain that single person's parking history for the day of the robbery. Search or no search? Why or why not?

Consider this commentary by Evan Caminker, a professor at and former dean of the University of Michigan Law School. Caminker briefed and argued Carpenter on behalf of the United States when the case was at the Sixth Circuit; he was on academic leave and was working with the federal prosecutors in Michigan. After Caminker was back in academia—and the Supreme Court had decided the case—he published these reflections:

How should courts square *Katz* in the future? The Court in *Carpenter* said there are two separate rationales underlying the third-party doctrine—lack of special sensitivity and voluntary exposure—and that CSLI triggers neither. As with its involuntary arguments, however, the Court does not explain how the two rationales relate as part of the overall doctrine.

The Court might mean that the third-party doctrine applies when *either* of the two rationales is present. In other words, if highly

sensitive information was voluntarily conveyed (think Fitbit health data), *or* if nonsensitive information was involuntarily shared (perhaps computer internet protocol addresses?), then the privacy interest dissipates. This reading fits with the Court's decision to address both variables, rather than to end its analysis after finding no voluntary sharing.

Or, the Court might mean that privacy dissipates only if *both* rationales apply, and the information is both voluntarily shared *and* nonsensitive. That seems perfectly logical too, though it seems less likely because it would mean that the third-party doctrine can *never* apply to sensitive information, no matter how clearly it was voluntarily shared (think of Carpenter posting his own location history on Facebook, or celebrities publishing tell-all memoirs).

And then there is a third possibility, raised and criticized by the dissents: an open-ended multifactor test. Justice Gorsuch, for example, lamented a "*second Katz*-like balancing inquiry, asking whether the fact of disclosure … outweighs privacy interests in the 'category of information' so disclosed." Justice Kennedy also viewed the Court as announcing a balancing test that encompassed both privacy interests and CSLI tracking properties by "considering intimacy, comprehensiveness, expense, retrospectivity, and voluntariness." Of course, the Court often articulates doctrine through multifactor tests, but Justice Kennedy feared that this one would particularly put "the law on a new and unstable foundation" as lower courts would be left to figure out for themselves how the doctrinal variables relate when they address other surveillance technologies and types of digital data.

Evan Caminker, *Location Tracking and Digital Data: Can Carpenter Build A Stable Privacy Doctrine?*, 2018 S. Ct. Rev. 411, 450–51 (2018).

Less than two years after *Carpenter* was decided, reporters revealed that federal agents had "bought access to a commercial database that maps the movements of millions of cellphones in America" and were "using it for immigration and border enforcement." *See* Bryan Tau & Michelle Hackman, *Federal Agencies Use Cellphone Location Data for Immigration Enforcement*, Wall St. J. (Feb. 7, 2020). Asked about whether Fourth Amendment law might regulate this tactic, a former Homeland Security official said, "In this case, the government is a commercial purchaser like anybody else. *Carpenter* is not relevant." He added, "The government is just buying a widget."

* * *

In our remaining material for this chapter, we will see how the Court has applied its Fourth Amendment principles to a more old-fashioned investigatory tool: the use of dogs by police. Depending on the context—a dog sniffing bags at an airport, a dog sniffing a car during a traffic stop, a dog sniffing someone's porch—the Court has reached different conclusions on whether using a dog is a "search."

Supreme Court of the United States

United States v. Raymond J. Place

Decided June 20, 1983 – 462 U.S. 696

Justice O'CONNOR delivered the opinion of the Court.

Respondent Raymond J. Place's behavior aroused the suspicions of law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to New York's LaGuardia Airport. As Place proceeded to the gate for his flight, the agents approached him and requested his airline ticket and some identification. Place complied with the request and consented to a search of the two suitcases he had checked. Because his flight was about to depart, however, the agents decided not to search the luggage.

Prompted by Place's parting remark that he had recognized that they were police, the agents inspected the address tags on the checked luggage and noted discrepancies in the two street addresses. Further investigation revealed that neither address existed and that the telephone number Place had given the airline belonged to a third address on the same street. On the basis of their encounter with Place and this information, the Miami agents called Drug Enforcement Administration (DEA) authorities in New York to relay their information about Place.

Two DEA agents waited for Place at the arrival gate at LaGuardia Airport in New York. There again, his behavior aroused the suspicion of the agents. After he had claimed his two bags and called a limousine, the agents decided to approach him. They identified themselves as federal narcotics agents, to which Place responded that he knew they were "cops" and had spotted them as soon as he had deplaned. One of the agents informed Place that, based on their own observations and information obtained from the Miami authorities, they believed that he might be carrying narcotics. After identifying the bags as belonging to him,

Place stated that a number of police at the Miami Airport had surrounded him and searched his baggage. The agents responded that their information was to the contrary. The agents requested and received identification from Place—a New Jersey driver's license, on which the agents later ran a computer check that disclosed no offenses, and his airline ticket receipt. When Place refused to consent to a search of his luggage, one of the agents told him that they were going to take the luggage to a federal judge to try to obtain a search warrant and that Place was free to accompany them. Place declined, but obtained from one of the agents telephone numbers at which the agents could be reached.

The agents then took the bags to Kennedy Airport, where they subjected the bags to a "sniff test" by a trained narcotics detection dog. The dog reacted positively to the smaller of the two bags but ambiguously to the larger bag. Because it was late on a Friday afternoon, the agents retained the luggage until Monday morning, when they secured a search warrant from a magistrate for the smaller bag. Upon opening that bag, the agents discovered 1,125 grams of cocaine.

Place was indicted for possession of cocaine with intent to distribute. In the District Court, Place moved to suppress the contents of the luggage seized from him at LaGuardia Airport, claiming that the warrantless seizure of the luggage violated his Fourth Amendment rights. The District Court denied the motion.

On appeal of the conviction, the United States Court of Appeals for the Second Circuit reversed. We granted certiorari and now affirm.

The purpose for which respondent's luggage was seized was to arrange its exposure to a narcotics detection dog. Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test—no matter how brief—could not be justified on less than probable cause.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

[Although the Court found that the dog sniff was not a "search," Place prevailed because the Court held that police committed an unlawful seizure of Place's property by detaining his luggage for 90 minutes and not informing him of their plans for the luggage. The concurring opinion below disagrees with the majority's conclusion about the dog sniff.]

Justice BRENNAN, with whom Justice MARSHALL joins, concurring in the result.

The Court suggests today that exposure of respondent's luggage to a narcotics detection dog "did not constitute a 'search' within the meaning of the Fourth Amendment."

[T]he issue is more complex than the Court's discussion would lead one to believe. As Justice STEVENS suggested in objecting to "unnecessarily broad dicta" in *United States v. Knotts,* the use of electronic detection techniques that enhance human perception implicates "especially sensitive concerns." Obviously, a narcotics detection dog is not an electronic detection device. Unlike the electronic "beeper" in *Knotts,* however, a dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual's privacy. Such use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic detection devices.

I have expressed the view that dog sniffs of people constitute searches. In any event, I would leave the determination of whether dog sniffs of luggage amount to searches, and the subsidiary question of what standards should govern such intrusions, to a future case providing an appropriate, and more informed, basis for deciding these questions.

* * *

In *Place*, the Court focused on the use of dogs in an airport, which is a public place that persons visit by choice. In the next case, the Court turned its attention to the use of dogs during traffic stops, in which motorists are detained involuntarily.

Supreme Court of the United States

Illinois v. Roy I. Caballes

Decided Jan. 24, 2005 – 543 U.S. 405

Justice STEVENS delivered the opinion of the Court.

Illinois State Trooper Daniel Gillette stopped respondent for speeding on an interstate highway. When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog. When they arrived, respondent's car was on the shoulder of the road and respondent was in Gillette's vehicle. While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent. The entire incident lasted less than 10 minutes.

Respondent was convicted of a narcotics offense and sentenced to 12 years' imprisonment and a $256,136 fine. The trial judge denied his motion to suppress the seized evidence and to quash his arrest. He held that the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probable cause to conduct the search. Although the Appellate Court affirmed, the Illinois Supreme Court reversed, concluding that because the canine sniff was performed without any "'specific and articulable facts'" to suggest drug activity, the use of the dog "unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation."

The question on which we granted certiorari is narrow: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." Thus, we proceed on the assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding; accordingly, we have omitted any reference to facts about respondent that might have triggered a modicum of suspicion.

[T]he Illinois Supreme Court held that the initially lawful traffic stop became an unlawful seizure solely as a result of the canine sniff that occurred outside respondent's stopped car. That is, the court characterized the dog sniff as the cause rather than the consequence of a constitutional violation. In its view, the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics, it was unlawful. In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.

Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest." This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." Respondent concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.

Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States,* 533 U.S. 27 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each

night the lady of the house takes her daily sauna and bath." The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

The judgment of the Illinois Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice SOUTER, dissenting.

I would hold that using the dog for the purposes of determining the presence of marijuana in the car's trunk was a search unauthorized as an incident of the speeding stop and unjustified on any other ground. I would accordingly affirm the judgment of the Supreme Court of Illinois, and I respectfully dissent.

At the heart both of *Place* and the Court's opinion today is the proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband. Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the sniff "does not implicate legitimate privacy interests" and is not to be treated as a search.

The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are "generally reliable" shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search. In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.

Once the dog's fallibility is recognized, however, that ends the justification claimed in *Place* for treating the sniff as *sui generis* under the Fourth Amendment: the sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime. This is not, of course, to deny that a dog's reaction may provide reasonable suspicion, or probable cause, to search the container or enclosure; the Fourth Amendment does not demand certainty of success to justify a search for evidence or contraband. The point is simply that the sniff and alert cannot claim the certainty that *Place* assumed, both in treating the deliberate use of sniffing dogs as *sui generis* and then taking that characterization as a reason to say they are not searches subject to Fourth Amendment scrutiny. And when that aura of uniqueness disappears, there is no basis in *Place's* reasoning, and no good reason otherwise, to ignore the actual function that dog sniffs perform. They are conducted to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced. The information is not provided by independent third parties beyond the reach of constitutional limitations, but gathered by the government's own officers in order to justify searches of the traditional sort, which may or may not reveal evidence of crime but will disclose anything meant to be kept private in the area searched. Thus in practice the government's use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area. And given the fallibility of the dog, the sniff is the first step in a process that may disclose "intimate details" without revealing contraband, just as a thermal-imaging device might do, as described in *Kyllo v. United States*.

It makes sense, then, to treat a sniff as the search that it amounts to in practice, and to rely on the body of our Fourth Amendment cases, including *Kyllo,* in deciding whether such a search is reasonable. As a general proposition, using a dog to sniff for drugs is subject to the rule that the object of enforcing criminal laws does not, without more, justify suspicionless Fourth Amendment intrusions. Since the police claim to have had no particular suspicion that Caballes was violating any drug law, this sniff search must stand or fall on its being ancillary to the traffic stop that led up to it.

For the sake of providing a workable framework to analyze cases on facts like these, which are certain to come along, I would treat the dog sniff as the familiar search it is in fact, subject to scrutiny under the Fourth Amendment.[1]

Justice GINSBURG, with whom Justice SOUTER joins, dissenting.

The Court has never removed police action from Fourth Amendment control on the ground that the action is well calculated to apprehend the guilty. Under today's decision, every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population.

The Illinois Supreme Court, it seems to me, correctly apprehended the danger in allowing the police to search for contraband despite the absence of cause to suspect its presence. Today's decision, in contrast, clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green.

Today's decision also undermines this Court's situation-sensitive balancing of Fourth Amendment interests in other contexts. For example, in *Bond v. United States,* 529 U.S. 334 (2000), the Court held that a bus passenger had an expectation of privacy in a bag placed in an overhead bin and that a police officer's physical manipulation of the bag constituted an illegal search. If canine drug sniffs are entirely exempt from Fourth Amendment inspection, a sniff could substitute for an officer's request to a bus passenger for permission to search his bag, with this significant difference: The passenger would not have the option to say "No."

The dog sniff in this case, it bears emphasis, was for drug detection only. A dog sniff for explosives, involving security interests not presented here, would be an entirely different matter.

For the reasons stated, I would hold that the police violated Caballes' Fourth Amendment rights when, without cause to suspect wrongdoing, they conducted a dog sniff of his vehicle. I would therefore affirm the judgment of the Illinois Supreme Court.

* * *

The previous two cases analyzed the use of dogs under the "reasonable expectation of privacy" test derived from *Katz*. In the next case, which came one year after *United States v. Jones*, the Court considered the use of dogs under the law of trespass.

Supreme Court of the United States

Florida v. Joelis Jardines

Decided March 26, 2013 – 569 U.S. 1

Justice SCALIA delivered the opinion of the Court.

We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment.

I

In 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified tip that marijuana was being grown in the home of respondent Joelis Jardines. One month later, the Department and the Drug Enforcement Administration sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. He watched the home for fifteen minutes and saw no vehicles in the driveway or activity around the home, and could not see inside because the blinds were drawn. Detective Pedraja then approached Jardines' home accompanied by Detective Douglas Bartelt, a trained canine handler who had just arrived at the scene with his drug-sniffing dog. The dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler.

Detective Bartelt had the dog on a six-foot leash, owing in part to the dog's "wild" nature and tendency to dart around erratically while searching. As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor. As Detective Bartelt explained, the dog "began tracking that airborne odor by … tracking back and forth," engaging in what is called "bracketing," "back and forth, back and forth." Detective Bartelt gave the dog "the full six feet of the leash plus whatever safe distance [he could] give him" to do this—he testified that he needed to give the dog "as much distance as I can." And Detective Pedraja stood back while this was occurring, so that he would not "get knocked over" when the dog was "spinning around trying to find" the source.

After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.

On the basis of what he had learned at the home, Detective Pedraja applied for and received a warrant to search the residence.

When the warrant was executed later that day, Jardines attempted to flee and was arrested; the search revealed marijuana plants, and he was charged with trafficking in cannabis.

At trial, Jardines moved to suppress the marijuana plants on the ground that the canine investigation was an unreasonable search. The trial court granted the motion, and the Florida Third District Court of Appeal reversed. On a petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District Court of Appeal and approved the trial court's decision to suppress, holding (as relevant here) that the use of the trained narcotics dog to investigate Jardines' home was a Fourth Amendment search unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search.

We granted certiorari, limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment.

II

[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends."

Since the officers' investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion. While law enforcement officers need not "shield their eyes" when passing by the home "on public thoroughfares," an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. As it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.

We have recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."

But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

The government's use of trained police dogs to investigate the home and its immediate surroundings is a "search" within the meaning of the Fourth Amendment. The judgment of the Supreme Court of Florida is therefore affirmed.

Notes, Comments, and Questions

Does the outcome change if the dog is sniffing the door of an apartment instead of a home? Consider a police officer who is investigating an individual for methamphetamine production. The individual lives on the third floor of an apartment building. The police officer leads a dog to the third-floor hallway; the dog sniffs several doors in the hallway without alerting. While sniffing the suspect's door, the dog alerts to the presence of drugs. Search or no search? Why or why not? *See State v. Edstrom*, 916 N.W.2d 512, 515 (Minn. 2018), *cert. denied,* 139 S. Ct. 1262 (2019).

This chapter's final dog case differs somewhat from the previous cases. Instead of considering what activity by dogs counts as a "search," the Court considers how well trained a police dog must be for its "alert" to count toward the probable cause needed to justify a vehicle search. The more reliable a dog is, the more reasonable it is for police to search an area to which the dog has alerted. The less reliable the dog, the less reasonable police reliance becomes.

Supreme Court of the United States

Florida v. Clayton Harris

Decided Feb. 19, 2013 – 568 U.S. 237

Justice KAGAN delivered the opinion of the [unanimous] Court.

In this case, we consider how a court should determine if the "alert" of a drug-detection dog during a traffic stop provides probable cause to search a vehicle. The Florida Supreme Court held that the State must in every case present an exhaustive set of records, including a log of the dog's performance in the field, to establish the dog's reliability. We think that demand inconsistent with the "flexible, common-sense standard" of probable cause.

I

William Wheetley is a K–9 Officer in the Liberty County, Florida Sheriff's Office. On June 24, 2006, he was on a routine patrol with Aldo, a German shepherd trained to detect certain narcotics (methamphetamine, marijuana, cocaine, heroin, and ecstasy). Wheetley pulled over respondent Clayton Harris's truck because it had an expired license plate. On approaching the driver's-side door, Wheetley saw that Harris was "visibly nervous," unable to sit still, shaking, and breathing rapidly. Wheetley also noticed an open can of beer in the truck's cup holder. Wheetley asked Harris for consent to search the truck, but Harris refused. At that point, Wheetley retrieved Aldo from the patrol car and walked him around Harris's truck for a "free air sniff." Aldo alerted at the driver's-side door handle—signaling, through a distinctive set of behaviors, that he smelled drugs there.

Wheetley concluded, based principally on Aldo's alert, that he had probable cause to search the truck. His search did not turn up any of the drugs Aldo was trained to detect. But it did reveal 200 loose pseudoephedrine pills, 8,000 matches, a bottle of hydrochloric acid, two containers of antifreeze, and a coffee filter full of iodine crystals—all ingredients for making methamphetamine. Wheetley accordingly arrested Harris, who admitted after proper *Miranda* warnings that he routinely "cooked" methamphetamine at his house and could not go "more than a few days without using" it. The State charged Harris with possessing pseudoephedrine for use in manufacturing methamphetamine.

While out on bail, Harris had another run-in with Wheetley and Aldo. This time, Wheetley pulled Harris over for a broken brake light. Aldo again sniffed the truck's exterior, and again alerted at the driver's-side door handle. Wheetley once more searched the truck, but on this occasion discovered nothing of interest.

Harris moved to suppress the evidence found in his truck on the ground that Aldo's alert had not given Wheetley probable cause for a search. At the hearing on that motion, Wheetley testified about both his and Aldo's training in drug detection. Wheetley (and a different dog) completed a 160-hour course in narcotics detection offered by the Dothan, Alabama Police Department, while Aldo (and a different handler) completed a similar, 120-hour course given by the Apopka, Florida Police Department. That same year, Aldo received a one-year certification from Drug Beat, a private company that specializes in testing and certifying K-9 dogs. Wheetley and Aldo teamed up in 2005 and went through another, 40-hour refresher course in Dothan together. They also did four hours of training exercises each week to maintain their skills. Wheetley would hide drugs in certain vehicles or buildings while leaving others "blank" to determine whether Aldo alerted at the right places. According to Wheetley, Aldo's performance in those exercises was "really good." The State introduced "Monthly Canine Detection Training Logs" consistent with that testimony: They showed that Aldo always found hidden drugs and that he performed "satisfactorily" (the higher of two possible assessments) on each day of training.

On cross-examination, Harris's attorney chose not to contest the quality of Aldo's or Wheetley's training. She focused instead on Aldo's certification and his performance in the field, particularly the two stops of Harris's truck. Wheetley conceded that the certification (which, he noted, Florida law did not require) had expired the year before he pulled Harris over. Wheetley also acknowledged that he did not keep complete records of Aldo's performance in traffic stops or other field work; instead, he maintained records only of alerts resulting in arrests. But Wheetley defended Aldo's two alerts to Harris's seemingly narcotics-free truck: According to Wheetley, Harris probably transferred the odor of methamphetamine to the door handle, and Aldo responded to that "residual odor."

The trial court concluded that Wheetley had probable cause to search Harris's truck and so denied the motion to suppress. Harris then entered a no-contest plea while reserving the right to appeal the trial court's ruling. An intermediate state court summarily affirmed.

The Florida Supreme Court reversed, holding that Wheetley lacked probable cause to search Harris's vehicle under the Fourth Amendment. "[W]hen a dog alerts," the court wrote, "the fact that the dog has been trained and certified is simply not enough to establish probable cause." To demonstrate a dog's reliability, the State needed to produce a wider array of evidence:

"[T]he State must present ... the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability."

The court particularly stressed the need for "evidence of the dog's performance history," including records showing "how often the dog has alerted in the field without illegal contraband having been found." That data, the court stated, could help to expose such problems as a handler's tendency (conscious or not) to "cue [a] dog to alert" and "a dog's inability to distinguish between residual odors and actual drugs." Accordingly, an officer like Wheetley who did not keep full records of his dog's field performance could never have the requisite cause to think "that the dog is a reliable indicator of drugs."

We granted certiorari and now reverse.

II

A police officer has probable cause to conduct a search when "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief'" that contraband or evidence of a crime is present. The test for probable cause is not reducible to "precise definition or quantification." "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence ... have no place in the [probable-cause] decision." All we have required is the kind of "fair probability" on which "reasonable and prudent [people,] not legal technicians, act."

In evaluating whether the State has met this practical and common-sensical standard, we have consistently looked to the totality of the circumstances. We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach. Probable cause, is "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."

The Florida Supreme Court flouted this established approach to determining probable cause. To assess the reliability of a drug-detection dog, the court created a strict evidentiary checklist, whose every item the State must tick off. Most prominently, an alert cannot establish probable cause under the Florida court's decision unless the State introduces comprehensive documentation of the dog's prior "hits" and "misses" in the field. (One wonders how the court would apply its test to a rookie dog.) No matter how much other proof the State offers of the dog's reliability, the absent field performance records will preclude a finding of probable cause. That is the antithesis of a totality-of-the-circumstances analysis. [A] finding of a drug-detection dog's reliability cannot depend on the State's satisfaction of multiple, independent evidentiary requirements. No more for dogs than for human informants is such an inflexible checklist the way to prove reliability, and thus establish probable cause.

Making matters worse, the decision below treats records of a dog's field performance as the gold standard in evidence, when in most cases they have relatively limited import. Errors may abound in such records. If a dog on patrol fails to alert to a car containing drugs, the mistake usually will go undetected because the officer will not initiate a search. Field data thus may not capture a dog's false negatives. Conversely (and more relevant here), if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all. The dog may have detected substances that were too well hidden or present in quantities too small for the officer to locate. Or the dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person. Field data thus may markedly overstate a dog's real false positives. By contrast, those inaccuracies—in either direction—do not taint records of a dog's performance in standard training and certification settings. There, the designers of an assessment know where drugs are hidden and where they are not—and so where a dog should alert and where he should not. The better measure of a dog's reliability thus comes away from the field, in controlled testing environments.

For that reason, evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring

unnecessary risks or wasting limited time and resources.

A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the dog's (or handler's) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant, as the Solicitor General acknowledged at oral argument. And even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions.

In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

III

And here, Aldo's did. The record in this case amply supported the trial court's determination that Aldo's alert gave Wheetley probable cause to search Harris's truck.

Because training records established Aldo's reliability in detecting drugs and Harris failed to undermine that showing, we agree with the trial court that Wheetley had probable cause to search Harris's truck. We accordingly reverse the judgment of the Florida Supreme Court.

Notes, Comments, and Questions

In *Harris*, the Court held that Aldo (the police dog) was reliable enough that his "alert" provided sufficient evidence of crime that officers had "probable cause" to search a vehicle. The term "probable cause" appears in the text of the Fourth Amendment, and its definition is essential to understanding when police may obtain warrants, when they may search cars, and many other important questions. We examine the concept of probable cause in some detail in the next chapter.

When studying dog alerts, students should remember that lawyers have many opportunities to object to what they consider unreliable dog-alert evidence. In *Harris*, defense counsel's goal was to exclude the evidence police found while searching a truck. A different Florida case, *State v. Merrit Alonzo Sims* (Fla. 2007), the Supreme Court of Florida considered a lawyer's failure to object to dog-alert evidence for a different reason. In that case, a police dog handler testified at a murder trial "that his dog alerted him to the presence of narcotics in the passenger side of the car that Sims was driving." Sims had admitted to killing a police officer with the officer's police pistol; the issue at trial was whether the killing was murder or self-defense. Sims claimed the officer "had choked him, used racial epithets, and repeatedly threatened to kill him."

The state, by contrast, argued that because Sims had drugs in his car, he had a motive to kill the officer to avoid being returned to prison (drug possession was against the terms of Sims's parole). One difficulty for the state was that drugs were not found when the car was searched sometime after the killing. The state argued "that the dog would alert to the scent of narcotics after the drugs had been removed, and ... used this to develop its theory of Sims' motive." After Sims had spent more than a decade on death row, the Florida Supreme Court considered whether his trial counsel provided ineffective assistance of counsel by failing to object to the dog-alert evidence (that is, to the testimony by the dog handler). The court held that the evidence was so unreliable that it would have been excluded had counsel properly objected, that counsel had no good justification for that failure, and that Sims's conviction must be set aside. Sims would later plead guilty, taking a deal that included a sentence of 25 years' imprisonment—and no death penalty.

This is but one example of a reason one might object to unreliable evidence (of all kinds). Further, even if a lawyer cannot win the exclusion of unreliable evidence, she can still argue to the jury that the evidence is lousy and should be disregarded. When studying legal doctrines related to the exclusion of evidence, students should not forget that the most common ways to attack

"bad" evidence involve a combination of argument and contrary evidence.

Search Review

Fourth Amendment: What Is a Search?

Before moving to the next chapter, students may wish to review the definition of "search" by considering these examples. Instructions: Write "is," "is not," or "may be" in each blank. If your answer is "may be," jot down in the margin why you are unsure. Each problem is independent of all other ones.

1) If a police officer uses a car to follow a suspect who is driving from home to work, that _____ a search.

2) If a police officer flies a helicopter fifty feet above the ground and uses binoculars to look into a house window, that _____ a search.

3) If a police officer rifles through a suspect's paper recycling before the sanitation department collects it (and removes an itemized credit card bill), that _____ a search.

4) If a police officer borrows a rare super-sensitive microphone from the CIA and points it at a living room window from across the street, thereby capturing the window vibrations and listening to the conversations of people inside, that _____ a search.

5) If a police department deploys officers in shifts 24/7 to watch a house, writing down the description of everyone who comes and goes, that _____ a search.

6) If a police officer chases a robbery suspect from the scene of a bank robbery, and the officer follows the sprinting subject into a nearby house, that _____ a search.

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2.5: Chapter 6 - Probable Cause and Reasonable Suspicion

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause." Accordingly, warrants (and the searches that followed in the wake of their issuance) have been challenged on the ground that police did not provide sufficient evidence when obtaining the warrants from judges. In addition, the Court has held that in several common situations, police may conduct searches and seizures without a warrant, but only with probable cause. For example, the vehicle searches described in *Florida v. Harris* (Chapter 5) were permissible under the "automobile exception" to the warrant requirement, about which we will learn more later. In *Illinois v. Gates*, the Court set forth a new standard for when an informant's tip provides probable cause to justify a search or arrest.

Supreme Court of the United States

Illinois v. Lance Gates

Decided June 8, 1983 – 462 U.S. 213

Justice REHNQUIST delivered the opinion of the Court.

Respondents Lance and Susan Gates were indicted for violation of state drug laws after police officers, executing a search warrant, discovered marijuana and other contraband in their automobile and home. Prior to trial the Gateses moved to suppress evidence seized during this search. The Illinois Supreme Court affirmed the decisions of lower state courts, granting the motion. It held that the affidavit submitted in support of the State's application for a warrant to search the Gateses' property was inadequate under this Court's decisions in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969).

We granted certiorari to consider the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip.

We conclude that the Illinois Supreme Court read the requirements of our Fourth Amendment decisions too restrictively.

II

We now decide whether respondents' rights under the Fourth and Fourteenth Amendments were violated by the search of their car and house. A chronological statement of events usefully introduces the issues at stake. Bloomingdale, Ill., is a suburb of Chicago located in DuPage County. On May 3, 1978, the Bloomingdale Police Department received by mail an anonymous handwritten letter which read as follows:

"This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.

"They brag about the fact they never have to work, and make their entire living on pushers."

"I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often."

The letter was referred by the Chief of Police of the Bloomingdale Police Department to Detective Mader, who decided to pursue the tip. Mader learned, from the office of the Illinois Secretary of State, that an Illinois driver's license had been issued to one Lance Gates, residing at a stated address in Bloomingdale. He contacted a confidential informant, whose examination of certain financial records revealed a more recent address for the Gates, and he also learned from a police officer assigned to O'Hare Airport that "L. Gates" had made a reservation on Eastern Airlines flight 245 to West Palm Beach, Fla., scheduled to depart from Chicago on May 5 at 4:15 p.m.

Mader then made arrangements with an agent of the Drug Enforcement Administration for surveillance of the May 5 Eastern

Airlines flight. The agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxi to the nearby Holiday Inn. They also reported that Gates went to a room registered to one Susan Gates and that, at 7:00 a.m. the next morning, Gates and an unidentified woman left the motel in a Mercury bearing Illinois license plates and drove northbound on an interstate frequently used by travelers to the Chicago area. In addition, the DEA agent informed Mader that the license plate number on the Mercury registered to a Hornet station wagon owned by Gates. The agent also advised Mader that the driving time between West Palm Beach and Bloomingdale was approximately 22 to 24 hours.

Mader signed an affidavit setting forth the foregoing facts, and submitted it to a judge of the Circuit Court of DuPage County, together with a copy of the anonymous letter. The judge of that court thereupon issued a search warrant for the Gateses' residence and for their automobile. The judge, in deciding to issue the warrant, could have determined that the *modus operandi* of the Gates had been substantially corroborated. As the anonymous letter predicted, Lance Gates had flown from Chicago to West Palm Beach late in the afternoon of May 5th, had checked into a hotel room registered in the name of his wife, and, at 7:00 a.m. the following morning, had headed north, accompanied by an unidentified woman, out of West Palm Beach on an interstate highway used by travelers from South Florida to Chicago in an automobile bearing a license plate issued to him.

At 5:15 a.m. on March 7th, only 36 hours after he had flown out of Chicago, Lance Gates, and his wife, returned to their home in Bloomingdale, driving the car in which they had left West Palm Beach some 22 hours earlier. The Bloomingdale police were awaiting them, searched the trunk of the Mercury, and uncovered approximately 350 pounds of marijuana. A search of the Gateses' home revealed marijuana, weapons, and other contraband. The Illinois Circuit Court ordered suppression of all these items, on the ground that the affidavit submitted to the Circuit Judge failed to support the necessary determination of probable cause to believe that the Gateses' automobile and home contained the contraband in question. This decision was affirmed in turn by the Illinois Appellate Court and by a divided vote of the Supreme Court of Illinois.

The Illinois Supreme Court concluded—and we are inclined to agree—that, standing alone, the anonymous letter sent to the Bloomingdale Police Department would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gateses' car and home. The letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gateses' criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gateses' home and car.

The Illinois Supreme Court also properly recognized that Detective Mader's affidavit might be capable of supplementing the anonymous letter with information sufficient to permit a determination of probable cause. In holding that the affidavit in fact did not contain sufficient additional information to sustain a determination of probable cause, the Illinois court applied a "two-pronged test," derived from our decision in *Spinelli v. United States,* 393 U.S. 410 (1969). The Illinois Supreme Court, like some others, apparently understood *Spinelli* as requiring that the anonymous letter satisfy each of two independent requirements before it could be relied on. According to this view, the letter, as supplemented by Mader's affidavit, first had to adequately reveal the "basis of knowledge" of the letter writer—the particular means by which he came by the information given in his report. Second, it had to provide facts sufficiently establishing either the "veracity" of the affiant's informant, or, alternatively, the "reliability" of the informant's report in this particular case.

The Illinois court, alluding to an elaborate set of legal rules that have developed among various lower courts to enforce the "two-pronged test," found that the test had not been satisfied. First, the "veracity" prong was not satisfied because, "there was simply no basis [for] ... conclud[ing] that the anonymous person [who wrote the letter to the Bloomingdale Police Department] was credible." The court indicated that corroboration by police of details contained in the letter might never satisfy the "veracity" prong, and in any event, could not do so if, as in the present case, only "innocent" details are corroborated. In addition, the letter gave no indication of the basis of its writer's knowledge of the Gateses' activities. The Illinois court understood *Spinelli* as permitting the detail contained in a tip to be used to infer that the informant had a reliable basis for his statements, but it thought that the anonymous letter failed to provide sufficient detail to permit such an inference. Thus, it concluded that no showing of probable cause had been made.

We agree with the Illinois Supreme Court that an informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply. Rather, as detailed below, they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

III

This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific "tests" be satisfied by every informant's tip. Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical conception." "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Our observation in *United States v. Cortez,* 449 U.S. 411, 418 (1981) regarding "particularized suspicion," is also applicable to the probable cause standard:

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons.

Moreover, the "two-pronged test" directs analysis into two largely independent channels—the informant's "veracity" or "reliability" and his "basis of knowledge." There are persuasive arguments against according these two elements such independent status. Instead, they are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.

If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary. Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case. Unlike a totality-of-the-circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the "two-pronged test" has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate.

Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."

We also have recognized that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of "probable cause." The rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our *Spinelli* decision, cannot be reconciled with the fact that many warrants are—quite properly—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings.

Similarly, we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts."

If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."

Finally, the direction taken by decisions following *Spinelli* poorly serves "the most basic function of any government": "to provide for the security of the individual and of his property." The strictures that inevitably accompany the "two-pronged test" cannot

avoid seriously impeding the task of law enforcement. If, as the Illinois Supreme Court apparently thought, that test must be rigorously applied in every case, anonymous tips would be of greatly diminished value in police work. Ordinary citizens, like ordinary witnesses, generally do not provide extensive recitations of the basis of their everyday observations. Likewise, as the Illinois Supreme Court observed in this case, the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable. As a result, anonymous tips seldom could survive a rigorous application of either of the *Spinelli* prongs. Yet, such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes." While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.

For all these reasons, we conclude that it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that "he has cause to suspect and does believe that" liquor illegally brought into the United States is located on certain premises will not do. An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and [a] wholly conclusory statement fail[s] to meet this requirement. An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. [T]his is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. But when we move beyond the "bare bones" affidavits this area simply does not lend itself to a prescribed set of rules, like that which had developed from *Spinelli*. Instead, the flexible, common-sense standard better serves the purposes of the Fourth Amendment's probable cause requirement.

IV

Our decisions applying the totality-of-the-circumstances analysis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work. Likewise, we recognized the probative value of corroborative efforts of police officials in *Aguilar*—the source of the "two-pronged test"—by observing that if the police had made some effort to corroborate the informant's report at issue, "an entirely different case" would have been presented.

The showing of probable cause in the present case was fully compelling. Even standing alone, the facts obtained through the independent investigation of Mader and the DEA at least suggested that the Gateses were involved in drug trafficking. In addition to being a popular vacation site, Florida is well-known as a source of narcotics and other illegal drugs. Lance Gates' flight to Palm Beach, his brief, overnight stay in a motel, and apparent immediate return north to Chicago in the family car, conveniently awaiting him in West Palm Beach, is as suggestive of a pre-arranged drug run, as it is of an ordinary vacation trip.

In addition, the judge could rely on the anonymous letter, which had been corroborated in major part by Mader's efforts. The corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. "Because an informant is right about some things, he is more probably right about other facts" including the claim regarding the Gateses' illegal activity. This may well not be the type of "reliability" or "veracity" necessary to satisfy some views of the "veracity prong" of *Spinelli,* but we think it suffices for the practical, common-sense judgment called for in making a probable cause determination. It is enough, for purposes of assessing probable cause, that "corroboration through other sources of information reduced the chances of a reckless or prevaricating tale," thus providing "a substantial basis for crediting the hearsay."

Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letter writer's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate

could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses' alleged illegal activities. Of course, the Gateses' travel plans might have been learned from a talkative neighbor or travel agent; under the "two-pronged test" developed from *Spinelli,* the character of the details in the anonymous letter might well not permit a sufficiently clear inference regarding the letter writer's "basis of knowledge." But, as discussed previously, probable cause does not demand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gateses or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a "substantial basis for ... conclud[ing]" that probable cause to search the Gateses' home and car existed. The judgment of the Supreme Court of Illinois therefore must be

Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

I write to dissent from the Court's unjustified and ill-advised rejection of the two-prong test for evaluating the validity of a warrant based on hearsay announced in *Aguilar v. Texas,* 378 U.S. 108 (1964), and refined in *Spinelli v. United States,* 393 U.S. 410 (1969).

I

In recognition of the judiciary's role as the only effective guardian of Fourth Amendment rights, this Court has developed over the last half century a set of coherent rules governing a magistrate's consideration of a warrant application and the showings that are necessary to support a finding of probable cause. We start with the proposition that a neutral and detached magistrate, and not the police, should determine whether there is probable cause to support the issuance of a warrant.

In order to emphasize the magistrate's role as an independent arbiter of probable cause and to insure that searches or seizures are not effected on less than probable cause, the Court has insisted that police officers provide magistrates with the underlying facts and circumstances that support the officers' conclusions. The Court stated that "[u]nder the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."

[Our previous cases] advance an important [ ] substantive value: Findings of probable cause, and attendant intrusions, should not be authorized unless there is some assurance that the information on which they are based has been obtained in a reliable way by an honest or credible person. As applied to police officers, the rules focus on the way in which the information was acquired. As applied to informants, the rules focus both on the honesty or credibility of the informant and on the reliability of the way in which the information was acquired. Insofar as it is more complicated, an evaluation of affidavits based on hearsay involves a more difficult inquiry. This suggests a need to structure the inquiry in an effort to insure greater accuracy. The standards announced in *Aguilar,* as refined by *Spinelli,* fulfill that need. The standards inform the police of what information they have to provide and magistrates of what information they should demand. The standards also inform magistrates of the subsidiary findings they must make in order to arrive at an ultimate finding of probable cause. By requiring police to provide certain crucial information to magistrates and by structuring magistrates' probable cause inquiries, *Aguilar* and *Spinelli* assure the magistrate's role as an independent arbiter of probable cause, insure greater accuracy in probable cause determinations, and advance the substantive value identified above.

Until today the Court has never squarely addressed the application of the *Aguilar* and *Spinelli* standards to tips from anonymous informants. By definition nothing is known about an anonymous informant's identity, honesty, or reliability. One commentator has suggested that anonymous informants should be treated as presumptively unreliable. In any event, there certainly is no basis for treating anonymous informants as presumptively reliable. Nor is there any basis for assuming that the information provided by an anonymous informant has been obtained in a reliable way. If we are unwilling to accept conclusory allegations from the police, who are presumptively reliable, or from informants who are known, at least to the police, there cannot possibly be any rational basis for accepting conclusory allegations from anonymous informants.

II

In rejecting the *Aguilar-Spinelli* standards, the Court suggests that a "totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." In support of this proposition the Court relies on the "practical, nontechnical" nature of probable cause.

[O]ne can concede that probable cause is a "practical, nontechnical" concept without betraying the values that *Aguilar* and

Spinelli reflect. As noted, *Aguilar* and *Spinelli* require the police to provide magistrates with certain crucial information. They also provide structure for magistrates' probable cause inquiries. In so doing, *Aguilar* and *Spinelli* preserve the role of magistrates as independent arbiters of probable cause, insure greater accuracy in probable cause determinations, and advance the substantive value of precluding findings of probable cause, and attendant intrusions, based on anything less than information from an honest or credible person who has acquired his information in a reliable way. Neither the standards nor their effects are inconsistent with a "practical, nontechnical" conception of probable cause. Once a magistrate has determined that he has information before him that he can reasonably say has been obtained in a reliable way by a credible person, he has ample room to use his common sense and to apply a practical, nontechnical conception of probable cause.

At the heart of the Court's decision to abandon *Aguilar* and *Spinelli* appears to be its belief that "the direction taken by decisions following *Spinelli* poorly serves 'the most basic function of any government: to provide for the security of the individual and of his property.'" This conclusion rests on the judgment that *Aguilar* and *Spinelli* "seriously imped[e] the task of law enforcement," and render anonymous tips valueless in police work. Surely, the Court overstates its case. But of particular concern to all Americans must be that the Court gives virtually no consideration to the value of insuring that findings of probable cause are based on information that a magistrate can reasonably say has been obtained in a reliable way by an honest or credible person.

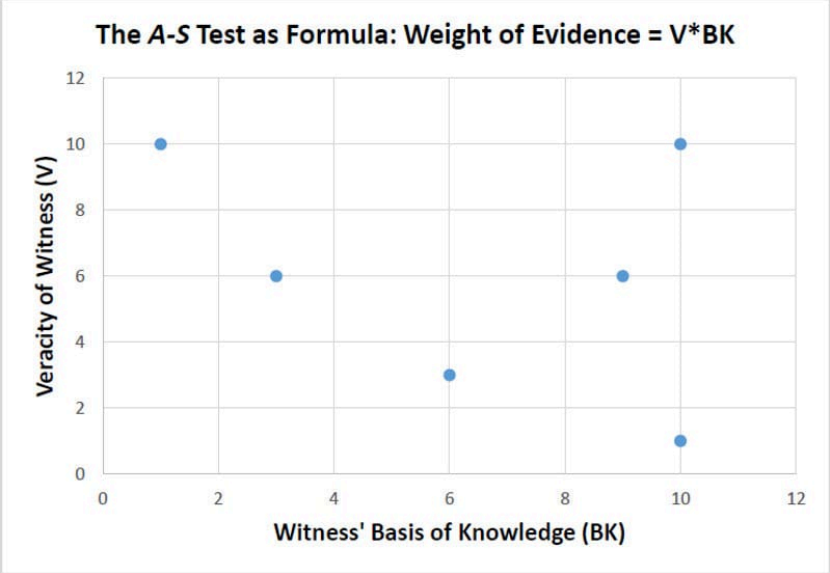
III

The Court's complete failure to provide any persuasive reason for rejecting *Aguilar* and *Spinelli* doubtlessly reflects impatience with what it perceives to be "overly technical" rules governing searches and seizures under the Fourth Amendment. Words such as "practical," "nontechnical," and "commonsense," as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment. Everyone shares the Court's concern over the horrors of drug trafficking, but under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure this evil. We must be ever mindful of Justice Stewart's admonition in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), that "[i]n times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts." In the same vein, *Glasser v. United States,* 315 U.S. 60 (1942), warned that "[s]teps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties."

Rights secured by the Fourth Amendment are particularly difficult to protect because their "advocates are usually criminals." But the rules "we fashion [are] for the innocent and guilty alike." By replacing *Aguilar* and *Spinelli* with a test that provides no assurance that magistrates, rather than the police, or informants, will make determinations of probable cause; imposes no structure on magistrates' probable cause inquiries; and invites the possibility that intrusions may be justified on less than reliable information from an honest or credible person, today's decision threatens to "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

Notes, Comments, and Questions

The *Gates* Court rejects the *Aguilar-Spinelli* test's insistence on using two specific measures to compose a (somewhat) mathematical formula for probable cause. As the Court explains, the existence of probable cause will not be found by entering "veracity" and "basis of knowledge" into a formula which yields the total weight of evidence presented to a magistrate. (The graph below exemplifies how such a formula might work.)



As the Court puts it:

“This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific ‘tests’ be satisfied by every informant’s tip. Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a ‘practical, nontechnical conception.’”

When police have probable cause to believe either (1) that evidence of crime will be found in a particular place or (2) that a certain person has committed a crime, important police action becomes lawful that would have remained unlawful absent probable cause. One important example involves vehicle stops; police may stop a car based on probable cause to believe that its driver has committed a traffic law violation. It is widely believed that many officers use this power for reasons other than traffic enforcement—for example, stopping drivers who violate trivial traffic rules in the hope of discovering evidence of more serious lawbreaking. In addition, some critics of police allege that at least some officers use their traffic-stop authority in ways that constitute unlawful discrimination, such as on the basis of race. Based on these beliefs and allegations, motorists have sought review of vehicle stops, justified by probable cause, on the basis of police officers’ “real” or “true” reasons for conducting the stops. The Court has resisted engaging in such review.

Supreme Court of the United States

Michael A. Whren v. United States

Decided June 10, 1996 – 517 U.S. 806

Justice SCALIA delivered the opinion of the [unanimous] Court.

In this case we decide whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment’s prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.

I

On the evening of June 10, 1993, plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department were patrolling a “high drug area” of the city in an unmarked car. Their suspicions were aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signaling, and sped off at an “unreasonable” speed. The policemen followed, and in a short while overtook the Pathfinder when it stopped behind other traffic at a red light. They pulled up alongside, and Officer Ephraim Soto stepped out and approached the driver’s door, identifying himself as a police officer and directing the driver, petitioner Brown, to put the vehicle

in park. When Soto drew up to the driver's window, he immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands. Petitioners were arrested, and quantities of several types of illegal drugs were retrieved from the vehicle.

Petitioners were charged in a four-count indictment with violating various federal drug laws. At a pretrial suppression hearing, they challenged the legality of the stop and the resulting seizure of the drugs. They argued that the stop had not been justified by probable cause to believe, or even reasonable suspicion, that petitioners were engaged in illegal drug-dealing activity; and that Officer Soto's asserted ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual. The District Court denied the suppression motion, concluding that "the facts of the stop were not controverted," and "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop."

Petitioners were convicted of the counts at issue here. The Court of Appeals affirmed the convictions, holding with respect to the suppression issue that, "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation." We granted certiorari.

II

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of this provision. An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.

Petitioners accept that Officer Soto had probable cause to believe that various provisions of the District of Columbia traffic code had been violated. They argue, however, that "in the unique context of civil traffic regulations" probable cause is not enough. Since, they contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.

A

Petitioners contend that the standard they propose is consistent with our past cases' disapproval of police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas. We are reminded that [in previous cases] we stated that "an inventory search" must not be a ruse for a general rummaging in order to discover incriminating evidence"; that in approving an inventory search, we apparently thought it significant that there had been "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation"; and that we observed, in upholding the constitutionality of a warrantless administrative inspection, that the search did not appear to be "a 'pretext' for obtaining evidence of ... violation of ... penal laws." But only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. In each case we were addressing the validity of a search conducted in the *absence* of probable cause. Our statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.

We think [our prior decisions] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

B

Recognizing that we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers, petitioners disavow any intention to make the individual officer's subjective good faith the touchstone of "reasonableness." They insist that the standard they have put forward—whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given—is an "objective" one.

But although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations. Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons. Petitioners' proposed standard may not use the word "pretext," but it is designed to combat nothing other than the perceived "danger" of the pretextual stop, albeit only indirectly and over the run of cases. Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.

Why one would frame a test designed to combat pretext in such fashion that the court cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option. If those cases were based only upon the evidentiary difficulty of establishing subjective intent, petitioners' attempt to root out subjective vices through objective means might make sense. But they were not based only upon that, or indeed even principally upon that. Their principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. But even if our concern had been only an evidentiary one, petitioners' proposal would by no means assuage it. Indeed, it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a "reasonable officer" would have been moved to act upon the traffic violation. While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.

Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities. The difficulty is illustrated by petitioners' arguments in this case. Their claim that a reasonable officer would not have made this stop is based largely on District of Columbia police regulations which permit plainclothes officers in unmarked vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others." This basis of invalidation would not apply in jurisdictions that had a different practice. And it would not have applied even in the District of Columbia, if Officer Soto had been wearing a uniform or patrolling in a marked police cruiser.

III

In what would appear to be an elaboration on the "reasonable officer" test, petitioners argue that the balancing inherent in any Fourth Amendment inquiry requires us to weigh the governmental and individual interests implicated in a traffic stop such as we have here. That balancing, petitioners claim, does not support investigation of minor traffic infractions by plainclothes police in unmarked vehicles; such investigation only minimally advances the government's interest in traffic safety, and may indeed retard it by producing motorist confusion and alarm—a view said to be supported by the Metropolitan Police Department's own regulations generally prohibiting this practice. And as for the Fourth Amendment interests of the individuals concerned, petitioners point out that our cases acknowledge that even ordinary traffic stops entail "a possibly unsettling show of authority"; that they at best "interfere with freedom of movement, are inconvenient, and consume time" and at worst "may create substantial anxiety." That anxiety is likely to be even more pronounced when the stop is conducted by plainclothes officers in unmarked cars.

It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause.

Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body. The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken "outbalances"

private interest in avoiding police contact.

Petitioners urge as an extraordinary factor in this case that the "multitude of applicable traffic and equipment regulations" is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.

Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct. The judgment is

Affirmed.

Notes, Comments, and Questions

The unanimous decision by the Court illustrates how important it is to the Justices to avoid creating legal rules and tests that require judges to guess what officers were thinking when performing certain actions. If the admissibility of evidence depends upon the mental state of a police officer during a stressful moment months or even years before a resulting evidentiary hearing, multiple problems are created. First, as a practical matter, determining what the officer was thinking when (for example) stopping a car will not be easy. Second, the officer may be tempted to commit perjury if her mental state was not the "correct" one under the relevant test.

In addition, the result in *Whren* exemplifies the Court's apparent desire to avoid becoming in charge of day-to-day management of police departments. If the Court finds a constitutional requirement for departments to adopt certain best practices, then the Justices must (1) learn enough about policing to decide what practices should be required and (2) eventually hear more cases on whether departments are sufficiently obedient to the Court's command. These prospects seem unappealing to the Justices. (Similar feelings may inform the Court's decisions in education law cases. The Court has retreated from supervising school districts despite evidence that school segregation remains a serious problem.)

The *Whren* majority noted that if police indeed performed traffic stops on the basis of impermissible reasons related to the race of motorists, the stops might violate the Equal Protection Clause of the Fourteenth Amendment. The savvy reader might ask whether the Fourteenth Amendment applies at all. The traffic stop was in Washington, D.C. If the District of Columbia is not a "state," and accordingly is not covered by the Fourteenth Amendment, then is racial discrimination allowed (or, to be more precise, is there no constitutional remedy)? The Court decided that there is a remedy. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (establishing "reverse incorporation" of equal protection against the federal government) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

Unfortunately for Whren, the Court has not allowed evidence to be excluded from criminal trials on the basis of Equal Protection violations; the legal remedy for such violations would come from civil lawsuits.

The Court's holding in *Whren* illustrates the power of probable cause. Because the Court is so resistant to examining the motives of officers who take investigatory steps on the basis of probable cause, the term's definition is of exceptional importance. In a 2018 case, the Court applied the standard set forth in *Illinois v. Gates* to new facts.

Supreme Court of the United States

District of Columbia v. Theodore Wesby

Decided Jan. 22, 2018 – 138 S. Ct. 577

Justice THOMAS delivered the opinion of the Court.

This case involves a civil suit against the District of Columbia and five of its police officers, brought by 16 individuals who were arrested for holding a raucous, late-night party in a house they did not have permission to enter. The United States Court of Appeals for the District of Columbia Circuit held that there was no probable cause to arrest the partygoers, and that the officers were not entitled to qualified immunity. We reverse on both grounds.

I

Around 1 a.m. on March 16, 2008, the District's Metropolitan Police Department received a complaint about loud music and illegal activities at a house in Northeast D.C. The caller, a former neighborhood commissioner, told police that the house had been vacant for several months. When officers arrived at the scene, several neighbors confirmed that the house should have been empty. The officers approached the house and, consistent with the complaint, heard loud music playing inside.

After the officers knocked on the front door, they saw a man look out the window and then run upstairs. One of the partygoers opened the door, and the officers entered. They immediately observed that the inside of the house "'was in disarray'" and looked like "'a vacant property.'" The officers smelled marijuana and saw beer bottles and cups of liquor on the floor. In fact, the floor was so dirty that one of the partygoers refused to sit on it while being questioned. Although the house had working electricity and plumbing, it had no furniture downstairs other than a few padded metal chairs. The only other signs of habitation were blinds on the windows, food in the refrigerator, and toiletries in the bathroom.

In the living room, the officers found a makeshift strip club. Several women were wearing only bras and thongs, with cash tucked into their garter belts. The women were giving lap dances while other partygoers watched. Most of the onlookers were holding cash and cups of alcohol. After seeing the uniformed officers, many partygoers scattered into other parts of the house.

The officers found more debauchery upstairs. A naked woman and several men were in the bedroom. A bare mattress—the only one in the house—was on the floor, along with some lit candles and multiple open condom wrappers. A used condom was on the windowsill. The officers found one partygoer hiding in an upstairs closet, and another who had shut himself in the bathroom and refused to come out.

The officers found a total of 21 people in the house. After interviewing all 21, the officers did not get a clear or consistent story. Many partygoers said they were there for a bachelor party, but no one could identify the bachelor. Each of the partygoers claimed that someone had invited them to the house, but no one could say who. Two of the women working the party said that a woman named "Peaches" or "Tasty" was renting the house and had given them permission to be there. One of the women explained that the previous owner had recently passed away, and Peaches had just started renting the house from the grandson who inherited it. But the house had no boxes or moving supplies. She did not know Peaches' real name. And Peaches was not there.

An officer asked the woman to call Peaches on her phone so he could talk to her. Peaches answered and explained that she had just left the party to go to the store. When the officer asked her to return, Peaches refused because she was afraid of being arrested. The sergeant supervising the investigation also spoke with Peaches. At first, Peaches claimed to be renting the house from the owner, who was fixing it up for her. She also said that she had given the attendees permission to have the party. When the sergeant again asked her who had given her permission to use the house, Peaches became evasive and hung up. The sergeant called her back, and she began yelling and insisting that she had permission before hanging up a second time. The officers eventually got Peaches on the phone again, and she admitted that she did not have permission to use the house.

The officers then contacted the owner. He told them that he had been trying to negotiate a lease with Peaches, but they had not reached an agreement. He confirmed that he had not given Peaches (or anyone else) permission to be in the house—let alone permission to use it for a bachelor party. At that point, the officers arrested the 21 partygoers for unlawful entry. The police transported the partygoers to the police station, where the lieutenant decided to charge them with disorderly conduct. The partygoers were released, and the charges were eventually dropped.

II

Respondents, 16 of the 21 partygoers, sued the District and five of the arresting officers. They sued the officers for false arrest under the Fourth Amendment. The partygoers' claims were all "predicated upon the allegation that [they] were arrested without probable cause."

On cross-motions for summary judgment, the District Court awarded partial summary judgment to the partygoers. It concluded that the officers lacked probable cause to arrest the partygoers for unlawful entry.[1] The officers were told that Peaches had invited the partygoers to the house, the District Court reasoned, and nothing the officers learned in their investigation suggested the

partygoers "'knew or should have known that [they were] entering against the [owner's] will.'" The District Court also concluded that the officers were not entitled to qualified immunity under § 1983. It noted that, under District case law, "probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner." And in its view, the officers had no such evidence.

With liability resolved, the case proceeded to trial on damages. The jury awarded the partygoers a total of $680,000 in compensatory damages. After the District Court awarded attorney's fees, the total award was nearly $1 million.

On appeal, a divided panel of the D.C. Circuit affirmed. [T]he panel majority made Peaches' invitation "central" to its determination that the officers lacked probable cause to arrest the partygoers for unlawful entry. The panel majority asserted that, "in the absence of any conflicting information, Peaches' invitation vitiates the necessary element of [the partygoers'] intent to enter against the will of the lawful owner." And the panel majority determined that "there is simply no evidence in the record that [the partygoers] had any reason to think the invitation was invalid."

We granted certiorari to resolve [] whether the officers had probable cause to arrest the partygoers.

III

To determine whether an officer had probable cause for an arrest, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." Because probable cause "deals with probabilities and depends on the totality of the circumstances," it is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules." It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Probable cause "is not a high bar."

A

There is no dispute that the partygoers entered the house against the will of the owner. Nonetheless, the partygoers contend that the officers lacked probable cause to arrest them because the officers had no reason to believe that they "knew or should have known" their "entry was unwanted." We disagree. Considering the totality of the circumstances, the officers made an "entirely reasonable inference" that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party.

Consider first the condition of the house. Multiple neighbors, including a former neighborhood official, informed the officers that the house had been vacant for several months. The house had no furniture, except for a few padded metal chairs and a bare mattress. The rest of the house was empty, save for some fixtures and large appliances. The house had a few signs of inhabitance—working electricity and plumbing, blinds on the windows, toiletries in the bathroom, and food in the refrigerator. But those facts are not necessarily inconsistent with the house being unoccupied. The owner could have paid the utilities and kept the blinds while he looked for a new tenant, and the partygoers could have brought the food and toiletries. Although one woman told the officers that Peaches had recently moved in, the officers had reason to doubt that was true. There were no boxes or other moving supplies in the house; nor were there other possessions, such as clothes in the closet, suggesting someone lived there.

In addition to the condition of the house, consider the partygoers' conduct. The party was still going strong when the officers arrived after 1 a.m., with music so loud that it could be heard from outside. Upon entering the house, multiple officers smelled marijuana. The partygoers left beer bottles and cups of liquor on the floor, and they left the floor so dirty that one of them refused to sit on it. The living room had been converted into a makeshift strip club. Strippers in bras and thongs, with cash stuffed in their garter belts, were giving lap dances. Upstairs, the officers found a group of men with a single, naked woman on a bare mattress—the only bed in the house—along with multiple open condom wrappers and a used condom.

Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several "'common-sense conclusions about human behavior.'" Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized.

The partygoers' reaction to the officers gave them further reason to believe that the partygoers knew they lacked permission to be in the house. Many scattered at the sight of the uniformed officers. Two hid themselves, one in a closet and the other in a bathroom. "[U]nprovoked flight upon noticing the police," we have explained, "is certainly suggestive" of wrongdoing and can be treated as "suspicious behavior" that factors into the totality of the circumstances. In fact, "deliberately furtive actions and flight at the approach of … law officers are *strong* indicia of *mens rea*." A reasonable officer could infer that the partygoers' scattering and hiding was an indication that they knew they were not supposed to be there.

The partygoers' answers to the officers' questions also suggested their guilty state of mind. When the officers asked who had given them permission to be there, the partygoers gave vague and implausible responses. They could not say who had invited them. Only two people claimed that Peaches had invited them, and they were working the party instead of attending it. If Peaches was the hostess, it was odd that none of the partygoers mentioned her name. Additionally, some of the partygoers claimed the event was a bachelor party, but no one could identify the bachelor. The officers could have disbelieved them, since people normally do not throw a bachelor party without a bachelor. Based on the vagueness and implausibility of the partygoers' stories, the officers could have reasonably inferred that they were lying and that their lies suggested a guilty mind.

The panel majority relied heavily on the fact that Peaches said she had invited the partygoers to the house. But when the officers spoke with Peaches, she was nervous, agitated, and evasive. After initially insisting that she had permission to use the house, she ultimately confessed that this was a lie—a fact that the owner confirmed. Peaches' lying and evasive behavior gave the officers reason to discredit everything she had told them. For example, the officers could have inferred that Peaches lied to them when she said she had invited the others to the house, which was consistent with the fact that hardly anyone at the party knew her name. Or the officers could have inferred that Peaches told the partygoers (like she eventually told the police) that she was not actually renting the house, which was consistent with how the partygoers were treating it.

Viewing these circumstances as a whole, a reasonable officer could conclude that there was probable cause to believe the partygoers knew they did not have permission to be in the house.

B

In concluding otherwise, the panel majority engaged in an "excessively technical dissection" of the factors supporting probable cause. Indeed, the panel majority failed to follow two basic and well-established principles of law.

First, the panel majority viewed each fact "in isolation, rather than as a factor in the totality of the circumstances." This was "mistaken in light of our precedents." The "totality of the circumstances" requires courts to consider "the whole picture." Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation. Instead of considering the facts as a whole, the panel majority took them one by one. For example, it dismissed the fact that the partygoers "scattered or hid when the police entered the house" because that fact was "not sufficient *standing alone* to create probable cause." Similarly, it found "nothing in the record suggesting that the condition of the house, *on its own,* should have alerted the [partygoers] that they were unwelcome." The totality-of-the-circumstances test "precludes this sort of divide-and-conquer analysis."

Second, the panel majority mistakenly believed that it could dismiss outright any circumstances that were "susceptible of innocent explanation." For example, the panel majority brushed aside the drinking and the lap dances as "consistent with" the partygoers' explanation that they were having a bachelor party. And it similarly dismissed the condition of the house as "entirely consistent with" Peaches being a "new tenant." But probable cause does not require officers to rule out [sic] a suspect's innocent explanation for suspicious facts. As we have explained, "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." Thus, the panel majority should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a "substantial chance of criminal activity."

For all of these reasons, we reverse the D.C. Circuit's holding that the officers lacked probable cause to arrest. Accordingly, the District and its officers are entitled to summary judgment on all of the partygoers' claims.

The judgment of the D.C. Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice GINSBURG, concurring in the judgment in part.

This case, well described in the opinion of the Court of Appeals, leads me to question whether this Court, in assessing probable cause, should continue to ignore why police in fact acted. No arrests of plaintiffs-respondents were made until Sergeant Suber so instructed. His instruction, when conveyed to the officers he superintended, was based on an error of law. Sergeant Suber believed that the absence of the premises owner's consent, an uncontested fact in this case, sufficed to justify arrest of the partygoers for unlawful entry. An essential element of unlawful entry in the District of Columbia is that the defendant "knew or should have known that his entry was unwanted." But under Sergeant Suber's view of the law, what the arrestees knew or should have known was irrelevant. They could be arrested, as he comprehended the law, even if they believed their entry was invited by a lawful occupant.

Ultimately, plaintiffs-respondents were not booked for unlawful entry. Instead, they were charged at the police station with

disorderly conduct. Yet no police officers at the site testified to having observed any activities warranting a disorderly conduct charge. Quite the opposite. The officers at the scene of the arrest uniformly testified that they had neither seen nor heard anything that would justify such a charge, and Sergeant Suber specifically advised his superiors that the charge was unwarranted.

The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. A number of commentators have criticized the path we charted in *Whren v. United States,* 517 U.S. 806 (1996), and follow-on opinions, holding that "an arresting officer's state of mind ... is irrelevant to the existence of probable cause." I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry. Given the current state of the Court's precedent, however, I agree that the disposition gained by plaintiffs-respondents [*i.e.*, a ruling that officers violated their rights] was not warranted by "settled law." The defendants-petitioners are therefore sheltered by qualified immunity.

Notes, Comments, and Questions

Does the procedural posture of this case change your view on the outcome? This is not a criminal prosecution, in which the defendants are arguing about probable cause to get their charges dismissed. This is a lawsuit by the people at the party, alleging that police violated their clearly established constitutional rights when arresting them.

The standard for probable cause is not especially high. It's nothing like proof beyond a reasonable doubt or even preponderance of the evidence. In addition to "probable cause," the Court has used several cases to define "reasonable suspicion," which is more than a mere hunch but requires less evidence than probable cause. Certain police conduct—most importantly "stop and frisk"—is permissible on the basis of reasonable suspicion even if officers lack probable cause. We will review reasonable suspicion at length when studying stop and frisk.

As the semester progresses, students should make a point of noting (1) which police tactics are permissible with no evidence or suspicion whatsoever (for example, investigatory tactics that are not "searches," such as opening a bag of trash left out for collection), (2) which tactics may not be conducted with *no* suspicion but are allowed with "reasonable suspicion," and (3) which police tactics require probable cause. Among those police tactics requiring probable cause, students should note which require warrants.

The Phenomenon of "Driving While Black" or "Driving While Brown"

For decades, observers have documented that Black and brown drivers are more likely than white drivers to be stopped by police, a phenomenon sometimes described as "Driving While [Black/Brown]" or "DWB." (Similar observations have been made about which pedestrians police choose to stop and frisk, a topic to which we will return.) U.S. Senator Tim Scott (R-S.C.) described in a 2016 speech his experiences as a Black motorist, along with incidents in which Capitol police questioned whether he really was a member of the Senate.[2] Reporting that he had been stopped by police while driving seven times over the prior year, he asked colleagues to "imagine the frustration, the irritation the sense of a loss of dignity that accompanies each of those stops."

Noting that in most of the incidents, "[He] was doing nothing more than driving a new car, in the wrong neighborhood, or some other reason just as trivial," he said, "I have felt the anger, the frustration, the sadness and the humiliation that comes with feeling that you're being targeted for nothing more than just being yourself."

After being stopped by Capitol police, Sen. Scott received apologies on multiple occasions from police leadership. Most Americans, however, lack the social capital possessed by Senators and cannot expect that sort of response to complaints.

Although the cause of "DWB" stops is disputed, the existence of the phenomenon is well-documented,[3] as are its effects on relations between police departments and minority communities. For example, one of your authors once attended an event in St. Louis at which a leader of the St. Louis City police said that certain St. Louis County police departments treat minority residents so badly, City police have trouble getting cooperation from potential witnesses, impeding the City department's ability to solve serious crimes.

Robert Wilkins, now a federal appellate judge, was a plaintiff in 1990s litigation related to DWB stops in Maryland. A 2016 CBS News interview in which he describes his experiences is available here: [YouTube]

In the spring and summer of 2020, police treatment of members of minority communities—especially African Americans—once again received a national spotlight. The May 2020 killing of George Floyd by police in Minneapolis and the March 2020 killing

of Breonna Taylor by police in Louisville aroused particular indignation, inspiring protests across the country. Police response to protests in some cities, including violence captured on video, inspired further calls for reform, along with more radical proposals.

As you read subsequent chapters, consider how Supreme Court criminal procedure decisions affect how police departments interact with communities they exist to serve. For example, does the Court's Fourth Amendment doctrine encourage police officers to act in ways that build confidence among community members? When police officers violate rules set forth by the Court, do existing legal remedies encourage better future behavior? If you are unhappy with the state of policing, how might things be improved? If instead you think policing is going fairly well, to what do you attribute the discontent exhibited during the 2020 protests?

One purpose of this book is to help you consider questions like these. Recall, however, that most Americans will never attend law school. Knowledge of criminal procedure doctrine among the public is sketchy at best. If Americans better understood Supreme Court doctrine related to the Fourth, Fifth, and Sixth Amendments, do you think they would have more or less faith in the criminal justice system? Why? After finishing this book, answer these questions again and examine whether your own opinions have changed.

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2.6: Chapter 7 - Warrants

Warrants

The Court has stated repeatedly that searches conducted without a warrant are presumptively "unreasonable" and, accordingly, are presumptive violations of the Fourth Amendment. Although one can argue whether the Court truly enforces a "warrant requirement"—*see* Justice Thomas's dissent in *Groh v. Ramirez* below—one cannot deny the importance of valid warrants to a huge range of police conduct. For example, absent exceptional circumstances (such as officers chasing a fleeing felon), police normally must have a valid warrant to search a residence without the occupant's permission.

To be valid, a warrant must obey the Fourth Amendment's command that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This portion of the Amendment is known as the "Warrant Clause." It requires: (1) that the evidence presented to the issuing judge or magistrate be sufficient to qualify as "probable cause," (2) that the officers bringing the evidence to the judge or magistrate swear or affirm that the evidence is true to the best of their knowledge, (3) that the warrant specify where officers can search, and (4) that the warrant specify what things or persons officers may look for and may seize if found.

In addition, the Court has held that only a "neutral and detached magistrate" may issue a warrant. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971). That means the judge or magistrate must be independent of law enforcement; a state attorney general cannot issue warrants. In *Connally v. Georgia*, 429 U.S. 245 (1977), the Court held that a justice of the peace who received payment upon issuing a warrant, but no fee upon denying a warrant application, was not "neutral and detached."

We have already studied the Court's definition of "probable cause." In the next cases, we examine the particularity requirement—the Fourth Amendment's requirement that warrants specify in some detail where officers may search and what they may seize.

Supreme Court of the United States

Peter C. Andresen v. Maryland

Decided June 29, 1976 – 427 U.S. 463

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents the issue whether the introduction into evidence of a person's business records, seized during a search of his offices, violates the Fifth Amendment's command that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."[1] We also must determine whether the particular searches and seizures here were "unreasonable" and thus violated the Fourth Amendment.

I

In early 1972, a Bi-County Fraud Unit, acting under the joint auspices of the State's Attorneys' Offices of Montgomery and Prince George's Counties, Md., began an investigation of real estate settlement activities in the Washington, D.C., area. At the time, petitioner Andresen was an attorney who, as a sole practitioner, specialized in real estate settlements in Montgomery County. During the Fraud Unit's investigation, his activities came under scrutiny, particularly in connection with a transaction involving Lot 13T in the Potomac Woods subdivision of Montgomery County. The investigation, which included interviews with the purchaser, the mortgage holder, and other lienholders of Lot 13T, as well as an examination of county land records, disclosed that petitioner, acting as settlement attorney, had defrauded Standard-Young Associates, the purchaser of Lot 13T. Petitioner had represented that the property was free of liens and that, accordingly, no title insurance was necessary, when in fact, he knew that there were two outstanding liens on the property. In addition, investigators learned that the lienholders, by threatening to foreclose their liens, had forced a halt to the purchaser's construction on the property. When Standard-Young had confronted petitioner with this information, he responded by issuing, as an agent of a title insurance company, a title policy guaranteeing clear title to the property. By this action, petitioner also defrauded that insurance company by requiring it to pay the outstanding liens.

The investigators, concluding that there was probable cause to believe that petitioner had committed the state crime of false pretenses against Standard-Young, applied for warrants to search petitioner's law office and the separate office of Mount Vernon Development Corporation, of which petitioner was incorporator, sole shareholder, resident agent, and director. The application sought permission to search for specified documents pertaining to the sale and conveyance of Lot 13T. A judge of the Sixth Judicial Circuit of Montgomery County concluded that there was probable cause and issued the warrants.

Petitioner eventually was charged, partly by information and partly by indictment, with the crime of false pretenses, based on his misrepresentation to Standard-Young concerning Lot 13T, and with fraudulent misappropriation by a fiduciary, based on similar false claims made to three home purchasers. Before trial began, petitioner moved to suppress the seized documents. The trial court held a full suppression hearing. [T]he only item seized from the corporation's offices that was not returned by the State or suppressed was a single file labeled "Potomac Woods General."

With respect to all the items not suppressed or returned, the trial court ruled that admitting them into evidence would not violate the Fourth Amendment[ ]. [T]he search warrants were based on probable cause, and the documents not returned or suppressed were either directly related to Lot 13T, and therefore within the express language of the warrants, or properly seized and otherwise admissible to show a pattern of criminal conduct relevant to the charge concerning Lot 13T.

At trial, the State proved its case primarily by public land records and by records provided by the complaining purchasers, lienholders, and the title insurance company. It did introduce into evidence, however, a number of the seized items. Three documents from the "Potomac Woods General" file, seized during the search of petitioner's corporation, were admitted. These were notes in the handwriting of an employee who used them to prepare abstracts in the course of his duties as a title searcher and law clerk. The notes concerned deeds of trust affecting the Potomac Woods subdivision and related to the transaction involving Lot 13T. Five items seized from petitioner's law office were also admitted. One contained information relating to the transactions with one of the defrauded home buyers. The second was a file partially devoted to the Lot 13T transaction; among the documents were settlement statements, the deed conveying the property to Standard-Young Associates, and the original and a copy of a notice to the buyer about releases of liens. The third item was a file devoted exclusively to Lot 13T. The fourth item consisted of a copy of a deed of trust, dated March 27, 1972, from the seller of certain lots in the Potomac Woods subdivision to a lienholder. The fifth item contained drafts of documents and memoranda written in petitioner's handwriting.

After a trial by jury, petitioner was found guilty upon five counts of false pretenses and three counts of fraudulent misappropriation by a fiduciary. He was sentenced to eight concurrent two-year prison terms. [T]he Court of Special Appeals rejected petitioner's Fourth and Fifth Amendment Claims. Specifically, it held that the warrants were supported by probable cause, that they did not authorize a general search in violation of the Fourth Amendment, and that the items admitted into evidence against petitioner at trial were within the scope of the warrants or were otherwise properly seized. We granted certiorari limited to the Fourth and Fifth Amendment issues.

III

We turn [] to petitioner's contention that rights guaranteed him by the Fourth Amendment were violated because the descriptive terms of the search warrants were so broad as to make them impermissible "general" warrants.

The specificity of the search warrants. Although petitioner concedes that the warrants for the most part were models of particularity, he contends that they were rendered fatally "general" by the addition, in each warrant, to the exhaustive list of particularly described documents, of the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." The quoted language, it is argued, must be read in isolation and without reference to the rest of the long sentence at the end of which it appears. When read "properly," petitioner contends, it permits the search for and seizure of any evidence of any crime.

General warrants of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. ... [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." This requirement "'makes general searches ... impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'"

In this case we agree with the determination of the Court of Special Appeals of Maryland that the challenged phrase must be read as authorizing only the search for and seizure of evidence relating to "the crime of false pretenses with respect to Lot 13T." The challenged phrase is not a separate sentence. Instead, it appears in each warrant at the end of a sentence containing a lengthy list of specified and particular items to be seized, all pertaining to Lot 13T.[2] We think it clear from the context that the

term “crime” in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T. The “other fruits” clause is one of a series that follows the colon after the word “Maryland.” All clauses in the series are limited by what precedes that colon, namely, “items pertaining to ... lot 13, block T.” The warrants, accordingly, did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crime of false pretenses and Lot 13T.[3]

The judgment of the Court of Special Appeals of Maryland is affirmed.

Mr. Justice BRENNAN, dissenting.

I believe that the warrants under which petitioner’s papers were seized were impermissibly general. I therefore dissent.

[T]he warrants under which those papers were seized were impermissibly general. General warrants are specially prohibited by the Fourth Amendment. The problem to be avoided is “not that of intrusion *per se*, but of a general, exploratory rummaging in a person’s belongings.” Thus the requirement plainly appearing on the face of the Fourth Amendment that a warrant specify with particularity the place to be searched and the things to be seized is imposed to the end that “unauthorized invasions of ‘the sanctity of a man’s home and the privacies of life’” be prevented. “‘As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.’”

The Court recites these requirements, but their application in this case renders their limitation on unlawful governmental conduct an empty promise. After a lengthy and admittedly detailed listing of items to be seized, the warrants in this case further authorized the seizure of “other fruits, instrumentalities and evidence of crime at this [time] unknown.” The Court construes this sweeping authorization to be limited to evidence pertaining to the crime of false pretenses with respect to the sale of Lot 13T. However, neither this Court’s construction of the warrants nor the similar construction by the Court of Special Appeals of Maryland was available to the investigators at the time they executed the warrants. The question is not how those warrants are to be viewed in hindsight, but how they were in fact viewed by those executing them. The overwhelming quantity of seized material that was either suppressed or returned to petitioner is irrefutable testimony to the unlawful generality of the warrants. The Court’s attempt to cure this defect by *post hoc* judicial construction evades principles settled in this Court’s Fourth Amendment decisions. “The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge ....” It is not the function of a detached and neutral review to give effect to warrants whose terms unassailably authorize the far-reaching search and seizure of a person’s papers especially where that has in fact been the result of executing those warrants.

Notes, Comments, and Questions

In *Andresen*, the long list of items (even with the “other fruits, instrumentalities and evidence” language does not constitute a “general warrant.” What if instead the list of items subject to seizure had read (in its entirety), “Evidence of real estate fraud”? Would that be sufficient? Should it be?

Or, to move away from the complicated context of searching a lawyer’s office, consider a case in which police lawfully arrest someone for marijuana possession. The suspect tells police that he purchased the marijuana at a certain house and provides the address. If police obtain a warrant to search the house, is it sufficient for the warrant to list the items subject to seizure as “marijuana and other evidence of marijuana possession and sale”?

Students may wonder why the inclusion of “the persons or things to be seized” in a warrant will matter in practice. The following scenarios may help explain:

Imagine that police have probable cause to believe that a stolen piano is located in a suspect’s house. If the warrant authorizes police to search the house for “a black Steinway Model B grand piano,” the police may search any location in the house at which the piano might reasonably be found. That means police likely can enter any room. But unless the house contains unusually massive medicine cabinets, police likely cannot open a medicine cabinet. Therefore, drugs found in a medicine cabinet would be the fruits of an unlawful search.

By contrast, if police seek stolen earrings, and the warrant authorizes police to search the house for “two diamond stud earrings, with platinum settings,” then police can open medicine cabinets, drawers, and all sorts of places in which earrings can be hidden but pianos cannot.

In addition, imagine that police are searching for both the piano and the earrings. If the warrant lists only the piano, then police

should end their search promptly if they find the piano just inside the front door; they have no other items listed in the warrant to find. If instead the warrant lists both the piano and the earrings, then police may continue their search after finding the piano—examining every crevice in which earrings might be found.

In the next case, the Court considered a warrant that failed entirely to state what items officers were permitted to seize when searching a certain house.

Supreme Court of the United States

Jeff Groh v. Joseph R. Ramirez

Decided Feb. 24, 2004 – 540 U.S. 551

Justice STEVENS delivered the opinion of the Court.

Petitioner conducted a search of respondents' home pursuant to a warrant that failed to describe the "persons or things to be seized." The question[] presented [is] whether the search violated the Fourth Amendment.

I

Respondents, Joseph Ramirez and members of his family, live on a large ranch in Butte-Silver Bow County, Montana. Petitioner, Jeff Groh, has been a Special Agent for the Bureau of Alcohol, Tobacco and Firearms (ATF) since 1989. In February 1997, a concerned citizen informed petitioner that on a number of visits to respondents' ranch the visitor had seen a large stock of weaponry, including an automatic rifle, grenades, a grenade launcher, and a rocket launcher. Based on that information, petitioner prepared and signed an application for a warrant to search the ranch. The application stated that the search was for "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers." Petitioner supported the application with a detailed affidavit, which he also prepared and executed, that set forth the basis for his belief that the listed items were concealed on the ranch. Petitioner then presented these documents to a Magistrate, along with a warrant form that petitioner also had completed. The Magistrate signed the warrant form.

Although the application particularly described the place to be searched and the contraband petitioner expected to find, the warrant itself was less specific; it failed to identify any of the items that petitioner intended to seize. In the portion of the form that called for a description of the "person or property" to be seized, petitioner typed a description of respondents' two-story blue house rather than the alleged stockpile of firearms. The warrant did not incorporate by reference the itemized list contained in the application. It did, however, recite that the Magistrate was satisfied the affidavit established probable cause to believe that contraband was concealed on the premises, and that sufficient grounds existed for the warrant's issuance.

The day after the Magistrate issued the warrant, petitioner led a team of law enforcement officers, including both federal agents and members of the local sheriff's department, in the search of respondents' premises. Although respondent Joseph Ramirez was not home, his wife and children were. Petitioner states that he orally described the objects of the search to Mrs. Ramirez in person and to Mr. Ramirez by telephone. According to Mrs. Ramirez, however, petitioner explained only that he was searching for "'an explosive device in a box.'" At any rate, the officers' search uncovered no illegal weapons or explosives. When the officers left, petitioner gave Mrs. Ramirez a copy of the search warrant, but not a copy of the application, which had been sealed. The following day, in response to a request from respondents' attorney, petitioner faxed the attorney a copy of the page of the application that listed the items to be seized. No charges were filed against the Ramirezes.

Respondents sued petitioner and the other officers, raising eight claims, including violation of the Fourth Amendment. The District Court entered summary judgment for all defendants. The court found no Fourth Amendment violation, because it considered the case comparable to one in which the warrant contained an inaccurate address, and in such a case, the court reasoned, the warrant is sufficiently detailed if the executing officers can locate the correct house.

The Court of Appeals affirmed the judgment with respect to all defendants and all claims, with the exception of respondents' Fourth Amendment claim against petitioner. On that claim, the court held that the warrant was invalid because it did not "describe with particularity the place to be searched and the items to be seized," and that oral statements by petitioner during or after the search could not cure the omission. The court observed that the warrant's facial defect "increased the likelihood and degree of confrontation between the Ramirezes and the police" and deprived respondents of the means "to challenge officers who might have exceeded the limits imposed by the magistrate." The court also expressed concern that "permitting officers to expand the

scope of the warrant by oral statements would broaden the area of dispute between the parties in subsequent litigation."

II

The warrant was plainly invalid. The Fourth Amendment states unambiguously that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized*." (Emphasis added.) The warrant in this case complied with the first three of these requirements: It was based on probable cause and supported by a sworn affidavit, and it described particularly the place of the search. On the fourth requirement, however, the warrant failed altogether. Indeed, petitioner concedes that "the warrant ... was deficient in particularity because it provided no description of the type of evidence sought."

The fact that the *application* adequately described the "things to be seized" does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. And for good reason: "The presence of a search warrant serves a high function," and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection. We do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant. But in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant. Hence, we need not further explore the matter of incorporation.

Petitioner argues that even though the warrant was invalid, the search nevertheless was "reasonable" within the meaning of the Fourth Amendment. He notes that a Magistrate authorized the search on the basis of adequate evidence of probable cause, that petitioner orally described to respondents the items to be seized, and that the search did not exceed the limits intended by the Magistrate and described by petitioner. Thus, petitioner maintains, his search of respondents' ranch was functionally equivalent to a search authorized by a valid warrant.

We disagree. This warrant did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items. Nor did it make what fairly could be characterized as a mere technical mistake or typographical error. Rather, in the space set aside for a description of the items to be seized, the warrant stated that the items consisted of a "single dwelling residence ... blue in color." In other words, the warrant did not describe the items to be seized *at all*. In this respect the warrant was so obviously deficient that we must regard the search as "warrantless" within the meaning of our case law. "We are not dealing with formalities." Because "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'" stands "'[a]t the very core' of the Fourth Amendment," our cases have firmly established the "'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," Thus, "absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within."

We have clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant.

Petitioner asks us to hold that a search conducted pursuant to a warrant lacking particularity should be exempt from the presumption of unreasonableness if the goals served by the particularity requirement are otherwise satisfied. He maintains that the search in this case satisfied those goals—which he says are "to prevent general searches, to prevent the seizure of one thing under a warrant describing another, and to prevent warrants from being issued on vague or dubious information" because the scope of the search did not exceed the limits set forth in the application. But unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit. In this case, for example, it is at least theoretically possible that the Magistrate was satisfied that the search for weapons and explosives was justified by the showing in the affidavit, but not convinced that any evidentiary basis existed for rummaging through respondents' files and papers for receipts pertaining to the purchase or manufacture of such items. Or, conceivably, the Magistrate might have believed that some of the weapons mentioned in the affidavit could have been lawfully possessed and therefore should not be seized. The mere fact that the Magistrate issued a warrant does not necessarily establish that he agreed that the scope of the search should be as broad as the affiant's request. Even though petitioner acted with restraint in conducting the search, "the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer."

We have long held, moreover, that the purpose of the particularity requirement is not limited to the prevention of general searches.

A particular warrant also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."

Petitioner argues that even if the goals of the particularity requirement are broader than he acknowledges, those goals nevertheless were served because he orally described to respondents the items for which he was searching. Thus, he submits, respondents had all of the notice that a proper warrant would have accorded. But this case presents no occasion even to reach this argument, since respondents, as noted above, dispute petitioner's account. According to Mrs. Ramirez, petitioner stated only that he was looking for an "'explosive device in a box.'" Because this dispute is before us on petitioner's motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor." The posture of the case therefore obliges us to credit Mrs. Ramirez's account, and we find that petitioner's description of "'an explosive device in a box'" was little better than no guidance at all.

It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted. Because petitioner did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly "unreasonable" under the Fourth Amendment. The Court of Appeals correctly held that the search was unconstitutional.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The precise relationship between the Amendment's Warrant Clause and Unreasonableness Clause is unclear. But neither Clause explicitly requires a warrant. While "it is of course textually possible to consider [a warrant requirement] implicit within the requirement of reasonableness," the text of the Fourth Amendment certainly does not mandate this result. Nor does the Amendment's history, which is clear as to the Amendment's principal target (general warrants), but not as clear with respect to when warrants were required, if ever. Indeed, because of the very different nature and scope of federal authority and ability to conduct searches and arrests at the founding, it is possible that neither the history of the Fourth Amendment nor the common law provides much guidance.

As a result, the Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard. Today the Court holds that the warrant in this case was "so obviously deficient" that the ensuing search must be regarded as a warrantless search and thus presumptively unreasonable. However, the text of the Fourth Amendment, its history, and the sheer number of exceptions to the Court's categorical warrant requirement seriously undermine the bases upon which the Court today rests its holding. Instead of adding to this confusing jurisprudence, as the Court has done, I would turn to first principles in order to determine the relationship between the Warrant Clause and the Unreasonableness Clause. But even within the Court's current framework, a search conducted pursuant to a defective warrant is constitutionally different from a "warrantless search." Consequently, despite the defective warrant, I would still ask whether this search was unreasonable and would conclude that it was not. For these reasons, I respectfully dissent.

I

"[A]ny Fourth Amendment case may present two separate questions: whether the search was conducted pursuant to a warrant issued in accordance with the second Clause, and, if not, whether it was nevertheless 'reasonable' within the meaning of the first." By categorizing the search here to be a "warrantless" one, the Court declines to perform a reasonableness inquiry and ignores the fact that this search is quite different from searches that the Court has considered to be "warrantless" in the past. Our cases involving "warrantless" searches do not generally involve situations in which an officer has obtained a warrant that is later determined to be facially defective, but rather involve situations in which the officers neither sought nor obtained a warrant. By simply treating this case as if no warrant had even been sought or issued, the Court glosses over what should be the key inquiry: whether it is always appropriate to treat a search made pursuant to a warrant that fails to describe particularly the things to be seized as presumptively unreasonable.

The Court also rejects the argument that the details of the warrant application and affidavit save the warrant, because "'[t]he presence of a search warrant serves a high function.'" But it is not only the physical existence of the warrant and its typewritten contents that serve this high function. The Warrant Clause's principal protection lies in the fact that the "'Fourth Amendment has interposed a magistrate between the citizen and the police ... so that an objective mind might weigh the need to invade [the searchee's] privacy in order to enforce the law.'" The Court has further explained:

"The point of the Fourth Amendment ... is not that it denies law enforcement the support of the usual inferences which reasonable

men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers .... When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

But the actual contents of the warrant are simply manifestations of this protection. Hence, in contrast to the case of a truly warrantless search, where a warrant (due to a mistake) does not specify on its face the particular items to be seized but the warrant application passed on by the magistrate judge contains such details, a searchee still has the benefit of a determination by a neutral magistrate that there is probable cause to search a particular place and to seize particular items. In such a circumstance, the principal justification for applying a rule of presumptive unreasonableness falls away.

In the instant case, the items to be seized were clearly specified in the warrant application and set forth in the affidavit, both of which were given to the Judge (Magistrate). The Magistrate reviewed all of the documents and signed the warrant application and made no adjustment or correction to this application. It is clear that respondents here received the protection of the Warrant Clause. Under these circumstances, I would not hold that any ensuing search constitutes a presumptively unreasonable warrantless search. Instead, I would determine whether, despite the invalid warrant, the resulting search was reasonable and hence constitutional.

II

Because the search was not unreasonable, I would conclude that it was constitutional. Prior to execution of the warrant, petitioner briefed the search team and provided a copy of the search warrant application, the supporting affidavit, and the warrant for the officers to review. Petitioner orally reviewed the terms of the warrant with the officers, including the specific items for which the officers were authorized to search. Petitioner and his search team then conducted the search entirely within the scope of the warrant application and warrant; that is, within the scope of what the Magistrate had authorized. Finding no illegal weapons or explosives, the search team seized nothing. When petitioner left, he gave respondents a copy of the search warrant. Upon request the next day, petitioner faxed respondents a copy of the more detailed warrant application. Indeed, putting aside the technical defect in the warrant, it is hard to imagine how the actual search could have been carried out any more reasonably.

The Court argues that this eminently reasonable search is nonetheless unreasonable because "there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit" "unless the particular items described in the affidavit are also set forth in the warrant itself." The Court argues that it was at least possible that the Magistrate intended to authorize a much more limited search than the one petitioner requested. As a theoretical matter, this may be true. But the more reasonable inference is that the Magistrate intended to authorize everything in the warrant application, as he signed the application and did not make any written adjustments to the application or the warrant itself.

The Court also attempts to bolster its focus on the faulty warrant by arguing that the purpose of the particularity requirement is not only to prevent general searches, but also to assure the searchee of the lawful authority for the search. But as the Court recognizes, neither the Fourth Amendment nor Federal Rule of Criminal Procedure 41 requires an officer to serve the warrant on the searchee before the search. Thus, a search should not be considered *per se* unreasonable for failing to apprise the searchee of the lawful authority prior to the search, especially where, as here, the officer promptly provides the requisite information when the defect in the papers is detected. Additionally, unless the Court adopts the Court of Appeals' view that the Constitution protects a searchee's ability to "be on the lookout and to challenge officers," while the officers are actually carrying out the search, petitioner's provision of the requisite information the following day is sufficient to satisfy this interest.

For the foregoing reasons, I respectfully dissent.

* * *

In the next two cases, the Court considers a recurring question related to how officers may execute a valid warrant. Specifically, the question is whether officers must "knock and announce" before breaking in someone's door to conduct a search pursuant to a warrant. Even more specifically, the question is whether the Fourth Amendment generally requires the knocking and announcing and, if so, what exceptions limit the general rule.

Supreme Court of the United States

Sharlene Wilson v. Arkansas

Decided May 22, 1995 – 514 U.S. 927

Justice THOMAS delivered the opinion of the [unanimous] Court.

At the time of the framing, the common law of search and seizure recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority. In this case, we hold that this common-law "knock and announce" principle forms a part of the reasonableness inquiry under the Fourth Amendment.

I

During November and December 1992, petitioner Sharlene Wilson made a series of narcotics sales to an informant acting at the direction of the Arkansas State Police. In late November, the informant purchased marijuana and methamphetamine at the home that petitioner shared with Bryson Jacobs. On December 30, the informant telephoned petitioner at her home and arranged to meet her at a local store to buy some marijuana. According to testimony presented below, petitioner produced a semiautomatic pistol at this meeting and waved it in the informant's face, threatening to kill her if she turned out to be working for the police. Petitioner then sold the informant a bag of marijuana.

The next day, police officers applied for and obtained warrants to search petitioner's home and to arrest both petitioner and Jacobs. Affidavits filed in support of the warrants set forth the details of the narcotics transactions and stated that Jacobs had previously been convicted of arson and firebombing. The search was conducted later that afternoon. Police officers found the main door to petitioner's home open. While opening an unlocked screen door and entering the residence, they identified themselves as police officers and stated that they had a warrant. Once inside the home, the officers seized marijuana, methamphetamine, valium, narcotics paraphernalia, a gun, and ammunition. They also found petitioner in the bathroom, flushing marijuana down the toilet. Petitioner and Jacobs were arrested and charged with delivery of marijuana, delivery of methamphetamine, possession of drug paraphernalia, and possession of marijuana.

Before trial, petitioner filed a motion to suppress the evidence seized during the search. Petitioner asserted that the search was invalid on various grounds, including that the officers had failed to "knock and announce" before entering her home. The trial court summarily denied the suppression motion. After a jury trial, petitioner was convicted of all charges and sentenced to 32 years in prison.

The Arkansas Supreme Court affirmed petitioner's conviction on appeal. The court noted that "the officers entered the home *while they were identifying themselves,*" but it rejected petitioner's argument that "the Fourth Amendment requires officers to knock and announce prior to entering the residence." Finding "no authority for [petitioner's] theory that the knock and announce principle is required by the Fourth Amendment," the court concluded that neither Arkansas law nor the Fourth Amendment required suppression of the evidence.

We granted certiorari to resolve the conflict among the lower courts as to whether the common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry. We hold that it does, and accordingly reverse and remand.

II

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment. An examination of the common law of search and seizure leaves no doubt that 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.

Although the common law generally protected a man's house as "his castle of defense and asylum," common-law courts long have held that "when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter." To this rule, however, common-law courts appended an important qualification:

"But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors ..., for the law without

a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it...."

Several prominent founding-era commentators agreed on this basic principle. According to Sir Matthew Hale, the "constant practice" at common law was that "the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door." William Hawkins propounded a similar principle: "the law doth never allow" an officer to break open the door of a dwelling "but in cases of necessity," that is, unless he "first signify to those in the house the cause of his coming, and request them to give him admittance." Sir William Blackstone stated simply that the sheriff may "justify breaking open doors, if the possession be not quietly delivered."

The common-law knock and announce principle was woven quickly into the fabric of early American law. Most of the States that ratified the Fourth Amendment had enacted constitutional provisions or statutes generally incorporating English common law, and a few States had enacted statutes specifically embracing the common-law view that the breaking of the door of a dwelling was permitted once admittance was refused.

Our own cases have acknowledged that the common law principle of announcement is "embedded in Anglo-American law," but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. As even petitioner concedes, the common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances.

Indeed, at the time of the framing, the common-law admonition that an officer "ought to signify the cause of his coming" had not been extended conclusively to the context of felony arrests. The common-law principle gradually was applied to cases involving felonies, but at the same time the courts continued to recognize that under certain circumstances the presumption in favor of announcement necessarily would give way to contrary considerations.

Thus, because the common-law rule was justified in part by the belief that announcement generally would avoid "the destruction or breaking of any house ... by which great damage and inconvenience might ensue," courts acknowledged that the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence. Similarly, courts held that an officer may dispense with announcement in cases where a prisoner escapes from him and retreats to his dwelling. Proof of "demand and refusal" was deemed unnecessary in such cases because it would be a "senseless ceremony" to require an officer in pursuit of a recently escaped arrestee to make an announcement prior to breaking the door to retake him. Finally, courts have indicated that unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given.

We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or 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.

III

Respondent contends that the judgment below should be affirmed because the unannounced entry in this case was justified for two reasons. First, respondent argues that police officers reasonably believed that a prior announcement would have placed them in peril, given their knowledge that petitioner had threatened a government informant with a semiautomatic weapon and that Mr. Jacobs had previously been convicted of arson and firebombing. Second, respondent suggests that prior announcement would have produced an unreasonable risk that petitioner would destroy easily disposable narcotics evidence.

These considerations may well provide the necessary justification for the unannounced entry in this case. Because the Arkansas Supreme Court did not address their sufficiency, however, we remand to allow the state courts to make any necessary findings of fact and to make the determination of reasonableness in the first instance. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Notes, Comments, and Questions

In *Wilson*, the Court stated that obeying the "knock and announce" rule was part of conducting a "reasonable" search under the Fourth Amendment. The Court also stated, however, that certain searches may be conducted without knocking and announcing. Indeed, after the Court remanded Sharlene Wilson's case to the Arkansas court system, she was not released. It seems that Arkansas courts determined that under the facts presented, it was reasonable for officers to enter Wilson's home without knocking and announcing.

Although best known to today's students for her role in knock-and-announce doctrine, Sharlene Wilson was briefly famous two decades ago—at least among followers of certain conspiracy theories—for other reasons. During her imprisonment, it was reported that Wilson claimed to have seen then-Arkansas Governor Bill Clinton using cocaine and attending "cocaine parties." It was also suggested that Wilson had been sent to prison in an effort to prevent her from harming Clinton's political ambitions. Her case was celebrated by certain activists who sought her release, and Governor Mike Huckabee (father of future White House press secretary Sarah Sanders) reduced her sentence in 1999, making Wilson eligible for parole. Then, after marrying Bryson Jacobs—the boyfriend mentioned in the *Wilson* opinion—she began a ministry tour.

In the next case, the Court attempted to provide more guidance about when knocking and announcing is not required.

Supreme Court of the United States

Steiney Richards v. Wisconsin

Decided April 28, 1997 – 520 U.S. 385

Justice STEVENS delivered the opinion of the [unanimous] Court.

In *Wilson v. Arkansas,* we held that the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry. At the same time, we recognized that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," and left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."

In this case, the Wisconsin Supreme Court concluded that police officers are *never* required to knock and announce their presence when executing a search warrant in a felony drug investigation. In so doing, it reaffirmed a pre-*Wilson* holding and concluded that *Wilson* did not preclude this *per se* rule. We disagree with the court's conclusion that the Fourth Amendment permits a blanket exception to the knock-and-announce requirement for this entire category of criminal activity. But because the evidence presented to support the officers' actions in this case establishes that the decision not to knock and announce was a reasonable one under the circumstances, we affirm the judgment of the Wisconsin court.

I

On December 31, 1991, police officers in Madison, Wisconsin, obtained a warrant to search Steiney Richards' motel room for drugs and related paraphernalia. The search warrant was the culmination of an investigation that had uncovered substantial evidence that Richards was one of several individuals dealing drugs out of motel rooms in Madison. The police requested a warrant that would have given advance authorization for a "no-knock" entry into the motel room, but the Magistrate explicitly deleted those portions of the warrant.

The officers arrived at the motel room at 3:40 a.m. Officer Pharo, dressed as a maintenance man, led the team. With him were several plainclothes officers and at least one man in uniform. Officer Pharo knocked on Richards' door and, responding to the query from inside the room, stated that he was a maintenance man. With the chain still on the door, Richards cracked it open. Although there is some dispute as to what occurred next, Richards acknowledges that when he opened the door he saw the man in uniform standing behind Officer Pharo. He quickly slammed the door closed and, after waiting two or three seconds, the officers began kicking and ramming the door to gain entry to the locked room. At trial, the officers testified that they identified themselves as police while they were kicking the door in. When they finally did break into the room, the officers caught Richards trying to escape through the window. They also found cash and cocaine hidden in plastic bags above the bathroom ceiling tiles.

Richards sought to have the evidence from his motel room suppressed on the ground that the officers had failed to knock and announce their presence prior to forcing entry into the room. The trial court denied the motion, concluding that the officers could

gather from Richards' strange behavior when they first sought entry that he knew they were police officers and that he might try to destroy evidence or to escape. The judge emphasized that the easily disposable nature of the drugs the police were searching for further justified their decision to identify themselves as they crossed the threshold instead of announcing their presence before seeking entry. Richards appealed the decision to the Wisconsin Supreme Court and that court affirmed.

The Wisconsin Supreme Court did not delve into the events underlying Richards' arrest in any detail, but accepted the following facts: "[O]n December 31, 1991, police executed a search warrant for the motel room of the defendant seeking evidence of the felonious crime of Possession with Intent to Deliver a Controlled Substance in violation of Wis. Stat. § 161.41(1m) (1991-92). They did not knock and announce prior to their entry. Drugs were seized."

II

We recognized in *Wilson* that the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." It is indisputable that felony drug investigations may frequently involve both of these circumstances. The question we must resolve is whether this fact justifies dispensing with case-by-case evaluation of the manner in which a search was executed.

The Wisconsin court explained its blanket exception as necessitated by the special circumstances of today's drug culture, and the State asserted at oral argument that the blanket exception was reasonable in "felony drug cases because of the convergence in a violent and dangerous form of commerce of weapons and the destruction of drugs." But creating exceptions to the knock-and-announce rule based on the "culture" surrounding a general category of criminal behavior presents at least two serious concerns.

First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence. Or the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry. Wisconsin's blanket rule impermissibly insulates these cases from judicial review.

A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others. Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a *per se* exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.

Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.

III

Although we reject the Wisconsin court's blanket exception to the knock-and-announce requirement, we conclude that the officers' no-knock entry into Richards' motel room did not violate the Fourth Amendment. We agree with the trial court that the circumstances in this case show that the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so.

The judge who heard testimony at Richards' suppression hearing concluded that it was reasonable for the officers executing the warrant to believe that Richards knew, after opening the door to his motel room the first time, that the men seeking entry to

his room were the police. Once the officers reasonably believed that Richards knew who they were, the court concluded, it was reasonable for them to force entry immediately given the disposable nature of the drugs.

In arguing that the officers' entry was unreasonable, Richards places great emphasis on the fact that the Magistrate who signed the search warrant for his motel room deleted the portions of the proposed warrant that would have given the officers permission to execute a no-knock entry. But this fact does not alter the reasonableness of the officers' decision, which must be evaluated as of the time they entered the motel room. At the time the officers obtained the warrant, they did not have evidence sufficient, in the judgment of the Magistrate, to justify a no-knock warrant. Of course, the Magistrate could not have anticipated in every particular the circumstances that would confront the officers when they arrived at Richards' motel room. These actual circumstances—petitioner's apparent recognition of the officers combined with the easily disposable nature of the drugs—justified the officers' ultimate decision to enter without first announcing their presence and authority.

Accordingly, although we reject the blanket exception to the knock-and-announce requirement for felony drug investigations, the judgment of the Wisconsin Supreme Court is affirmed.

Notes, Comments, and Questions

When police "knock and announce," they are often not obligated to wait very long before forcing entry. In *United States v. Banks*, 540 U.S. 31 (2003), the Court found that a "15-to-20-second wait before a forcible entry" was justified by the circumstances, and federal courts have approved even shorter wait times.[4] Short wait times are especially likely to be deemed reasonable if officers are searching for drugs and hear no response after knocking and announcing. The necessary time officers must wait before "reasonably" breaking a door varies depending on factors such as what police seek, the anticipated dangerousness of persons likely to be on the premises, and how persons react to the arrival of officers.

The 2017 news that federal agents conducted a no-knock raid against Paul Manafort, the former presidential campaign manager for Donald Trump, inspired new interest in the phenomenon of no-knock entries and the breaking of doors by police. Although some commentators suggested that such raids are unusual, it would have been more accurate to say that such raids are unusual for suspects like Paul Manafort. In drug cases, no-knock raids are not unusual at all.[5]

Students interested in what happens when police execute warrants, particularly without knocking and announcing, may appreciate Radley Balko's book *Rise of the Warrior Cop* (2013). Balko observed:

Today in America SWAT teams violently smash into private homes more than one hundred times per day. The vast majority of these raids are to enforce laws against consensual crimes.[6] In many cities, police departments have given up the traditional blue uniforms for "battle dress uniforms" modeled after soldier attire. Police departments across the country now sport armored personnel carriers designed for use on a battlefield. ... They carry military-grade weapons. Most of this equipment comes from the military itself. Many SWAT teams today are trained by current and former personnel from special forces units.[7]

Balko notes also that despite the Supreme Court's guidance concerning no-knock raids—that is, holdings that the Fourth Amendment limits the use of such tactics—"the police officers interviewed for this book unanimously told me that beginning in about the mid-1980s, judges almost never denied their requests for a search warrant" and that "knock-and-announce requests were never a problem."[8]

In March 2020, no-knock warrants gained national attention after police in Louisville, Kentucky shot and killed Breonna Taylor, a 26-year-old emergency room technician. Police entered her apartment soon after midnight on March 13, under authority of a no-knock warrant issued by a judge. Taylor's boyfriend, Kenneth Walker, said later that when police entered, he and Taylor believed they were victims of a burglary and did not know that the persons entering their home were police officers. Officers said later that they did knock and announce. After police entered, Walker shot at the officers, hitting one in the leg. Police fired back, killing Taylor. She was shot at least eight times. The warrant had been issued as part of an investigation into drug sales. No drugs were found in Taylor's apartment. Taylor's death was one of several—including the May 2020 killing of George Floyd by police in Minneapolis—that inspired nationwide protests. Louisville officials announced new policies relating to no-knock warrants in the wake of protests. In addition, some have argued that under existing law set forth in *Wilson* and *Richards*, the no-knock warrant in Taylor's case was not lawfully issued.

In our next chapter, we will continue examining how the Court regulates the execution of warrants by police. In particular, we will review how officers may treat persons who happen to be present while officers are searching pursuant to a warrant (including whether such persons may be detained and searched), as well as how mistakes by police in the execution of warrants (such as

searching the wrong place) affect the “reasonableness” of searches.

After that, we will spend several chapters studying the circumstances in which the Court has declared that warrants are not required.

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2.7: Chapter 8 - Execution of Warrants

Execution of Warrants

The execution of warrants presents several opportunities for disaster, as well as more minor problems. Straightforward risks include efforts by persons present at the search location to disrupt the search, such as by destroying evidence or barring entry. In addition, the possibility that suspects will assault officers cannot be ignored. The Court has attempted to balance concern about these risks with concern for the civil liberties of persons present during a search. Two common recurring questions include: (1) when officers may detain those present at the search location and (2) when officers may search them.

In addition to hazards faced by law enforcement officers, other problems can be created by officers themselves or by the judges who issue warrants. For example, a warrant listing the wrong address can cause officers to search the wrong house. Officers who do not read a warrant carefully can search locations beyond those authorized by a warrant. And rough search methods can cause needless property damage.

We begin with the Court's rulings about how police may treat persons who are present during the execution of a valid search warrant.

Supreme Court of the United States

Darin L. Muehler v. Iris Mena

Decided March 22, 2005 – 544 U.S. 93

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent Iris Mena was detained in handcuffs during a search of the premises that she and several others occupied. Petitioners were lead members of a police detachment executing a search warrant of these premises. She sued the officers and the District Court found in her favor. The Court of Appeals affirmed the judgment, holding that the use of handcuffs to detain Mena during the search violated the Fourth Amendment and that the officers' questioning of Mena about her immigration status during the detention constituted an independent Fourth Amendment violation. We hold that Mena's detention in handcuffs for the length of the search was consistent with our opinion in *Michigan v. Summers,* 452 U.S. 692 (1981), and that the officers' questioning during that detention did not violate her Fourth Amendment rights.

Based on information gleaned from the investigation of a gang-related, driveby shooting, petitioners Muehler and Brill had reason to believe at least one member of a gang—the West Side Locos—lived at 1363 Patricia Avenue. They also suspected that the individual was armed and dangerous, since he had recently been involved in the driveby shooting. As a result, Muehler obtained a search warrant for 1363 Patricia Avenue that authorized a broad search of the house and premises for, among other things, deadly weapons and evidence of gang membership. In light of the high degree of risk involved in searching a house suspected of housing at least one, and perhaps multiple, armed gang members, a Special Weapons and Tactics (SWAT) team was used to secure the residence and grounds before the search.

At 7 a.m. on February 3, 1998, petitioners, along with the SWAT team and other officers, executed the warrant. Mena was asleep in her bed when the SWAT team, clad in helmets and black vests adorned with badges and the word "POLICE," entered her bedroom and placed her in handcuffs at gunpoint. The SWAT team also handcuffed three other individuals found on the property. The SWAT team then took those individuals and Mena into a converted garage, which contained several beds and some other bedroom furniture. While the search proceeded, one or two officers guarded the four detainees, who were allowed to move around the garage but remained in handcuffs.

Aware that the West Side Locos gang was composed primarily of illegal immigrants, the officers had notified the Immigration and Naturalization Service (INS) that they would be conducting the search, and an INS officer accompanied the officers executing the warrant. During their detention in the garage, an officer asked for each detainee's name, date of birth, place of birth, and immigration status. The INS officer later asked the detainees for their immigration documentation. Mena's status as a permanent resident was confirmed by her papers.[1]

The search of the premises yielded a .22 caliber handgun with .22 caliber ammunition, a box of .25 caliber ammunition, several baseball bats with gang writing, various additional gang paraphernalia, and a bag of marijuana. Before the officers left the area, Mena was released.

In her § 1983 suit against the officers she alleged that she was detained "for an unreasonable time and in an unreasonable manner" in violation of the Fourth Amendment. In addition, she claimed that the warrant and its execution were overbroad, that the officers failed to comply with the "knock and announce" rule, and that the officers had needlessly destroyed property during the search. The officers moved for summary judgment, asserting that they were entitled to qualified immunity, but the District Court denied their motion. The Court of Appeals affirmed that denial, *except* for Mena's claim that the warrant was overbroad; on this claim the Court of Appeals held that the officers were entitled to qualified immunity. After a trial, a jury, pursuant to a special verdict form, found that Officers Muehler and Brill violated Mena's Fourth Amendment right to be free from unreasonable seizures by detaining her both with force greater than that which was reasonable and for a longer period than that which was reasonable. The jury awarded Mena $10,000 in actual damages and $20,000 in punitive damages against each petitioner for a total of $60,000.

The Court of Appeals affirmed the judgment on two grounds. Reviewing the denial of qualified immunity *de novo,* it first held that the officers' detention of Mena violated the Fourth Amendment because it was objectively unreasonable to confine her in the converted garage and keep her in handcuffs during the search. In the Court of Appeals' view, the officers should have released Mena as soon as it became clear that she posed no immediate threat. The court additionally held that the questioning of Mena about her immigration status constituted an independent Fourth Amendment violation. The Court of Appeals went on to hold that those rights were clearly established at the time of Mena's questioning, and thus the officers were not entitled to qualified immunity. We granted certiorari and now vacate and remand.

In *Michigan v. Summers,* 452 U.S. 692 (1981), we held that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted." Such detentions are appropriate, we explained, because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial. We made clear that the detention of an occupant is "surely less intrusive than the search itself," and the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search the home. Against this incremental intrusion, we posited three legitimate law enforcement interests that provide substantial justification for detaining an occupant: "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and facilitating "the orderly completion of the search," as detainees' "self-interest may induce them to open locked doors or locked containers to avoid the use of force."

Mena's detention was, under *Summers,* plainly permissible. An officer's authority to detain incident to a search is categorical; it does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." Thus, Mena's detention for the duration of the search was reasonable under *Summers* because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search.

Inherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention. Indeed, *Summers* itself stressed that the risk of harm to officers and occupants is minimized "if the officers routinely exercise unquestioned command of the situation."

The officers' use of force in the form of handcuffs to effectuate Mena's detention in the garage, as well as the detention of the three other occupants, was reasonable because the governmental interests outweigh the marginal intrusion. The imposition of correctly applied handcuffs on Mena, who was already being lawfully detained during a search of the house, was undoubtedly a separate intrusion in addition to detention in the converted garage. The detention was thus more intrusive than that which we upheld in *Summers*.

But this was no ordinary search. The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants. Though this safety risk inherent in executing a search warrant for weapons was sufficient to justify the use of handcuffs, the need to detain multiple occupants made the use of handcuffs all the more reasonable.

Mena argues that, even if the use of handcuffs to detain her in the garage was reasonable as an initial matter, the duration of the use of handcuffs made the detention unreasonable. The duration of a detention can, of course, affect the balance of interests. However, the 2– to 3–hour detention in handcuffs in this case does not outweigh the government's continuing safety interests. As we have noted, this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons. We conclude that the detention of Mena in handcuffs during the search was reasonable.

The Court of Appeals also determined that the officers violated Mena's Fourth Amendment rights by questioning her about her immigration status during the detention. This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event. But the premise is faulty. We have "held repeatedly that mere police questioning does not constitute a seizure." "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.

In summary, the officers' detention of Mena in handcuffs during the execution of the search warrant was reasonable and did not violate the Fourth Amendment. Additionally, the officers' questioning of Mena did not constitute an independent Fourth Amendment violation.

The judgment of the Court of Appeals is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, concurring in the judgment.

In its opinion affirming the judgment, the Court of Appeals made two mistakes. First, as the Court explains, it erroneously held that the immigration officers' questioning of Mena about her immigration status was an independent violation of the Fourth Amendment. Second, instead of merely deciding whether there was sufficient evidence in the record to support the jury's verdict, the Court of Appeals appears to have ruled as a matter of law that the officers should have released her from the handcuffs sooner than they did. I agree that it is appropriate to remand the case to enable the Court of Appeals to consider whether the evidence supports Mena's contention that she was held longer than the search actually lasted. In doing so, the Court of Appeals must of course accord appropriate deference to the jury's reasonable factual findings, while applying the correct legal standard.

In my judgment, however, the Court's discussion of the amount of force used to detain Mena is analytically unsound. Although the Court correctly purports to apply the "objective reasonableness" test announced in *Graham v. Connor*, 490 U.S. 386 (1989), it misapplies that test. Given the facts of this case—and the presumption that a reviewing court must draw all reasonable inferences in favor of supporting the verdict—I think it clear that the jury could properly have found that this 5–foot–2–inch young lady posed no threat to the officers at the scene, and that they used excessive force in keeping her in handcuffs for up to three hours. Although *Summers* authorizes the detention of any individual who is present when a valid search warrant is being executed, that case does not give officers *carte blanche* to keep individuals who pose no threat in handcuffs throughout a search, no matter how long it may last. On remand, I would therefore instruct the Court of Appeals to consider whether the evidence supports Mena's contention that the petitioners used excessive force in detaining her when it considers the length of the *Summers* detention.

As the Court notes, the warrant in this case authorized the police to enter the Mena home to search for a gun belonging to Raymond Romero that may have been used in a gang-related driveby shooting. Romero, a known member of the West Side Locos gang, rented a room from the Mena family. The house, described as a "'poor house,'" was home to several unrelated individuals who rented from the Menas. Each resident had his or her own bedroom, which could be locked with a padlock on the outside, and each had access to the living room and kitchen. In addition, several individuals lived in trailers in the back yard and also had access to the common spaces in the Mena home.

In addition to Romero, police had reason to believe that at least one other West Side Locos gang member had lived at the residence, although Romero's brother told police that the individual had returned to Mexico. The officers in charge of the search, petitioners Muehler and Brill, had been at the same residence a few months earlier on an unrelated domestic violence call, but did not see any other individuals they believed to be gang members inside the home on that occasion.

In light of the fact that the police believed that Romero possessed a gun and that there might be other gang members at the residence, petitioner Muehler decided to use a Special Weapons and Tactics (SWAT) team to execute the warrant. As described in the majority opinion, eight members of the SWAT team forcefully entered the home at 7 a.m. In fact, Mena was the only occupant of the house, and she was asleep in her bedroom. The police woke her up at gunpoint, and immediately handcuffed her. At the same time, officers served another search warrant at the home of Romero's mother, where Romero was known to stay several nights each week. In part because Romero's mother had previously cooperated with police officers, they did not use a SWAT team to serve that warrant. Romero was found at his mother's house; after being cited for possession of a small amount of marijuana, he was released.

Meanwhile, after the SWAT team secured the Mena residence and gave the "all clear," police officers transferred Mena and three

other individuals (who had been in trailers in the back yard) to a converted garage. To get to the garage, Mena, who was still in her bedclothes, was forced to walk barefoot through the pouring rain. The officers kept her and the other three individuals in the garage for up to three hours while they searched the home. Although she requested them to remove the handcuffs, they refused to do so. For the duration of the search, two officers guarded Mena and the other three detainees. A .22–caliber handgun, ammunition, and gang-related paraphernalia were found in Romero's bedroom, and other gang-related paraphernalia was found in the living room. Officers found nothing of significance in Mena's bedroom.

Police officers' legitimate concern for their own safety is always a factor that should weigh heavily in balancing the relevant *Graham* factors. But, as Officer Brill admitted at trial, if that justification were always sufficient, it would authorize the handcuffing of every occupant of the premises for the duration of every *Summers* detention. Nothing in either the *Summers* or the *Graham* opinion provides any support for such a result. Rather, the decision of what force to use must be made on a case-by-case basis. There is evidence in this record that may well support the conclusion that it was unreasonable to handcuff Mena throughout the search. On remand, therefore, I would instruct the Ninth Circuit to consider that evidence, as well as the possibility that Mena was detained after the search was completed, when deciding whether the evidence in the record is sufficient to support the jury's verdict.

Notes, Comments, and Questions

Although the Court has authorized officers executing a search warrant to detain persons found on the premises, officers do not necessarily have authority to search the persons who are detained. In *Ybarra v. Illinois*, 444 U.S. 85 (1979), the Court considered a search that police had conducted at a bar pursuant to a warrant. The warrant allowed police to search the bar and the bartender for drugs, and it was based on reports of "tinfoil packets" possessed by the bartender and stored behind the bar.

When officers arrived at the bar, they told patrons to prepare to be searched for weapons, and officers then patted down the patrons. During one pat down, an officer felt a cigarette pack that seemed to have objects in it. The officer later removed the package from the suspect's pocket and opened it, finding tinfoil packets containing heroin.

The suspect, charged with possession of the heroin, moved to suppress the evidence as the fruit of an illegal search. The Supreme Court agreed, holding that officers lacked probable cause to believe that any particular customer possessed drugs. "It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91. (The Court also rejected an argument that the initial pat down was a lawful "stop and frisk" authorized by the Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), a topic to which we will return.) *See also United States v. Di Re*, 332 U.S. 581 (1948) (holding that even if the search of a certain car was lawful, that did not justify the ensuing search of its occupant).

A magazine aimed at a police officer readership stated the Court's holding clearly and succinctly in a 2016 article called "Serving the Search Warrant."[2] One heading reads: "Occupants Can be Detained." The next heading is: "Occupants Cannot be Searched." The article advises officers, "To justify searching detainees who are not authorized to be searched by the warrant, try to develop grounds for warrantless search, such as consent or probationary/parole search terms, where available." We will examine these police tactics later in the book.

If mere presence during the execution of a search warrant does not justify the search of a person, it follows that mere presence surely does not justify arresting everyone present. To reinforce this message, the Legal Bureau of the New York Police Department issued a bulletin in 2013 to this effect.[3] In response to the question, "May a police officer arrest all persons found in a location during the execution of a search warrant?," the bulletin answered, "No. An individual's mere presence in a search location does not establish probable cause to arrest."

Note that while police may detain persons present at the location to be searched, they may not detain persons who happened to be at the location earlier but have already left before police arrive to execute the warrant. In *Bailey v. United States*, 568 U.S. 186 (2013), the Court held that the rule of *Michigan v. Summers*, 452 U.S. 692 (1981) applies only to those in "the immediate vicinity of the premises to be searched." The Court explained, "Because detention is justified by the interests in executing a safe and efficient search, the decision to detain must be acted upon at the scene of the search and not at a later time in a more remote place." In *Bailey*, officers had followed two men 0.7 miles after seeing them leave the building officers had been about to search. The Court found the detention unreasonable. In a dissent, Justice Breyer complained that "immediate vicinity" was not defined by the majority.

In the next two cases, we examine what happens when police search the wrong location when executing a warrant. In one case,

a building turned out to have more apartments than officers realized when obtaining the warrant, causing officers to search the wrong person's home. In the other, officers entered a house looking for suspects who had moved out months earlier, causing an unpleasant surprise to the new residents.

Supreme Court of the United States

Maryland v. Harold Garrison

Decided Feb. 24, 1987 – 480 U.S. 79

Justice STEVENS delivered the opinion of the Court.

Baltimore police officers obtained and executed a warrant to search the person of Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment." When the police applied for the warrant and when they conducted the search pursuant to the warrant, they reasonably believed that there was only one apartment on the premises described in the warrant. In fact, the third floor was divided into two apartments, one occupied by McWebb and one by respondent Garrison. Before the officers executing the warrant became aware that they were in a separate apartment occupied by respondent, they had discovered the contraband that provided the basis for respondent's conviction for violating Maryland's Controlled Substances Act. The question presented is whether the seizure of that contraband was prohibited by the Fourth Amendment.

The trial court denied respondent's motion to suppress the evidence seized from his apartment, and the Maryland Court of Special Appeals affirmed. The Court of Appeals of Maryland reversed and remanded with instructions to remand the case for a new trial.

There is no question that the warrant was valid and was supported by probable cause. The trial court found, and the two appellate courts did not dispute, that after making a reasonable investigation, including a verification of information obtained from a reliable informant, an exterior examination of the three-story building at 2036 Park Avenue, and an inquiry of the utility company, the officer who obtained the warrant reasonably concluded that there was only one apartment on the third floor and that it was occupied by McWebb. When six Baltimore police officers executed the warrant, they fortuitously encountered McWebb in front of the building and used his key to gain admittance to the first-floor hallway and to the locked door at the top of the stairs to the third floor. As they entered the vestibule on the third floor, they encountered respondent, who was standing in the hallway area. The police could see into the interior of both McWebb's apartment to the left and respondent's to the right, for the doors to both were open. Only after respondent's apartment had been entered and heroin, cash, and drug paraphernalia had been found did any of the officers realize that the third floor contained two apartments. As soon as they became aware of that fact, the search was discontinued. All of the officers reasonably believed that they were searching McWebb's apartment. No further search of respondent's apartment was made.

The matter on which there is a difference of opinion concerns the proper interpretation of the warrant. A literal reading of its plain language, as well as the language used in the application for the warrant, indicates that it was intended to authorize a search of the entire third floor. This is the construction adopted by the intermediate appellate court and it also appears to be the construction adopted by the trial judge. One sentence in the trial judge's oral opinion, however, lends support to the construction adopted by the Court of Appeals, namely, that the warrant authorized a search of McWebb's apartment only. Under that interpretation, the Court of Appeals concluded that the warrant did not authorize the search of respondent's apartment and the police had no justification for making a warrantless entry into his premises.

Because the result that the Court of Appeals reached did not appear to be required by the Fourth Amendment, we granted certiorari. We reverse.

In our view, the case presents two separate constitutional issues, one concerning the validity of the warrant and the other concerning the reasonableness of the manner in which it was executed.

I

The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. Thus, the scope of a lawful

search is “defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.”

In this case there is no claim that the “persons or things to be seized” were inadequately described or that there was no probable cause to believe that those things might be found in “the place to be searched” as it was described in the warrant. With the benefit of hindsight, however, we now know that the description of that place was broader than appropriate because it was based on the mistaken belief that there was only one apartment on the third floor of the building at 2036 Park Avenue. The question is whether that factual mistake invalidated a warrant that undoubtedly would have been valid if it had reflected a completely accurate understanding of the building’s floor plan.

Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent’s apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. Just as the discovery of contraband cannot validate a warrant invalid when issued, so is it equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate. On the basis of that information, we agree with the conclusion of all three Maryland courts that the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued.

II

The question whether the execution of the warrant violated respondent’s constitutional right to be secure in his home is somewhat less clear. We have no difficulty concluding that the officers’ entry into the third-floor common area was legal; they carried a warrant for those premises, and they were accompanied by McWebb, who provided the key that they used to open the door giving access to the third-floor common area. If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb’s apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent’s apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant. The officers’ conduct and the limits of the search were based on the information available as the search proceeded. While the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.

[T]he validity of the search of respondent’s apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers’ failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between McWebb’s apartment and the third-floor premises.

For that reason, the officers properly responded to the command contained in a valid warrant even if the warrant is interpreted as authorizing a search limited to McWebb’s apartment rather than the entire third floor. Prior to the officers’ discovery of the factual mistake, they perceived McWebb’s apartment and the third-floor premises as one and the same; therefore their execution of the warrant reasonably included the entire third floor. Under either interpretation of the warrant, the officers’ conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

Under this Court’s precedents, the search of respondent Garrison’s apartment violated the Fourth Amendment. While executing a warrant specifically limited to McWebb’s residence, the officers expanded their search to include respondent’s adjacent apartment, an expansion made without a warrant and in the absence of exigent circumstances. In my view, Maryland’s highest court correctly concluded that the trial judge should have granted respondent’s motion to suppress the evidence seized as a result of this warrantless search of his apartment. Moreover, even if I were to accept the majority’s analysis of this case as one involving a mistake on the part of the police officers, I would find that the officers’ error, either in obtaining or in executing the

warrant, was not reasonable under the circumstances.

I

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or things to be seized." The particularity-of-description requirement is satisfied where "the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." In applying this requirement to searches aimed at residences within multiunit buildings, such as the search in the present case, courts have declared invalid those warrants that fail to describe the targeted unit with enough specificity to prevent a search of all the units.

Applying the above principle[] to this case, I conclude that the search of respondent's apartment was improper. The words of the warrant were plain and distinctive: the warrant directed the officers to seize marijuana and drug paraphernalia on the person of McWebb and in McWebb's apartment, *i.e.,* "on the premises known as 2036 Park Avenue third floor apartment." As the Court of Appeals observed, this warrant specifically authorized a search only of McWebb's—not respondent's—residence. In its interpretation of the warrant, the majority suggests that the language of this document, as well as that in the supporting affidavit, permitted a search of the *entire* third floor. It escapes me why the language in question, "third floor apartment," when used with reference to a single unit in a multiple-occupancy building and in the context of one person's residence, plainly has the meaning the majority discerns, rather than its apparent and, indeed, obvious signification—one apartment located *on* the third floor. Accordingly, if, as appears to be the case, the warrant was limited in its description to the third-floor apartment of McWebb, then the search of an additional apartment—respondent's—was warrantless and is presumed unreasonable "in the absence of some one of a number of well defined 'exigent circumstances.'" Because the State has not advanced any such exception to the warrant requirement, the evidence obtained as a result of this search should have been excluded.

II

Because the Court cannot justify the officers' search under the "exceptional circumstances" rubric, it analyzes the police conduct here in terms of "mistake." According to the Court, hindsight makes it clear that the officers were mistaken, first, in not describing McWebb's apartment with greater specificity in the warrant, and second, in including respondent's apartment within the scope of the execution of the warrant. The Court's inquiry focuses on what the officers knew or should have known at these particular junctures. The Court reasons that if, in light of the officers' actual or imputed knowledge, their behavior was reasonable, then their mistakes did not constitute an infringement on respondent's Fourth Amendment rights. In this case, the Court finds no Fourth Amendment violation because the officers could not reasonably have drawn the warrant with any greater particularity and because, until the moment when the officers realized that they were in fact searching two different apartments, they had no reason to believe that McWebb's residence did not cover the entire third floor.

Even if one accepts the majority's view that there is no Fourth Amendment violation where the officers' mistake is reasonable, it is questionable whether that standard was met in this case. To repeat Justice Harlan's observation, although the proper question in Fourth Amendment analysis is "what protection it affords to ... people, ... that question requires reference to a 'place.'" The "place" at issue here is a small multiple-occupancy building. Such forms of habitation are now common in this country, particularly in neighborhoods with changing populations and of declining affluence. Accordingly, any analysis of the "reasonableness" of the officers' behavior here must be done with this context in mind.

The efforts of Detective Marcus, the officer who procured the search warrant, do not meet a standard of reasonableness, particularly considering that the detective knew the search concerned a unit in a multiple-occupancy building. Upon learning from his informant that McWebb was selling marijuana in his third-floor apartment, Marcus inspected the outside of the building. He did not approach it, however, to gather information about the configuration of the apartments. Had he done so, he would have discovered, as did another officer on the day of executing the warrant, that there were seven separate mailboxes and bells on the porch outside the main entrance to the house. Although there is some dispute over whether names were affixed near these boxes and bells, their existence alone puts a reasonable observer on notice that the three-story structure (with, possibly, a basement) had seven individual units. The detective, therefore, should have been aware that further investigation was necessary to eliminate the possibility of more than one unit's being located on the third floor. Moreover, when Detective Marcus' informant told him that he had purchased drugs in McWebb's apartment, it appears that the detective never thought to ask the informant whether McWebb's apartment was the only one on the third floor. These efforts, which would have placed a slight burden upon the detective, are necessary in order to render reasonable the officer's behavior in seeking the warrant.

Moreover, even if one believed that Marcus' efforts in providing information for issuance of the warrant were reasonable, I doubt whether the officers' execution of the warrant could meet such a standard. In the Court's view, the "objective facts" did not put

the officers on notice that they were dealing with two separate apartments on the third floor until the moment, considerably into the search after they had rummaged through a dresser and a closet in respondent's apartment and had discovered evidence incriminating him, when they realized their "mistake." The Court appears to base its conclusion that the officers' error here was reasonable on the fact that neither McWebb nor respondent ever told the officers during the search that they lived in separate apartments.

In my view, however, the "objective facts" should have made the officers aware that there were two different apartments on the third floor well before they discovered the incriminating evidence in respondent's apartment. Before McWebb happened to drive up while the search party was preparing to execute the warrant, one of the officers, Detective Shea, somewhat disguised as a construction worker, was already on the porch of the row house and was seeking to gain access to the locked first-floor door that permitted entrance into the building. From this vantage point he had time to observe the seven mailboxes and bells; indeed, he rang *all* seven bells, apparently in an effort to summon some resident to open the front door to the search party. A reasonable officer in Detective Shea's position, already aware that this was a multiunit building and now armed with further knowledge of the number of units in the structure, would have conducted *at that time* more investigation to specify the exact location of McWebb's apartment before proceeding further. For example, he might have questioned another resident of the building.

It is surprising, moreover, that the Court places so much emphasis on the failure of McWebb to volunteer information about the exact location of his apartment. When McWebb drove up, one of the police vehicles blocked his car and the officers surrounded him and his passenger as they got out. Although the officers had no arrest warrant for McWebb, but only a search warrant for his person and apartment, and although they testified that they did not arrest him at that time, it was clear that neither McWebb nor his passenger was free to leave. In such circumstances, which strongly suggest that McWebb was already in custody, it was proper for the officers to administer to him [*Miranda*] warnings. It would have been reasonable for the officers, aware of the problem, from Detective Shea's discovery, in the specificity of their warrant, to ask McWebb whether his apartment was the only one on the third floor. As it is, the officers made several requests of and questioned McWebb, without giving him *Miranda* warnings, and yet failed to ask him the question, obvious in the circumstances, concerning the exact location of his apartment.

Moreover, a reasonable officer would have realized the mistake in the warrant during the moments following the officers' entrance to the third floor. The officers gained access to the vestibule separating McWebb's and respondent's apartments through a locked door for which McWebb supplied the key. There, in the open doorway to his apartment, they encountered respondent. Once again, the officers were curiously silent. The informant had not led the officers to believe that anyone other than McWebb lived in the third-floor apartment; the search party had McWebb, the person targeted by the search warrant, in custody when it gained access to the vestibule; yet when they met respondent on the third floor, they simply asked him who he was but never where he lived. Had they done so, it is likely that they would have discovered the mistake in the warrant before they began their search.

Finally and most importantly, even if the officers had learned nothing from respondent, they should have realized the error in the warrant from their initial security sweep. Once on the third floor, the officers first fanned out through the rooms to conduct a preliminary check for other occupants who might pose a danger to them. As the map of the third floor demonstrates, the two apartments were almost a mirror image of each other—each had a bathroom, a kitchen, a living room, and a bedroom. Given the somewhat symmetrical layout of the apartments, it is difficult to imagine that, in the initial security sweep, a reasonable officer would not have discerned that two apartments were on the third floor, realized his mistake, and then confined the ensuing search to McWebb's residence.

Accordingly, even if a reasonable error on the part of police officers prevents a Fourth Amendment violation, the mistakes here, both with respect to obtaining and executing the warrant, are not reasonable and could easily have been avoided.

I respectfully dissent.

* * *

In the next case, the Supreme Court forcefully rejects the reasoning of a decision by the U.S. Court of Appeals for the Ninth Circuit. The Court not only decided the case *per curiam*—that is, in an unsigned opinion—but also did so immediately upon the grant of certiorari, without allowing briefing or oral argument on the merits.

Supreme Court of the United States

Los Angeles County, California v. Max Rettele

Decided May 21, 2007 – 550 U.S. 609.

PER CURIAM.

Deputies of the Los Angeles County Sheriff's Department obtained a valid warrant to search a house, but they were unaware that the suspects being sought had moved out three months earlier. When the deputies searched the house, they found in a bedroom two residents who were of a different race than the suspects. The deputies ordered these innocent residents, who had been sleeping unclothed, out of bed. The deputies required them to stand for a few minutes before allowing them to dress.

The residents brought suit, naming the deputies and other parties and accusing them of violating the Fourth Amendment right to be free from unreasonable searches and seizures. The District Court granted summary judgment to all named defendants. The Court of Appeals for the Ninth Circuit reversed, concluding both that the deputies violated the Fourth Amendment and that they were not entitled to qualified immunity because a reasonable deputy would have stopped the search upon discovering that respondents were of a different race than the suspects and because a reasonable deputy would not have ordered respondents from their bed. We grant the petition for certiorari and reverse the judgment of the Court of Appeals by this summary disposition.

I

From September to December 2001, Los Angeles County Sheriff's Department Deputy Dennis Watters investigated a fraud and identity-theft crime ring. There were four suspects of the investigation. One had registered a 9-millimeter Glock handgun. The four suspects were known to be African-Americans.

On December 11, Watters obtained a search warrant for two houses in Lancaster, California, where he believed he could find the suspects. The warrant authorized him to search the homes and three of the suspects for documents and computer files. In support of the search warrant an affidavit cited various sources showing the suspects resided at respondents' home. The sources included Department of Motor Vehicles reports, mailing address listings, an outstanding warrant, and an Internet telephone directory. In this Court respondents do not dispute the validity of the warrant or the means by which it was obtained.

What Watters did not know was that one of the houses (the first to be searched) had been sold in September to a Max Rettele. He had purchased the home and moved into it three months earlier with his girlfriend Judy Sadler and Sadler's 17-year-old son Chase Hall. All three, respondents here, are Caucasians.

On the morning of December 19, Watters briefed six other deputies in preparation for the search of the houses. Watters informed them they would be searching for three African–American suspects, one of whom owned a registered handgun. The possibility a suspect would be armed caused the deputies concern for their own safety. Watters had not obtained special permission for a night search, so he could not execute the warrant until 7 a.m. Around 7:15 Watters and six other deputies knocked on the door and announced their presence. Chase Hall answered. The deputies entered the house after ordering Hall to lie face down on the ground.

The deputies' announcement awoke Rettele and Sadler. The deputies entered their bedroom with guns drawn and ordered them to get out of their bed and to show their hands. They protested that they were not wearing clothes. Rettele stood up and attempted to put on a pair of sweatpants, but deputies told him not to move. Sadler also stood up and attempted, without success, to cover herself with a sheet. Rettele and Sadler were held at gunpoint for one to two minutes before Rettele was allowed to retrieve a robe for Sadler. He was then permitted to dress. Rettele and Sadler left the bedroom within three to four minutes to sit on the couch in the living room.

By that time the deputies realized they had made a mistake. They apologized to Rettele and Sadler, thanked them for not becoming upset, and left within five minutes. They proceeded to the other house the warrant authorized them to search, where they found three suspects. Those suspects were arrested and convicted.

Rettele and Sadler, individually and as guardians ad litem for Hall, filed this § 1983 suit against Los Angeles County, the Los Angeles County Sheriff's Department, Deputy Watters, and other members of the sheriff's department. Respondents alleged petitioners violated their Fourth Amendment rights by obtaining a warrant in reckless fashion and conducting an unreasonable search and detention. The District Court held that the warrant was obtained by proper procedures and the search was reasonable. It concluded in the alternative that any Fourth Amendment rights the deputies violated were not clearly established and that, as a result, the deputies were entitled to qualified immunity.

On appeal respondents did not challenge the validity of the warrant; they did argue that the deputies had conducted the search in an unreasonable manner. A divided panel of the Court of Appeals for the Ninth Circuit reversed in an unpublished opinion.

II

Because respondents were of a different race than the suspects the deputies were seeking, the Court of Appeals held that "[a]fter taking one look at [respondents], the deputies should have realized that [respondents] were not the subjects of the search warrant and did not pose a threat to the deputies' safety." We need not pause long in rejecting this unsound proposition. When the deputies ordered respondents from their bed, they had no way of knowing whether the African–American suspects were elsewhere in the house. The presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well. As the deputies stated in their affidavits, it is not uncommon in our society for people of different races to live together. Just as people of different races live and work together, so too might they engage in joint criminal activity. The deputies, who were searching a house where they believed a suspect might be armed, possessed authority to secure the premises before deciding whether to continue with the search.

In *Michigan v. Summers,* 452 U.S. 692 (1981), this Court held that officers executing a search warrant for contraband may "detain the occupants of the premises while a proper search is conducted." In weighing whether the search in *Summers* was reasonable the Court first found that "detention represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant." Against that interest, it balanced "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and facilitating "the orderly completion of the search."

In executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search. The test of reasonableness under the Fourth Amendment is an objective one. Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time.

The orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies. Blankets and bedding can conceal a weapon, and one of the suspects was known to own a firearm, factors which underscore this point. The Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach. The reports are replete with accounts of suspects sleeping close to weapons.

The deputies needed a moment to secure the room and ensure that other persons were not close by or did not present a danger. Deputies were not required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with the sheets. Rather, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."

This is not to say, of course, that the deputies were free to force Rettele and Sadler to remain motionless and standing for any longer than necessary. We have recognized that "special circumstances, or possibly a prolonged detention," might render a search unreasonable. There is no accusation that the detention here was prolonged. The deputies left the home less than 15 minutes after arriving. The detention was shorter and less restrictive than the 2– to 3–hour handcuff detention upheld in *Mena*. And there is no allegation that the deputies prevented Sadler and Rettele from dressing longer than necessary to protect their safety. Sadler was unclothed for no more than two minutes, and Rettele for only slightly more time than that. Sadler testified that once the police were satisfied that no immediate threat was presented, "they wanted us to get dressed and they were pressing us really fast to hurry up and get some clothes on."

The Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty. Valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation may be real, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.

Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

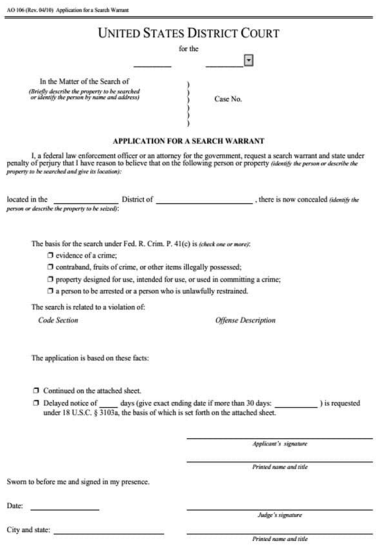
Notes, Comments, and Questions

One issue potentially raised by the facts of *Rettele*—although not addressed by the Justices—is the question of when a warrant goes "stale." A warrant based upon probable cause to believe that contraband or suspects will be found in a certain place becomes less reliable over time. To pick an extreme example, if police receive a warrant in 2018 to search a particular house for a suspect, news that the suspect died in 2019 would make it unreasonable for police to execute the warrant in 2021. Actual cases will present closer questions. For example, a warrant to search for drugs recently delivered to the house of a dealer might go stale relatively quickly because the dealer is likely to sell the drugs soon. By contrast, courts have found that collectors of

child pornography rarely destroy their material, meaning that warrants to search their computers for illicit images do not go stale. Similarly, a warrant to search an accountant's office for documents proving a client's tax fraud would probably remain "fresh" for a long time.

A 2010 raid on a Columbia, Missouri home illustrates the issue. Police had an eight-day-old warrant to search the house of Jonathan Whitworth for drugs. The raid went poorly, and officers shot two dogs, killing one. Officers pointed guns at Whitworth's wife and her seven-year-old daughter. While some contraband was found, police did not discover evidence of significant drug dealing.[4] Whitworth and his family sued the police, alleging among other things that the warrant was stale when executed. Although the court dismissed the lawsuit, Columbia police adopted new policies in response to outcry over the incident.[5] (A video of the raid—which is unpleasant to watch—is available online: [YouTube])

Sample Search Warrant Application Form (available online)



AO 106 (Rev. 04/10) Application for a Search Warrant

UNITED STATES DISTRICT COURT

for the

_____ _____

In the Matter of the Search of
(Briefly describe the property to be searched or identify the person by name and address)

Case No.

APPLICATION FOR A SEARCH WARRANT

I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that on the following person or property *(identify the person or describe the property to be searched and give its location)*:

located in the _____ District of _____, there is now concealed *(identify the person or describe the property to be seized)*:

The basis for the search under Fed. R. Crim. P. 41(c) is *(check one or more)*:

- ❒ evidence of a crime;
- ❒ contraband, fruits of crime, or other items illegally possessed;
- ❒ property designed for use, intended for use, or used in committing a crime;
- ❒ a person to be arrested or a person who is unlawfully restrained.

The search is related to a violation of:

Code Section *Offense Description*

The application is based on these facts:

❒ Continued on the attached sheet.

❒ Delayed notice of ____ days (give exact ending date if more than 30 days: _____) is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attached sheet.

_____
Applicant's signature

_____
Printed name and title

Sworn to before me and signed in my presence.

Date: _____

_____
Judge's signature

City and state: _____

_____
Printed name and title

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2.8: Chapter 9 - Warrant Exceptions

Warrant Exceptions

The Court has stated repeatedly over the decades that searches and seizures conducted without warrants are presumptively unlawful. The Court has also, however, created several exceptions to the warrant requirement. We will spend the next several chapters exploring these exceptions.

For every warrant exception, students should consider: (1) when the exception applies and (2) what the exception allows police to do. In particular, students should note whether probable cause is necessary for the exception to apply and, if not, what other quantum of evidence is required.

In this chapter, we consider the "plain view exception" and the "automobile exception," each of which has grown over time. In our first case, the Court considered both exceptions.

The Plain View Exception

The "plain view" exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be.[1]

Supreme Court of the United States

Edward H. Coolidge, Jr. v. New Hampshire

Decided June 21, 1971 – 403 U.S. 443

Mr. Justice STEWART delivered the opinion of the Court.[2]

We are called upon in this case to decide issues under the Fourth and Fourteenth Amendments arising in the context of a state criminal trial for the commission of a particularly brutal murder. As in every case, our single duty is to determine the issues presented in accord with the Constitution and the law.

Pamela Mason, a 14-year-old girl, left her home in Manchester, New Hampshire, on the evening of January 13, 1964, during a heavy snowstorm, apparently in response to a man's telephone call for a babysitter. Eight days later, after a thaw, her body was found by the site of a major north-south highway several miles away. She had been murdered. The event created great alarm in the area, and the police immediately began a massive investigation.

On January 28, having learned from a neighbor that the petitioner, Edward Coolidge, had been away from home on the evening of the girl's disappearance, the police went to his house to question him. They asked him, among other things, if he owned any guns, and he produced three, two shotguns and a rifle. They also asked whether he would take a lie-detector test concerning his account of his activities on the night of the disappearance. He agreed to do so on the following Sunday, his day off. The police later described his attitude on the occasion of this visit as fully "cooperative." His wife was in the house throughout the interview.

On the following Sunday, a policeman called Coolidge early in the morning and asked him to come down to the police station for the trip to Concord, New Hampshire, where the lie-detector test was to be administered. That evening, two plainclothes policemen arrived at the Coolidge house, where Mrs. Coolidge was waiting with her mother-in-law for her husband's return. These two policemen were not the two who had visited the house earlier in the week, and they apparently did not know that Coolidge had displayed three guns for inspection during the earlier visit. The plainclothesmen told Mrs. Coolidge that her husband was in "serious trouble" and probably would not be home that night. They asked Coolidge's mother to leave, and proceeded to question Mrs. Coolidge. During the course of the interview they obtained from her four guns belonging to Coolidge, and some clothes that Mrs. Coolidge thought her husband might have been wearing on the evening of Pamela Mason's disappearance.

Coolidge was held in jail on an unrelated charge that night, but he was released the next day. During the ensuing two and a half weeks, the State accumulated a quantity of evidence to support the theory that it was he who had killed Pamela Mason. On

February 19, the results of the investigation were presented at a meeting between the police officers working on the case and the State Attorney General, who had personally taken charge of all police activities relating to the murder, and was later to serve as chief prosecutor at the trial. At this meeting, it was decided that there was enough evidence to justify the arrest of Coolidge on the murder charge and a search of his house and two cars. At the conclusion of the meeting, the Manchester police chief made formal application, under oath, for the arrest and search warrants. The complaint supporting the warrant for a search of Coolidge's Pontiac automobile, the only warrant that concerns us here, stated that the affiant "has probable cause to suspect and believe, and does suspect and believe, and herewith offers satisfactory evidence, that there are certain objects and things used in the Commission of said offense, now kept, and concealed in or upon a certain vehicle, to wit: 1951 Pontiac two-door sedan ...." The warrants were then signed and issued by the Attorney General himself, acting as a justice of the peace. Under New Hampshire law in force at that time, all justices of the peace were authorized to issue search warrants.

The police arrested Coolidge in his house on the day the warrant issued. Mrs. Coolidge asked whether she might remain in the house with her small child, but was told that she must stay elsewhere, apparently in part because the police believed that she would be harassed by reporters if she were accessible to them. When she asked whether she might take her car, she was told that both cars had been "impounded," and that the police would provide transportation for her. Some time later, the police called a towing company, and about two and a half hours after Coolidge had been taken into custody the cars were towed to the police station. It appears that at the time of the arrest the cars were parked in the Coolidge driveway, and that although dark had fallen they were plainly visible both from the street and from inside the house where Coolidge was actually arrested. The 1951 Pontiac was searched and vacuumed on February 21, two days after it was seized, again a year later, in January 1965, and a third time in April 1965.

At Coolidge's subsequent jury trial on the charge of murder, vacuum sweepings, including particles of gun powder, taken from the Pontiac were introduced in evidence against him, as part of an attempt by the State to show by microscopic analysis that it was highly probable that Pamela Mason had been in Coolidge's car. Also introduced in evidence was one of the guns taken by the police on their Sunday evening visit to the Coolidge house—a 22-caliber Mossberg rifle, which the prosecution claimed was the murder weapon. Conflicting ballistics testimony was offered on the question whether the bullets found in Pamela Mason's body had been fired from this rifle. Finally, the prosecution introduced vacuum sweepings of the clothes taken from the Coolidge house that same Sunday evening, and attempted to show through microscopic analysis that there was a high probability that the clothes had been in contact with Pamela Mason's body. Pretrial motions to suppress all this evidence were referred by the trial judge to the New Hampshire Supreme Court, which ruled the evidence admissible. The jury found Coolidge guilty and he was sentenced to life imprisonment. The New Hampshire Supreme Court affirmed the judgment of conviction, and we granted certiorari to consider the constitutional questions raised by the admission of this evidence against Coolidge at his trial.

I

The petitioner's first claim is that the warrant authorizing the seizure and subsequent search of his 1951 Pontiac automobile was invalid because not issued by a "neutral and detached magistrate." Since we agree with the petitioner that the warrant was invalid for this reason, we need not consider his further argument that the allegations under oath supporting the issuance of the warrant were so conclusory as to violate relevant constitutional standards.

The classic statement of the policy underlying the warrant requirement of the Fourth Amendment is that of Mr. Justice Jackson, writing for the Court:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.... When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all. If the seizure and search are to be justified, they must, therefore, be justified on some other theory.

II

[T]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

B

[The majority rejected the state's claim that the automobile exception justified the search. Because the Court's analysis of the automobile exception is both confusing and at odds with current law, it is not included here at length. Certain language, however, is well known and illustrates the Court's early thinking on the exception. For example, citing precedent, the Court stated:

"'[E]xigent circumstances' justify the warrantless search of 'an automobile stopped on the highway,' where there is probable cause, because the car is 'movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.' '[T]he opportunity to search is fleeting ...."

Failing to find the necessary circumstances in this case, the Court wrote, "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."

Although the Court separated the concept of "exigent circumstances" from the automobile exception in subsequent cases, it continues to justify the automobile exception's existence with references to the easy mobility of vehicles.

The dissent of Justice Black, which disputed the Court's automobile exception analysis, has been omitted.]

C

The State's [] theory in support of the warrantless seizure and search of the Pontiac car is that the car itself was an "instrumentality of the crime," and as such might be seized by the police on Coolidge's property because it was in plain view. [F]or the reasons that follow, we hold that the "plain view" exception to the warrant requirement is inapplicable to this case.

It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

An example of the applicability of the "plain view" doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character. Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. Thus the police may inadvertently come across evidence while in "hot pursuit" of a fleeing suspect. And an object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant. Finally, the "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object.

What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plan view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

The rationale for the "plain view" exception is evident if we keep in mind the two distinct constitutional protections served by the warrant requirement. First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. The warrant accomplishes this second objective by requiring a "particular description" of the things to be seized.

The "plain view" doctrine is not in conflict with the first objective because plain view does not occur until a search is in progress. In each case, this initial intrusion is justified by a warrant or by an exception such as "hot pursuit" or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence. And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.

The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

The second limitation is that the discovery of evidence in plain view must be inadvertent. The rationale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."

If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of "Warrants ... particularly describing ... [the] things to be seized." The initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

In the light of what has been said, it is apparent that the "plain view" exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves.

The seizure was therefore unconstitutional, and so was the subsequent search at the station house. Since evidence obtained in the course of the search was admitted at Coolidge's trial, the judgment must be reversed and the case remanded to the New Hampshire Supreme Court.

Notes, Comments, and Questions

In *Coolidge*, the Court stated that the "plain view exception" existed but did not justify the search at issue in the case. In *Arizona v. Hicks*, 480 U.S. 321 (1987), the Court explained the plain view exception further. As the *Hicks* Court sets forth, the plain view exception can apply only if an officer conducts a seizure (1) while the officer is somewhere the officer has the lawful right to be (e.g., while on a public sidewalk, or inside a house executing a warrant) and (2) the officer has probable cause to believe that the object is subject to seizure. Objects are subject to seizure if they are contraband or are otherwise evidence of, fruits of, or instrumentalities of a crime. ("Contraband" refers to items that are unlawful to possess, such as illegal drugs.) In *Hicks*, an officer was lawfully inside a house and spotted an object the officer believed to be stolen. But because the officer lacked probable cause

to support his belief upon picking up the item, the officer's seizure of the object (a stolen stereo) was deemed outside the scope of the exception—that is, it was unlawful.

In *Horton v. California*, 496 U.S. 128 (1990), the Court expanded the scope of the plain view exception by removing the "inadvertence requirement" set forth in Justice Stewart's plurality opinion in *Coolidge*. Although the *Horton* Court described *Coolidge* as "binding precedent," it held that the inadvertence requirement was not "essential" to the Court's result in *Coolidge*. As the *Horton* majority put it, for the exception to apply, "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself." In addition, "not only must the item be in plain view; its incriminating character must also be 'immediately apparent.'"

After restating Justice Stewart's arguments in support of the inadvertence requirement, the *Horton* Court rejected it as follows:

"We find two flaws in this reasoning. First, even-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application for a search warrant. Specification of the additional item could only permit the officer to expand the scope of the search. On the other hand, if he or she has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first."

"Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive, because that interest is already served by the requirements that no warrant issue unless it 'particularly describ[es] the place to be searched and the persons or things to be seized,'" and that a warrantless search be circumscribed by the exigencies which justify its initiation."

Justice Brennan, joined by Justice Marshall, noted in dissent that "Forty-six States and the District of Columbia and 12 United States Courts of Appeals" had adopted the inadvertence requirement and that there had "been no outcry from law enforcement officials that the inadvertent discovery requirement unduly burdens their efforts." It is possible, however, that many of the courts cited by the dissent felt bound by *Coolidge*, regardless of their opinions on the wisdom of the inadvertence requirement.

In the next case, the Court explored the concept of a "plain feel" exception, which was analogized to the plain view exception.

Supreme Court of the United States

Minnesota v. Timothy Dickerson

Decided June 7, 1993 – 508 U.S. 366

Justice WHITE delivered the opinion of the Court.

In this case, we consider whether the Fourth Amendment permits the seizure of contraband detected through a police officer's sense of touch during a protective patdown search.

I

On the evening of November 9, 1989, two Minneapolis police officers were patrolling an area on the city's north side in a marked squad car. At about 8:15 p.m., one of the officers observed respondent leaving a 12-unit apartment building on Morgan Avenue North. The officer, having previously responded to complaints of drug sales in the building's hallways and having executed several search warrants on the premises, considered the building to be a notorious "crack house." According to testimony credited by the trial court, respondent began walking toward the police but, upon spotting the squad car and making eye contact with one of the officers, abruptly halted and began walking in the opposite direction. His suspicion aroused, this officer watched as respondent turned and entered an alley on the other side of the apartment building. Based upon respondent's seemingly evasive actions and the fact that he had just left a building known for cocaine traffic, the officers decided to stop respondent and investigate further.

The officers pulled their squad car into the alley and ordered respondent to stop and submit to a patdown search. The search revealed no weapons, but the officer conducting the search did take an interest in a small lump in respondent's nylon jacket. The

officer later testified:

"[A]s I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." The officer then reached into respondent's pocket and retrieved a small plastic bag containing one fifth of one gram of crack cocaine. Respondent was arrested and charged in Hennepin County District Court with possession of a controlled substance.

Before trial, respondent moved to suppress the cocaine. The trial court first concluded that the officers were justified under *Terry v. Ohio,* 392 U.S. 1 (1968), in stopping respondent to investigate whether he might be engaged in criminal activity. The court further found that the officers were justified in frisking respondent to ensure that he was not carrying a weapon. Finally, analogizing to the "plain-view" doctrine, under which officers may make a warrantless seizure of contraband found in plain view during a lawful search for other items, the trial court ruled that the officers' seizure of the cocaine did not violate the Fourth Amendment.

His suppression motion having failed, respondent proceeded to trial and was found guilty.

On appeal, the Minnesota Court of Appeals reversed. The court agreed with the trial court that the investigative stop and protective patdown search of respondent were lawful under *Terry* because the officers had a reasonable belief based on specific and articulable facts that respondent was engaged in criminal behavior and that he might be armed and dangerous. The court concluded, however, that the officers had overstepped the bounds allowed by *Terry* in seizing the cocaine. In doing so, the Court of Appeals "decline[d] to adopt the plain feel exception" to the warrant requirement.

The Minnesota Supreme Court affirmed. Like the Court of Appeals, the State Supreme Court held that both the stop and the frisk of respondent were valid under *Terry,* but found the seizure of the cocaine to be unconstitutional. The court expressly refused "to extend the plain view doctrine to the sense of touch" on the grounds that "the sense of touch is inherently less immediate and less reliable than the sense of sight" and that "the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment."

We granted certiorari to resolve a conflict among the state and federal courts over whether contraband detected through the sense of touch during a patdown search may be admitted into evidence. We now affirm.

II

A

The question presented today is whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by *Terry*. We think the answer is clearly that they may, so long as the officers' search stays within the bounds marked by *Terry*.

B

We have already held that police officers, at least under certain circumstances, may seize contraband detected during the lawful execution of a *Terry* search. The Court [has] held: "If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances."

The Court justified this latter holding by reference to our cases under the "plain-view" doctrine. Under that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i.e.,* if "its incriminating character [is not] 'immediately apparent,'"—the plain-view doctrine cannot justify its seizure.

We think that this doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point. The warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little

to promote the objectives of the Fourth Amendment. The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

III

It remains to apply these principles to the facts of this case. Respondent has not challenged the finding made by the trial court and affirmed by both the Court of Appeals and the State Supreme Court that the police were justified under *Terry* in stopping him and frisking him for weapons. Thus, the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent's jacket was contraband. The State District Court did not make precise findings on this point, instead finding simply that the officer, after feeling "a small, hard object wrapped in plastic" in respondent's pocket, "formed the opinion that the object ... was crack ... cocaine." The District Court also noted that the officer made "no claim that he suspected this object to be a weapon," a finding affirmed on appeal. The Minnesota Supreme Court, after "a close examination of the record," held that the officer's own testimony "belies any notion that he 'immediately'" recognized the lump as crack cocaine. Rather, the court concluded, the officer determined that the lump was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket"—a pocket which the officer already knew contained no weapon.

Under the State Supreme Court's interpretation of the record before it, it is clear that the court was correct in holding that the police officer in this case overstepped the bounds of the "strictly circumscribed" search for weapons allowed under *Terry*. Where, as here, "an officer who is executing a valid search for one item seizes a different item," this Court rightly "has been sensitive to the danger ... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to "[t]he sole justification of the search [under *Terry:*] ... the protection of the police officer and others nearby." It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize and that we have condemned in subsequent cases.

For these reasons, the judgment of the Minnesota Supreme Court is *[a]ffirmed*.

Notes, Comments, and Questions

Students often ask for examples of what would satisfy the "plain feel" standard that the Court found was not met in *Dickerson*. The simplest examples likely involve guns and other weapons that have fairly obvious shapes, such as a club.

When one of your authors taught bar review, he employed a different example, desiring to use something memorable not involving a weapon. Imagine that the Museum of Natural History has reported stolen a rare starfish from its Asteroidea collection. A few hours later, a police officer notices a person walking in an unusual way near the museum and—based on reasonable suspicion—lawfully stops and frisks the suspect. Upon patting down the suspect's jacket, the officer feels sharp pains in her hand. When she looks at her hand, she notices five rows of indentations on her palm, each radiating from a central point. It seems likely that the officer could reach into the suspect's jacket to seize (what she expects to be) the stolen starfish.

The Automobile Exception

In the early 2000s, hip hop mogul Jay-Z released "99 Problems," a song that concerned—among other things—the law governing when police may search the vehicles of criminal suspects. The song recounts a conversation between the rapper and a police officer who pulled him over in 1994.

Officer:	Do you mind if I look around the car a little bit?
Jay-Z:	Well, my glove compartment is locked, so is the trunk and the back, and I know my rights so you go'n need a warrant for that
Officer:	Aren't you sharp as a tack, some type of lawyer or something or somebody important or something?"
Jay-Z:	Nah I ain't pass the bar but I know a little bit ...[3]

Professor Caleb Mason published an essay in 2012 that examines "99 Problems" in great detail, focusing particularly on its relevance to criminal procedure.[4]

If this Essay serves no other purpose, I hope it serves to debunk, for any readers who persist in believing it, the myth that locking your trunk will keep the cops from searching it. Based on the number of my students who arrived at law school believing that if you lock your trunk and glove compartment, the police will need a warrant to search them, I surmise that it's even more widespread among the lay public. But it's completely, 100% wrong.

There is no warrant requirement for car searches. The Supreme Court has declared unequivocally that because cars are inherently mobile (and are pervasively regulated, and operated in public spaces), it is reasonable under the Fourth Amendment for the police to search the car—the whole car, and everything in the car, including containers—whenever they have probable cause to believe that the car contains evidence of crime. You don't have to arrest the person, or impound the vehicle. You just need probable cause to believe that the car contains evidence of crime. So, in any vehicle stop, the officers may search the entire car, without consent, if they develop probable cause to believe that car contains, say, drugs.

All the action, in short, is about probable cause. Warrants never come into the picture. The fact that the trunk and glove compartments are locked is completely irrelevant. Now, Jay-Z may have just altered the lyrics for dramatic effect, but that would be unfortunate insofar as the song is going to reach many more people than any criminal procedure lecture, and everyone should really know the outline of the law in this area. What the line should say is: "You'll need some p.c. for that."

In the next case, the Court sets forth what counts as an "automobile" for purposes of the automobile exception.

Supreme Court of the United States

California v. Charles R. Carney

Decided May 13, 1985 – 471 U.S. 386

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether law enforcement agents violated the Fourth Amendment when they conducted a warrantless search, based on probable cause, of a fully mobile "motor home" located in a public place.

I

On May 31, 1979, Drug Enforcement Agency Agent Robert Williams watched respondent, Charles Carney, approach a youth in downtown San Diego. The youth accompanied Carney to a Dodge Mini Motor Home parked in a nearby lot. Carney and the youth closed the window shades in the motor home, including one across the front window. Agent Williams had previously received uncorroborated information that the same motor home was used by another person who was exchanging marihuana for sex. Williams, with assistance from other agents, kept the motor home under surveillance for the entire one and one-quarter hours that Carney and the youth remained inside. When the youth left the motor home, the agents followed and stopped him. The youth told the agents that he had received marijuana in return for allowing Carney sexual contacts.

At the agents' request, the youth returned to the motor home and knocked on its door; Carney stepped out. The agents identified themselves as law enforcement officers. Without a warrant or consent, one agent entered the motor home and observed marihuana, plastic bags, and a scale of the kind used in weighing drugs on a table. Agent Williams took Carney into custody and took possession of the motor home. A subsequent search of the motor home at the police station revealed additional marihuana in the cupboards and refrigerator.

Respondent was charged with possession of marihuana for sale. At a preliminary hearing, he moved to suppress the evidence discovered in the motor home. The Magistrate denied the motion, upholding the initial search as a justifiable search for other persons, and the subsequent search as a routine inventory search.

Respondent renewed his suppression motion in the Superior Court. The Superior Court also rejected the claim, holding that there was probable cause to arrest respondent, that the search of the motor home was authorized under the automobile exception to the Fourth Amendment's warrant requirement, and that the motor home itself could be seized without a warrant as an instrumentality of the crime. Respondent then pleaded *nolo contendere* to the charges against him, and was placed on probation for three years.

Respondent appealed from the order placing him on probation. The California Court of Appeal affirmed, reasoning that the vehicle exception applied to respondent's motor home.

The California Supreme Court reversed the conviction. The Supreme Court did not disagree with the conclusion of the trial court that the agents had probable cause to arrest respondent and to believe that the vehicle contained evidence of a crime; however, the court held that the search was unreasonable because no warrant was obtained, rejecting the State's argument that the vehicle exception to the warrant requirement should apply. That court reached its decision by concluding that the mobility of a vehicle "is no longer the prime justification for the automobile exception; rather, 'the answer lies in the diminished expectation of privacy which surrounds the automobile.'" The California Supreme Court held that the expectations of privacy in a motor home are more like those in a dwelling than in an automobile because the primary function of motor homes is not to provide transportation but to "provide the occupant with living quarters."

We granted certiorari. We reverse.

II

[The automobile] exception to the [Fourth Amendment] warrant requirement was first set forth by the Court 60 years ago in *Carroll v. United States,* 267 U.S. 132 (1925). There, the Court recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests. The Court rested this exception on a long-recognized distinction between stationary structures and vehicles.

The capacity to be "quickly moved" was clearly the basis of the holding in *Carroll,* and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception.... The mobility of automobiles, we have observed, "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible."

However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. The reasons for the vehicle exception, we have said, are twofold. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."

Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception. In some cases, the configuration of the vehicle contributed to the lower expectations of privacy; for example, we held in *Cardwell v. Lewis,* 417 U.S. 583 (1974), that because the passenger compartment of a standard automobile is relatively open to plain view, there are lesser expectations of privacy. But even when enclosed "repository" areas have been involved, we have concluded that the lesser expectations of privacy warrant application of the exception. We have applied the exception in the context of a locked car trunk, a sealed package in a car trunk, a closed compartment under the dashboard, the interior of a vehicle's upholstery, or sealed packages inside a covered pickup truck.

These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways. As we explained in *South Dakota v. Opperman* [428 U.S. 364 (1976)], an inventory search case:

"Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order."

The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation. Historically, "individuals always [have] been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts." In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling.

At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.

While it is true that respondent's vehicle possessed some, if not many of the attributes of a home, it is equally clear that the vehicle falls clearly within the scope of the exception laid down in *Carroll* and applied in succeeding cases. Like the automobile in *Carroll,* respondent's motor home was readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police. Furthermore, the vehicle was licensed to "operate on public streets; [was] serviced in public places; ... and [was] subject to extensive regulation and inspection." And the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle.

Respondent urges us to distinguish his vehicle from other vehicles within the exception because it was *capable of functioning as a home*. In our increasingly mobile society, many vehicles used for transportation can be and are being used not only for transportation but for shelter, *i.e.,* as a "home" or "residence." To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that we apply the exception depending upon the size of the vehicle and the quality of its appointments. Moreover, to fail to apply the exception to vehicles such as a motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity. We decline today to distinguish between "worthy" and "unworthy" vehicles which are either on the public roads and highways, or situated such that it is reasonable to conclude that the vehicle is not being used as a residence.

Our application of the vehicle exception has never turned on the other uses to which a vehicle might be put. The exception has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation.[5] These two requirements for application of the exception ensure that law enforcement officials are not unnecessarily hamstrung in their efforts to detect and prosecute criminal activity, and that the legitimate privacy interests of the public are protected. Applying the vehicle exception in these circumstances allows the essential purposes served by the exception to be fulfilled, while assuring that the exception will acknowledge legitimate privacy interests.

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

The character of "the place to be searched" plays an important role in Fourth Amendment analysis. In this case, police officers searched a Dodge/Midas Mini Motor Home. The California Supreme Court correctly characterized this vehicle as a "hybrid" which combines "the mobility attribute of an automobile ... with most of the privacy characteristics of a house."

The hybrid character of the motor home places it at the crossroads between the privacy interests that generally forbid warrantless invasions of the home and the law enforcement interests that support the exception for warrantless searches of automobiles based on probable cause. By choosing to follow the latter route, the Court errs in three respects: it has entered new territory prematurely, it has accorded priority to an exception rather than to the general rule [of the warrant requirement], and it has abandoned the limits on the exception imposed by prior cases.

If the motor home were parked in the exact middle of the intersection between the general rule and the exception for automobiles, priority should be given to the rule rather than the exception.

The motor home, however, was not parked in the middle of that intersection. Our prior cases teach us that inherent mobility is not a sufficient justification for the fashioning of an exception to the warrant requirement, especially in the face of heightened expectations of privacy in the location searched. Motor homes, by their common use and construction, afford their owners a substantial and legitimate expectation of privacy when they dwell within. When a motor home is parked in a location that is removed from the public highway, I believe that society is prepared to recognize that the expectations of privacy within it are not unlike the expectations one has in a fixed dwelling. As a general rule, such places may only be searched with a warrant based upon probable cause. Warrantless searches of motor homes are only reasonable when the motor home is traveling on the public streets or highways, or when exigent circumstances otherwise require an immediate search without the expenditure of time necessary to obtain a warrant.

In this case, the motor home was parked in an off-the-street lot only a few blocks from the courthouse in downtown San Diego where dozens of magistrates were available to entertain a warrant application. The officers clearly had the element of surprise with them, and with curtains covering the windshield, the motor home offered no indication of any imminent departure. The officers plainly had probable cause to arrest the respondent and search the motor home, and on this record, it is inexplicable why they eschewed the safe harbor of a warrant.

In my opinion, searches of places that regularly accommodate a wide range of private human activity are fundamentally different from searches of automobiles which primarily serve a public transportation function. Although it may not be a castle, a motor home is usually the functional equivalent of a hotel room, a vacation and retirement home, or a hunting and fishing cabin. These places may be as spartan as a humble cottage when compared to the most majestic mansion, but the highest and most legitimate expectations of privacy associated with these temporary abodes should command the respect of this Court.

I respectfully dissent.

Notes, Comments, and Questions

Imagine that Andy, along with his friends Akiva and T-Pain, is on a boat. Police have probable cause to believe that the boat contains evidence of crime. May police search the boat without a warrant?

It turns out that the answer is "yes." Police can search the boat. As indicated by the Court's references to "movable vessels" searched during the earliest days of the Republic, the automobile exception is not limited to cars, trucks, and other land-based vehicles. It has been applied to boats and airplanes in the same way as to cars. *See United States v. Hill*, 855 F.2d 664, 668 (10th Cir. 1988) (houseboats); *United States v. Albers*, 136 F.3d 670, 673 & n.3 (9th Cir. 1997) (noting that when a houseboat is "permanently moored" and therefore not easily mobile, the exception may not apply); *United States v. Montgomery*, 620 F.2d 753 (10th Cir. 1980) (airplanes); *United States v. Nigro*, 727 F.2d 100, 107 (6th Cir. 1984) (same).

The next case allowed the Court to reconsider whether closed containers found inside an automobile are subject to the automobile exception. Students should note that if the answer is yes, then an object not subject to lawful warrantless search (for example, a duffel bag sitting on a sidewalk next to its owner) becomes subject to a lawful warrantless search simply by being moved into a vehicle.

Supreme Court of the United States

California v. Charles Steven Acevedo

Decided May 30, 1991 – 500 U.S. 565

Justice BLACKMUN delivered the opinion of the Court.

This case requires us once again to consider the so-called "automobile exception" to the warrant requirement of the Fourth Amendment and its application to the search of a closed container in the trunk of a car.

I

On October 28, 1987, Officer Coleman of the Santa Ana, Cal., Police Department received a telephone call from a federal drug enforcement agent in Hawaii. The agent informed Coleman that he had seized a package containing marijuana which was to have been delivered to the Federal Express Office in Santa Ana and which was addressed to J.R. Daza at 805 West Stevens Avenue in that city. The agent arranged to send the package to Coleman instead. Coleman then was to take the package to the Federal Express office and arrest the person who arrived to claim it.

Coleman received the package on October 29, verified its contents, and took it to the Senior Operations Manager at the Federal Express office. At about 10:30 a.m. on October 30, a man, who identified himself as Jamie Daza, arrived to claim the package. He accepted it and drove to his apartment on West Stevens. He carried the package into the apartment.

At 11:45 a.m., officers observed Daza leave the apartment and drop the box and paper that had contained the marijuana into a trash bin. Coleman at that point left the scene to get a search warrant. About 12:05 p.m., the officers saw Richard St. George leave the apartment carrying a blue knapsack which appeared to be half full. The officers stopped him as he was driving off, searched the knapsack, and found 1 ½ pounds of marijuana.

At 12:30 p.m., respondent Charles Steven Acevedo arrived. He entered Daza's apartment, stayed for about 10 minutes, and reappeared carrying a brown paper bag that looked full. The officers noticed that the bag was the size of one of the wrapped marijuana packages sent from Hawaii. Acevedo walked to a silver Honda in the parking lot. He placed the bag in the trunk of the car and started to drive away. Fearing the loss of evidence, officers in a marked police car stopped him. They opened the trunk and the bag, and found marijuana.

Respondent was charged in state court with possession of marijuana for sale. He moved to suppress the marijuana found in the car. The motion was denied. He then pleaded guilty but appealed the denial of the suppression motion.

The California Court of Appeal, Fourth District, concluded that the marijuana found in the paper bag in the car's trunk should have been suppressed.

The Supreme Court of California denied the State's petition for review. We granted certiorari to reexamine the law applicable to a closed container in an automobile, a subject that has troubled courts and law enforcement officers since it was first considered.

II

Contemporaneously with the adoption of the Fourth Amendment, the First Congress, and, later, the Second and Fourth Congresses, distinguished between the need for a warrant to search for contraband concealed in "a dwelling house or similar place" and the need for a warrant to search for contraband concealed in a movable vessel. In [1925] this Court established an exception to the warrant requirement for moving vehicles, for it recognized

"a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

It therefore held that a warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of crime in the light of an exigency arising out of the likely disappearance of the vehicle, did not contravene the Warrant Clause of the Fourth Amendment.

In *United States v. Ross,* 456 U.S. 798 (1982), we held that a warrantless search of an automobile under the *Carroll* doctrine could include a search of a container or package found inside the car when such a search was supported by probable cause. The warrantless search of Ross' car occurred after an informant told the police that he had seen Ross complete a drug transaction using drugs stored in the trunk of his car. The police stopped the car, searched it, and discovered in the trunk a brown paper bag containing drugs. We decided that the search of Ross' car was not unreasonable under the Fourth Amendment: "The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause." Thus, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." In *Ross,* therefore, we clarified the scope of the *Carroll* doctrine as properly including a "probing search" of compartments and containers within the automobile so long as the search is supported by probable cause.

In addition to this clarification, *Ross* distinguished the *Carroll* doctrine from the separate rule that governed the search of closed containers. The Court had announced this separate rule, unique to luggage and other closed packages, bags, and containers, in *United States v. Chadwick,* 433 U.S. 1 (1977). In *Chadwick,* federal narcotics agents had probable cause to believe that a 200-pound double-locked footlocker contained marijuana. The agents tracked the locker as the defendants removed it from a train and carried it through the station to a waiting car. As soon as the defendants lifted the locker into the trunk of the car, the agents arrested them, seized the locker, and searched it. In this Court, the United States did not contend that the locker's brief contact with the automobile's trunk sufficed to make the *Carroll* doctrine applicable. Rather, the United States urged that the search of movable luggage could be considered analogous to the search of an automobile.

The Court rejected this argument because, it reasoned, a person expects more privacy in his luggage and personal effects than he does in his automobile. Moreover, it concluded that as "may often not be the case when automobiles are seized," secure storage facilities are usually available when the police seize luggage.

In *Arkansas v. Sanders,* 442 U.S. 753 (1979), the Court extended *Chadwick*'s rule to apply to a suitcase actually being transported in the trunk of a car. In *Sanders,* the police had probable cause to believe a suitcase contained marijuana. They watched as the defendant placed the suitcase in the trunk of a taxi and was driven away. The police pursued the taxi for several blocks, stopped it, found the suitcase in the trunk, and searched it. [T]he *Sanders* majority stressed the heightened privacy expectation in personal luggage and concluded that the presence of luggage in an automobile did not diminish the owner's expectation of privacy in his personal items.

In *Ross,* the Court endeavored to distinguish between *Carroll,* which governed the *Ross* automobile search, and *Chadwick,* which governed the *Sanders* automobile search. It held that the *Carroll* doctrine covered searches of automobiles when the police had probable cause to search an entire vehicle, but that the *Chadwick* doctrine governed searches of luggage when the officers had

probable cause to search only a container within the vehicle. Thus, in a *Ross* situation, the police could conduct a reasonable search under the Fourth Amendment without obtaining a warrant, whereas in a *Sanders* situation, the police had to obtain a warrant before they searched.

III

The facts in this case closely resemble the facts in *Ross*. In *Ross,* the police had probable cause to believe that drugs were stored in the trunk of a particular car. Here, the California Court of Appeal concluded that the police had probable cause to believe that respondent was carrying marijuana in a bag in his car's trunk. Furthermore, for what it is worth, in *Ross,* as here, the drugs in the trunk were contained in a brown paper bag.

We now must decide the question deferred in *Ross:* whether the Fourth Amendment requires the police to obtain a warrant to open the sack in a movable vehicle simply because they lack probable cause to search the entire car. We conclude that it does not.

IV

Dissenters in *Ross* asked why the suitcase in *Sanders* was "more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the warrant requirement, than a container that police discover in a probable-cause search of an entire automobile?" We now agree that a container found after a general search of the automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy. In fact, we see no principled distinction in terms of either the privacy expectation or the exigent circumstances between the paper bag found by the police in *Ross* and the paper bag found by the police here. Furthermore, by attempting to distinguish between a container for which the police are specifically searching and a container which they come across in a car, we have provided only minimal protection for privacy and have impeded effective law enforcement.

The line between probable cause to search a vehicle and probable cause to search a package in that vehicle is not always clear, and separate rules that govern the two objects to be searched may enable the police to broaden their power to make warrantless searches and disserve privacy interests. We noted this in *Ross* in the context of a search of an entire vehicle. Recognizing that under *Carroll,* the "entire vehicle itself ... could be searched without a warrant," we concluded that "prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests." At the moment when officers stop an automobile, it may be less than clear whether they suspect with a high degree of certainty that the vehicle contains drugs in a bag or simply contains drugs. If the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross.*

We cannot see the benefit of a rule that requires law enforcement officers to conduct a more intrusive search in order to justify a less intrusive one.

To the extent that the *Chadwick-Sanders* rule protects privacy, its protection is minimal. Law enforcement officers may seize a container and hold it until they obtain a search warrant. "Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases."

Finally, the search of a paper bag intrudes far less on individual privacy than does the incursion sanctioned long ago in *Carroll.* In that case, prohibition agents slashed the upholstery of the automobile. This Court nonetheless found their search to be reasonable under the Fourth Amendment. If destroying the interior of an automobile is not unreasonable, we cannot conclude that looking inside a closed container is. In light of the minimal protection to privacy afforded by the *Chadwick-Sanders* rule, and our serious doubt whether that rule substantially serves privacy interests, we now hold that the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle.

V

The *Chadwick-Sanders* rule not only has failed to protect privacy but also has confused courts and police officers and impeded effective law enforcement.

Although we have recognized firmly that the doctrine of *stare decisis* serves profoundly important purposes in our legal system, this Court has overruled a prior case on the comparatively rare occasion when it has bred confusion or been a derelict or led to anomalous results. We conclude that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the

warrant requirement for closed containers set forth in *Sanders*.

VI

The interpretation of the *Carroll* doctrine set forth in *Ross* now applies to all searches of containers found in an automobile. In other words, the police may search without a warrant if their search is supported by probable cause.

"Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." We reaffirm that principle. In the case before us, the police had probable cause to believe that the paper bag in the automobile's trunk contained marijuana. That probable cause now allows a warrantless search of the paper bag. The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.

Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences. We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.

The judgment of the California Court of Appeal is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Justice STEVENS, with whom Justice MARSHALL joins, dissenting.

It is "'a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."'

Relying on arguments that conservative judges have repeatedly rejected in past cases, the Court today—despite its disclaimer to the contrary—enlarges the scope of the automobile exception to this "cardinal principle," which undergirded our Fourth Amendment jurisprudence.

Our decisions have always acknowledged that the warrant requirement imposes a burden on law enforcement. And our cases have not questioned that trained professionals normally make reliable assessments of the existence of probable cause to conduct a search. We have repeatedly held, however, that these factors are outweighed by the individual interest in privacy that is protected by advance judicial approval. The Fourth Amendment dictates that the privacy interest is paramount, no matter how marginal the risk of error might be if the legality of warrantless searches were judged only after the fact.

In its opinion today, the Court recognizes that the police did not have probable cause to search respondent's vehicle and that a search of anything but the paper bag that respondent had carried from Daza's apartment and placed in the trunk of his car would have been unconstitutional. Moreover, as I read the opinion, the Court assumes that the police could not have made a warrantless inspection of the bag before it was placed in the car. Finally, the Court also does not question the fact that, under our prior cases, it would have been lawful for the police to seize the container and detain it (and respondent) until they obtained a search warrant. Thus, all of the relevant facts that governed our decisions in *Chadwick* and *Sanders* are present here whereas the relevant fact that justified the vehicle search in *Ross* is not present.

The Court does not attempt to identify any exigent circumstances that would justify its refusal to apply the general rule against warrantless searches.

It is too early to know how much freedom America has lost today. The magnitude of the loss is, however, not nearly as significant as the Court's willingness to inflict it without even a colorable basis for its rejection of prior law.

I respectfully dissent.

Notes, Comments, and Questions

Imagine that police suspect a person of committing vehicular homicide. The issue is whether the suspect's actions before a fatal crash qualify as criminal conduct or are instead merely tortious (or perhaps not even blameworthy). Does the automobile

exception allow police to search the car's internal computer without a warrant? *See State v. Mobley*, 834 S.E.2d 785 (Ga. 2019). The *Mobley* Court described the data searched by police in a Georgia case.

The record shows that an ACM, also known as an "event data recorder" or "electronic control module," is an onboard electronic data recording device that is designed to preserve certain data about the operation of a vehicle in the moments preceding certain occurrences, including any event that results in the deployment of airbags. Although the precise data preserved varies from vehicle to vehicle, the data retrieved from the Charger in this case included the speed of the vehicle, the status of the brakes, the status of the brake switch, the time from maximum deceleration to impact, the time from impact to airbag deployment, the speed of the engine, the throttle position, the number of crankshaft revolutions per minute, the status of the driver's seatbelt, and a diagnostic indicator about the functioning of the ACM.

What arguments best support applying the automobile exception to these data sources? What arguments best support not applying the exception?

The issue remains unsettled, and different courts will likely make different judgments. More background on the issue, see the amicus brief filed in *Mobley* by the American Civil Liberties Union.

In *Collins v. Virginia*, 138 S. Ct. 1663 (2018), the Court decided "whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein." For the majority, the question was straightforward. In an opinion joined by six other Justices, Justice Sotomayor wrote: "Because the scope of the automobile exception extends no further than the automobile itself, it did not justify Officer Rhodes' invasion of the curtilage. Nothing in this Court's case law suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Such an expansion would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and '"untether"' the exception '"from the justifications underlying"' it." The Court rejected the idea "that the automobile exception is a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage."

Justice Alito dissented sharply, quoting Charles Dickens: "If that is the law, [a character in *Oliver Twist*] exclaimed, 'the law is a ass—a idiot.'" Justice Alito noted, "If the motorcycle had been parked at the curb, instead of in the driveway, it is undisputed that Rhodes could have searched it without obtaining a warrant." He found it bizarre that search became "unreasonable" "[b]ecause, in order to reach the motorcycle, [the officer] had to walk 30 feet or so up the driveway of the house rented by petitioner's girlfriend, and by doing that, ... invaded the home's 'curtilage.'"

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2.9: Chapter 10 - The Warrant Requirement- Exceptions (Part 2)

Warrant Exception: Searches Incident to a Lawful Arrest

When police perform a lawful arrest, they are allowed to search the arrestee. The permissible scope of such searches—known as searches incident to lawful arrest ("SILA")—has been the subject of multiple Supreme Court cases. No warrant is required for a SILA.[1]

For a search to be justified as a SILA: (1) there must have been an arrest, (2) the arrest must have been "lawful," and (3) the search must be "incident" to the arrest—that is, close in time and space to the arrest.

Later in the semester, we will study when arrests are permitted. For now, note that because police often need no warrant to arrest a suspect, a SILA can sometimes result from two distinct warrant exceptions. The first allows the underlying arrest, and the second allows the ensuing search.

Supreme Court of the United States

Ted Steven Chimel v. California

Decided June 23, 1969 – 395 U.S. 752

Mr. Justice STEWART delivered the opinion of the Court.

This case raises basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest.

The relevant facts are essentially undisputed. Late in the afternoon of September 13, 1965, three police officers arrived at the Santa Ana, California, home of the petitioner with a warrant authorizing his arrest for the burglary of a coin shop. The officers knocked on the door, identified themselves to the petitioner's wife, and asked if they might come inside. She ushered them into the house, where they waited 10 or 15 minutes until the petitioner returned home from work. When the petitioner entered the house, one of the officers handed him the arrest warrant and asked for permission to "look around." The petitioner objected, but was advised that "on the basis of the lawful arrest," the officers would nonetheless conduct a search. No search warrant had been issued.

Accompanied by the petitioner's wife, the officers then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop. In some rooms the search was relatively cursory. In the master bedroom and sewing room, however, the officers directed the petitioner's wife to open drawers and "to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary." After completing the search, they seized numerous items—primarily coins, but also several medals, tokens, and a few other objects. The entire search took between 45 minutes and an hour.

At the petitioner's subsequent state trial on two charges of burglary, the items taken from his house were admitted into evidence against him, over his objection that they had been unconstitutionally seized. He was convicted, and the judgments of conviction were affirmed by both the California Court of Appeal and the California Supreme Court. Both courts accepted the petitioner's contention that the arrest warrant was invalid because the supporting affidavit was set out in conclusory terms, but held that since the arresting officers had procured the warrant "in good faith," and since in any event they had had sufficient information to constitute probable cause for the petitioner's arrest, that arrest had been lawful. From this conclusion the appellate courts went on to hold that the search of the petitioner's home had been justified, despite the absence of a search warrant, on the ground that it had been incident to a valid arrest. We granted certiorari in order to consider the petitioner's substantial constitutional claims.

Without deciding the question, we proceed on the hypothesis that the California courts were correct in holding that the arrest of the petitioner was valid under the Constitution. This brings us directly to the question whether the warrantless search of the petitioner's entire house can be constitutionally justified as incident to that arrest. The decisions of this Court bearing upon that

question have been far from consistent, as even the most cursory review makes evident.

“The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. ... And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.”

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area “within his immediate control”—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The “adherence to judicial processes” mandated by the Fourth Amendment requires no less.

It is argued in the present case that it is “reasonable” to search a man’s house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on consideration relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively “reasonable” to search a man’s house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest. As Mr. Justice Frankfurter put it:

“To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an ‘unreasonable search’ is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and experience which it embodies and the safeguards afforded by it against the evils to which it was a response.”

Thus, although “[t]he recurring questions of the reasonableness of searches” depend upon “the facts and circumstances—the total atmosphere of the case,” those facts and circumstances must be viewed in the light of established Fourth Amendment principles.

No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items. The only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other.

[T]he general point so forcefully made by Judge Learned Hand remains:

“After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one’s papers are safe only so long as one is not at home.”

Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner’s person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, “unreasonable” under the Fourth and Fourteenth Amendments and the petitioner’s conviction cannot stand.

Reversed.

Mr. Justice WHITE, with whom Mr. Justice BLACK joins, dissenting.

Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search "incident to an arrest." There has been a remarkable instability in this whole area, which has seen at least four major shifts in emphasis. Today's opinion makes an untimely fifth. In my view, the Court should not now abandon the old rule.

The rule which has prevailed, but for very brief or doubtful periods of aberration, is that a search incident to an arrest may extend to those areas under the control of the defendant and where items subject to constitutional seizure may be found. The justification for this rule must, under the language of the Fourth Amendment, lie in the reasonableness of the rule.

In terms, then, the Court must decide whether a given search is reasonable. The Amendment does not proscribe "warrantless searches" but instead it proscribes "unreasonable searches" and this Court has never held nor does the majority today assert that warrantless searches are necessarily unreasonable.

Applying this reasonableness test to the area of searches incident to arrests, one thing is clear at the outset. Search of an arrested man and of the items within his immediate reach must in almost every case be reasonable. There is always a danger that the suspect will try to escape, seizing concealed weapons with which to overpower and injure the arresting officers, and there is a danger that he may destroy evidence vital to the prosecution. Circumstances in which these justifications would not apply are sufficiently rare that inquiry is not made into searches of this scope, which have been considered reasonable throughout.

The justifications which make such a search reasonable obviously do not apply to the search of areas to which the accused does not have ready physical access. This is not enough, however, to prove such searches unconstitutional. The Court has always held, and does not today deny, that when there is probable cause to search and it is "impracticable" for one reason or another to get a search warrant, then a warrantless search may be reasonable. This is the case whether an arrest was made at the time of the search or not.

This is not to say that a search can be reasonable without regard to the probable cause to believe that seizable items are on the premises. But when there are exigent circumstances, and probable cause, then the search may be made without a warrant, reasonably. An arrest itself may often create an emergency situation making it impracticable to obtain a warrant before embarking on a related search. Again assuming that there is probable cause to search premises at the spot where a suspect is arrested, it seems to me unreasonable to require the police to leave the scene in order to obtain a search warrant when they are already legally there to make a valid arrest, and when there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search. This must so often be the case that it seems to me as unreasonable to require a warrant for a search of the premises as to require a warrant for search of the person and his very immediate surroundings.

This case provides a good illustration of my point that it is unreasonable to require police to leave the scene of an arrest in order to obtain a search warrant when they already have probable cause to search and there is a clear danger that the items for which they may reasonably search will be removed before they return with a warrant. Petitioner was arrested in his home after an arrest. There was doubtless probable cause not only to arrest petitioner, but also to search his house. He had obliquely admitted, both to a neighbor and to the owner of the burglarized store, that he had committed the burglary. In light of this, and the fact that the neighbor had seen other admittedly stolen property in petitioner's house, there was surely probable cause on which a warrant could have issued to search the house for the stolen coins. Moreover, had the police simply arrested petitioner, taken him off to the station house, and later returned with a warrant, it seems very likely that petitioner's wife, who in view of petitioner's generally garrulous nature must have known of the robbery, would have removed the coins. For the police to search the house while the evidence they had probable cause to search out and seize was still there cannot be considered unreasonable.

In considering searches incident to arrest, it must be remembered that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search by his very presence at the scene, and having been arrested, he will soon be brought into contact with people who can explain his rights.

An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding. I would uphold the constitutionality of this search contemporaneous with an arrest since there were probable cause both for the search and for the arrest, exigent circumstances involving the removal or destruction of evidence, and satisfactory opportunity to dispute the issues of probable cause shortly thereafter. In this case, the search was reasonable.

* * *

In the next case, the Court made clear that a search cannot be “incident to a lawful arrest” if no one is arrested.

Supreme Court of the United States

Patrick Knowles v. Iowa

Decided Dec. 8, 1998 – 525 U.S. 113

Chief Justice REHNQUIST delivered the opinion of the Court.

An Iowa police officer stopped petitioner Knowles for speeding, but issued him a citation rather than arresting him. The question presented is whether such a procedure authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car. We answer this question “no.”

Knowles was stopped in Newton, Iowa, after having been clocked driving 43 miles per hour on a road where the speed limit was 25 miles per hour. The police officer issued a citation to Knowles, although under Iowa law he might have arrested him. The officer then conducted a full search of the car, and under the driver’s seat he found a bag of marijuana and a “pot pipe.” Knowles was then arrested and charged with violation of state laws dealing with controlled substances.

Before trial, Knowles moved to suppress the evidence so obtained. He argued that the search could not be sustained under the “search incident to arrest” exception because he had not been placed under arrest. At the hearing on the motion to suppress, the police officer conceded that he had neither Knowles’ consent nor probable cause to conduct the search. He relied on Iowa law dealing with such searches.

[Under Iowa law at the time, when an officer was authorized to arrest someone for a traffic offense but instead issued a citation, “the issuance of a citation in lieu of an arrest” did “not affect the officer’s authority to conduct an otherwise lawful search.”]

[T]he trial court denied the motion to suppress and found Knowles guilty. The Supreme Court of Iowa, sitting en banc, affirmed by a divided vote. [T]he Iowa Supreme Court upheld the constitutionality of the search under a bright-line “search incident to citation” exception to the Fourth Amendment’s warrant requirement, reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest. We granted certiorari and we now reverse.

[W]e [have] noted the two historical rationales for the “search incident to arrest” exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. But neither of these underlying rationales for the search incident to arrest exception is sufficient to justify the search in the present case.

We have recognized that the first rationale—officer safety—is “‘both legitimate and weighty,’” The threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a custodial arrest. [A] custodial arrest involves “danger to an officer” because of “the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.” We recognized that “[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.” A routine traffic stop, on the other hand, is a relatively brief encounter and “is more analogous to a so-called ‘*Terry* stop’ … than to a formal arrest.”

This is not to say that the concern for officer safety is absent in the case of a routine traffic stop. It plainly is not. But while the concern for officer safety in this context may justify the “minimal” additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search. Even without the search authority Iowa urges, officers have other, independent bases to search for weapons and protect themselves from danger. For example, they may order out of a vehicle both the driver and any passengers, perform a “patdown” of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous, conduct a “*Terry* patdown” of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon, and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest.

Nor has Iowa shown the second justification for the authority to search incident to arrest—the need to discover and preserve evidence. Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.

Iowa nevertheless argues that a "search incident to citation" is justified because a suspect who is subject to a routine traffic stop may attempt to hide or destroy evidence related to his identity (*e.g.,* a driver's license or vehicle registration), or destroy evidence of another, as yet undetected crime. As for the destruction of evidence relating to identity, if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation. As for destroying evidence of other crimes, the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote.

[T]he authority to conduct a full field search as incident to an arrest [is] a "bright-line rule," which [is] based on the concern for officer safety and destruction or loss of evidence, but which [does] not depend in every case upon the existence of either concern. Here we are asked to extend that "bright-line rule" to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all. We decline to do so. The judgment of the Supreme Court of Iowa is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Notes, Comments, and Questions

After the Court decided *Chimel v. California*, the proper physical scope of a SILA was defined with reasonable clarity in most contexts. In cases in which suspects were arrested in or near cars, however, there was substantial confusion about the proper scope of ensuing searches. In particular, the Court has repeatedly considered whether police may search a car from which a suspect was removed (or from which the suspect otherwise exited) shortly prior to arrest. In *Arizona v. Gant*, the Court considered the continuing vitality of a doctrine set forth in *New York v. Belton,* 453 U.S. 454 (1981). (Because the *Gant* Court describes *Belton* at length, students need not read *Belton* to understand the controversy it created.) Students should note that Justice Stevens, who wrote for the Court, could not have assembled a majority without the vote of Justice Scalia, who wrote separately to explain his discontent with how the majority responded to criticism of *Belton*.

Supreme Court of the United States

Arizona v. Rodney Joseph Gant

Decided April 21, 2009 – 556 U.S. 332

Justice STEVENS delivered the opinion of the Court.

After Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat. Because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search, the Arizona Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in *Chimel v. California,* 395 U.S. 752 (1969), and applied to vehicle searches in *New York v. Belton,* 453 U.S. 454 (1981), did not justify the search in this case. We agree with that conclusion.

Under *Chimel,* police may search incident to arrest only the space within an arrestee's "'immediate control,'" meaning "the area from within which he might gain possession of a weapon or destructible evidence." The safety and evidentiary justifications underlying *Chimel*'s reaching-distance rule determine *Belton*'s scope. Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. [W]e also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

I

On August 25, 1999, acting on an anonymous tip that the residence at 2524 North Walnut Avenue was being used to sell drugs, Tucson police officers Griffith and Reed knocked on the front door and asked to speak to the owner. Gant answered the door and, after identifying himself, stated that he expected the owner to return later. The officers left the residence and conducted a records check, which revealed that Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license.

When the officers returned to the house that evening, they found a man near the back of the house and a woman in a car parked in front of it. After a third officer arrived, they arrested the man for providing a false name and the woman for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived. The officers recognized

his car as it entered the driveway, and Officer Griffith confirmed that Gant was the driver by shining a flashlight into the car as it drove by him. Gant parked at the end of the driveway, got out of his car, and shut the door. Griffith, who was about 30 feet away, called to Gant, and they approached each other, meeting 10–to–12 feet from Gant's car. Griffith immediately arrested Gant and handcuffed him.

Because the other arrestees were secured in the only patrol cars at the scene, Griffith called for backup. When two more officers arrived, they locked Gant in the backseat of their vehicle. After Gant had been handcuffed and placed in the back of a patrol car, two officers searched his car: One of them found a gun, and the other discovered a bag of cocaine in the pocket of a jacket on the backseat.

Gant was charged with two offenses—possession of a narcotic drug for sale and possession of drug paraphernalia (*i.e.,* the plastic bag in which the cocaine was found). He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. Among other things, Gant argued that *Belton* did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. When asked at the suppression hearing why the search was conducted, Officer Griffith responded: "Because the law says we can do it."

The trial court rejected the State's contention that the officers had probable cause to search Gant's car for contraband when the search began but it denied the motion to suppress. Relying on the fact that the police saw Gant commit the crime of driving without a license and apprehended him only shortly after he exited his car, the court held that the search was permissible as a search incident to arrest. A jury found Gant guilty on both drug counts, and he was sentenced to a 3–year term of imprisonment.

After protracted state-court proceedings, the Arizona Supreme Court concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment. The court's opinion discussed at length our decision in *Belton,* which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of an arrest of the vehicle's recent occupant. The court distinguished *Belton* as a case concerning the permissible scope of a vehicle search incident to arrest and concluded that it did not answer "the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure." Relying on our earlier decision in *Chimel,* the court observed that the search-incident-to-arrest exception to the warrant requirement is justified by interests in officer safety and evidence preservation. When "the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer," the court concluded, a "warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence." Accordingly, the court held that the search of Gant's car was unreasonable.

The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles. We therefore granted the State's petition for certiorari.

II

Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Among the exceptions to the warrant requirement is a search incident to a lawful arrest. The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.

In *Chimel,* we held that a search incident to arrest may only include "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

In *Belton,* we considered *Chimel*'s application to the automobile context. A lone police officer in that case stopped a speeding car in which Belton was one of four occupants. While asking for the driver's license and registration, the officer smelled burnt marijuana and observed an envelope on the car floor marked "Supergold"—a name he associated with marijuana. Thus having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees, the officer "'split them up into four separate areas of the Thruway … so they would not be in physical touching area of each other'" and searched the vehicle, including the pocket of a jacket on the backseat, in which he found cocaine.

The New York Court of Appeals found the search unconstitutional, concluding that after the occupants were arrested the vehicle and its contents were "safely within the exclusive custody and control of the police." The State asked this Court to consider whether the exception recognized in *Chimel* permits an officer to search "a jacket found inside an automobile while the automobile's four occupants, all under arrest, are standing unsecured around the vehicle." We granted certiorari because "courts ha[d] found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile."

[W]e held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers therein. That holding was based in large part on our assumption "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach.'"

The Arizona Supreme Court read our decision in *Belton* as merely delineating "the proper scope of a search of the interior of an automobile" incident to an arrest. That is, *when* the passenger compartment is within an arrestee's reaching distance, *Belton* supplies the generalization that the entire compartment and any containers therein may be reached. On that view of *Belton,* the state court concluded that the search of Gant's car was unreasonable because Gant clearly could not have accessed his car at the time of the search. It also found that no other exception to the warrant requirement applied in this case.

Gant now urges us to adopt the reading of *Belton* followed by the Arizona Supreme Court.

III

Despite the textual and evidentiary support for the Arizona Supreme Court's reading of *Belton,* our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. This reading may be attributable to Justice Brennan's dissent in *Belton,* in which he characterized the Court's holding as resting on the "fiction … that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car." Under the majority's approach, he argued, "the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car" before conducting the search.

Since we decided *Belton,* Courts of Appeals have given different answers to the question whether a vehicle must be within an arrestee's reach to justify a vehicle search incident to arrest, but Justice Brennan's reading of the Court's opinion has predominated. As Justice O'Connor observed, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." Justice SCALIA has similarly noted that, although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in "this precise factual scenario … are legion." Indeed, some courts have upheld searches under *Belton* "even when … the handcuffed arrestee has already left the scene."

Under this broad reading of *Belton,* a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Although it does not follow from *Chimel,* we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others … the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton,* which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. Because police could not

reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

IV

The State does not seriously disagree with the Arizona Supreme Court's conclusion that Gant could not have accessed his vehicle at the time of the search, but it nevertheless asks us to uphold the search of his vehicle under the broad reading of *Belton* discussed above. The State argues that *Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle.

For several reasons, we reject the State's argument. First, the State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection. It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

At the same time as it undervalues these privacy concerns, the State exaggerates the clarity that its reading of *Belton* provides. Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene. The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a "bright line."

Contrary to the State's suggestion, a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests. Under our view, *Belton* and *Thornton [v. United States,* 541 U.S.615 (2004)] permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand.

These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. For these reasons, we are unpersuaded by the State's arguments that a broad reading of *Belton* would meaningfully further law enforcement interests and justify a substantial intrusion on individuals' privacy.

VI

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed.

Justice SCALIA, concurring.

To determine what is an "unreasonable" search within the meaning of the Fourth Amendment, we look first to the historical practices the Framers sought to preserve; if those provide inadequate guidance, we apply traditional standards of reasonableness. Since the historical scope of officers' authority to search vehicles incident to arrest is uncertain, traditional standards of reasonableness govern. It is abundantly clear that those standards do not justify what I take to be the rule set forth in *Belton* and *Thornton:* that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons. When an arrest is made in connection with a roadside stop, police virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car.

Law enforcement officers face a risk of being shot whenever they pull a car over. But that risk is at its height at the time of the

initial confrontation; and it is *not at all* reduced by allowing a search of the stopped vehicle after the driver has been arrested and placed in the squad car. I observed in *Thornton* that the Government had failed to provide a single instance in which a formerly restrained arrestee escaped to retrieve a weapon from his own vehicle; Arizona and its *amici* have not remedied that significant deficiency in the present case.

It must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested. Where no arrest is made, we have held that officers may search the car if they reasonably believe "the suspect is dangerous and … may gain immediate control of weapons." In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed.

Justice STEVENS acknowledges that an officer-safety rationale cannot justify all vehicle searches incident to arrest, but asserts that that is not the rule *Belton* and *Thornton* adopted. Justice STEVENS would therefore retain the application of *Chimel v. California,* 395 U.S. 752 (1969), in the car-search context but would apply in the future what he believes our cases held in the past: that officers making a roadside stop may search the vehicle so long as the "arrestee is within reaching distance of the passenger compartment at the time of the search." I believe that this standard fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search. In my view we should simply abandon the *Belton–Thornton* charade of officer safety and overrule those cases. I would hold that a vehicle search incident to arrest is *ipso facto* "reasonable" only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred. Because respondent was arrested for driving without a license (a crime for which no evidence could be expected to be found in the vehicle), I would hold in the present case that the search was unlawful.

Justice ALITO [in dissent] insists that the Court must demand a good reason for abandoning prior precedent. That is true enough, but it seems to me ample reason that the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results. We should recognize *Belton*'s fanciful reliance upon officer safety for what it was: "a return to the broader sort of [evidence-gathering] search incident to arrest that we allowed before *Chimel*."

Justice ALITO argues that there is no reason to adopt a rule limiting automobile-arrest searches to those cases where the search's object is evidence of the crime of arrest. I disagree. This formulation of officers' authority both preserves the outcomes of our prior cases and tethers the scope and rationale of the doctrine to the triggering event. *Belton,* by contrast, allowed searches precisely when its exigency-based rationale was least applicable: The fact of the arrest in the automobile context makes searches on exigency grounds *less* reasonable, not more. I also disagree with Justice ALITO's conclusory assertion that this standard will be difficult to administer in practice; the ease of its application in this case would suggest otherwise.

No other Justice, however, shares my view that application of *Chimel* in this context should be entirely abandoned. It seems to me unacceptable for the Court to come forth with a 4–to–1–to–4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice STEVENS. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.

Notes, Comments, and Questions

Consider what is included in the "passenger compartment." Does it include the trunk? What if the car is a hatchback or station wagon? Are the wheel wells or undercarriage part of the passenger compartment? What other warrant exceptions might apply to trunk searches?

Although some have argued that *Gant* implicitly overruled *Belton*, one could argue that the majority instead properly confined *Belton* to facts similar to those that justified the *Belton* decision itself. In *Belton*, a police officer stopped a car for speeding on the New York State Thruway. The Thruway is a system of highways covering hundreds of miles and is among the busiest toll roads in the United States.

The car contained four men (including Belton), and the officer was alone. The officer directed the four men to stand apart from one another so that they could not touch each other. By contrast, in *Gant*, multiple officers saw Gant park his car in a driveway. Perhaps the facts of *Belton*—a single officer dealing with multiple suspects on a busy highway—justified a search incident to lawful arrest in a way that the facts of *Gant* did not. In other words, perhaps police officers and courts had erroneously applied the rule of *Belton* to inappropriate circumstances, and the *Gant* Court clarified the Court's prior holding. Then again, perhaps *Belton* was written too broadly, and the passage of time allowed the Court to see its own error, which it corrected in *Gant*. In any event,

students would be wise to memorize the rule set forth in *Gant*, which is easy for bar examiners (and law professors) to test.

In 1973, the Court decided in *United States v. Robinson*, 414 U.S. 218, that police may lawfully open a cigarette package found upon an arrestee's person during a search incident to arrest. Even though the arresting officer had no particular reason to believe that the cigarette package contained contraband or evidence of crime, the Court held the search permissible. The majority concluded that, so long as officers stay within the temporal and geographic constraints imposed in cases such as *Chimel*, no further quantum of evidence is required to justify a thorough search of the arrestee's person, clothing, and immediate surroundings, along with inspection of papers and effects found during these searches. Accordingly, other than the probable cause necessary to justify the underlying arrest, no probable cause (or even reasonable suspicion) is required for a SILA.

Although the rule of *Robinson* may seem relatively clear at first, the case did not resolve the common issue of locked containers seized incident to arrest; nor did it explicitly address the issue of closed (but not locked) containers found near (but not on the person of) the arrestee. In *United States v Chadwick*, 433 U.S. 1 (1977) (abrogated on grounds unrelated to SILA law), the Court held that opening an arrestee's luggage ninety minutes after the arrest could not be justified as "incident" to the arrest—the time delay was too great. But the Court did not decide whether a locked (or otherwise closed) container could be opened closer in time to the arrest. Lower courts have split on the question.[2]

When the Court decided *Riley v. California* in 2014, it considered facts about a "container" that would have been unimaginable in 1973. Just a few decades ago, no arrestee had in his pocket a mini-computer full of private data, much less one capable of connecting to even more powerful computers with vast repositories of additional private information. Today, most arrestees carry such devices. The question before the Court was whether the rule from *Robinson* allows police to obtain data from a mobile phone found during a search incident to lawful arrest.

Supreme Court of the United States

David Leon Riley v. California

Decided June 25, 2014 – 134 S. Ct. 2473

Chief Justice ROBERTS delivered the opinion of the Court.

[This] case[] raise[s] a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

I

A

[P]etitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood.

An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also seized a cell phone from Riley's pants pocket. According to Riley's uncontradicted assertion, the phone was a "smart phone," a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters "CK"—a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he "went through" Riley's phone "looking for evidence, because ... gang members will often video themselves with guns or take pictures of themselves with the guns." Although there was "a lot of stuff" on the phone, particular files that "caught [the detective's] eye" included videos of young men sparring while someone yelled encouragement using the moniker "Blood." The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier.

Riley was ultimately charged, in connection with that earlier shooting, with firing at an occupied vehicle, assault with a

semiautomatic firearm, and attempted murder. The State alleged that Riley had committed those crimes for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence. Prior to trial, Riley moved to suppress all evidence that the police had obtained from his cell phone. He contended that the searches of his phone violated the Fourth Amendment, because they had been performed without a warrant and were not otherwise justified by exigent circumstances. The trial court rejected that argument. At Riley's trial, police officers testified about the photographs and videos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison.

The California Court of Appeal affirmed. The court relied on [] California Supreme Court [precedent], which held that the Fourth Amendment permits a warrantless search of cell phone data incident to an arrest, so long as the cell phone was immediately associated with the arrestee's person.

The California Supreme Court denied Riley's petition for review and we granted certiorari.

II

In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.

The [] case[] before us concern[s] the reasonableness of a warrantless search incident to a lawful arrest. In 1914, this Court first acknowledged in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement. Indeed, the label "exception" is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant.

Although the existence of the exception for such searches has been recognized for a century, its scope has been debated for nearly as long. That debate has focused on the extent to which officers may search property found on or near the arrestee. [The Court then discussed the development of the law in *Chimel, Robinson,* and *Gant*.]

III

[We now must] decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. [The] phone[] [is] based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided.

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."

On the government interest side, [the Court held in *Robinson*] that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, any privacy interests retained by an individual after arrest [are] significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search [we have previously] considered.

We therefore hold [] that officers must generally secure a warrant before conducting such a search.

A

In doing so, we do not overlook ... that searches of a person incident to arrest, "while based upon the need to disarm and to discover evidence," are reasonable regardless of "the probability in a particular arrest situation that weapons or evidence would in fact be found." Rather than requiring [] "case-by-case adjudication" ... we ask instead whether application of the search incident to arrest doctrine to this particular category of effects would "untether the rule from the justifications underlying the [] exception."

1

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

Perhaps the same might have been said of the cigarette pack seized from Robinson's pocket. Once an officer gained control of the pack, it was unlikely that Robinson could have accessed the pack's contents. But unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest. The officer in *Robinson* testified that he could not identify the objects in the cigarette pack but knew they were not cigarettes. Given that, a further search was a reasonable protective measure. No such unknowns exist with respect to digital data.

California suggest[s] that a search of cell phone data might help ensure officer safety in more indirect ways, for example by alerting officers that confederates of the arrestee are headed to the scene. There is undoubtedly a strong government interest in warning officers about such possibilities, but [] California offers [no] evidence to suggest that their concerns are based on actual experience. The proposed consideration would also represent a broadening of *Chimel*'s concern that an *arrestee himself* might grab a weapon and use it against an officer "to resist arrest or effect his escape." And any such threats from outside the arrest scene do not "lurk[ ] in all custodial arrests." Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board. To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances.

2

California focus[es] primarily on ... preventing the destruction of evidence. Riley concede[s] that officers could have seized and secured [his] cell phone[] to prevent destruction of evidence while seeking a warrant. That is a sensible concession. And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

California argue[s] that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. As an initial matter, these broader concerns about the loss of evidence are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. With respect to remote wiping, the Government's primary concern turns on the actions of third parties who are not present at the scene of arrest. And data encryption is even further afield. [That] focuses on the ordinary operation of a phone's security features, apart from *any* active attempt by a defendant or his associates to conceal or destroy evidence upon arrest.

We have also been given little reason to believe that either problem is prevalent. Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away.

In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in a [] "Faraday bag."

To the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If "the police are truly confronted with a 'now or never' situation," they may be able to rely on exigent circumstances to search the phone immediately.

B

The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody.

The fact that an arrestee has diminished privacy interests does not, [however,] mean that the Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." To the contrary, when "privacy-related

concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee."

The [Government] asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches [] of physical items. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

1

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick,* rather than a container the size of the cigarette package in *Robinson*.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.

In 1926, Learned Hand observed (in an opinion later quoted in *Chimel*) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

2

To further complicate the scope of the privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter. But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at

the tap of a screen. Moreover, the same type of data may be stored locally on the device for one user and in the cloud for another. [O]fficers searching a phone's data would not typically know whether the information they are viewing was stored locally at the time of the arrest or has been pulled from the cloud. The possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee is yet another reason that the privacy interests here dwarf those in *Robinson*.

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency."

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when '"the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury.

In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone. The defendants here recognize—indeed, they stress—that such fact-specific threats may justify a warrantless search of cell phone data. The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life." The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

We reverse and remand the case for further proceedings not inconsistent with this opinion.

Justice ALITO, concurring in part and concurring in the judgment.

I agree that we should not mechanically apply the rule used in the predigital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.

The Court strikes this balance in favor of privacy interests with respect to all cell phones and all information found in them, and this approach leads to anomalies. For example, the Court's broad holding favors information in digital form over information in hard-copy form. Suppose that two suspects are arrested. Suspect number one has in his pocket a monthly bill for his land-line phone, and the bill lists an incriminating call to a long-distance number. He also has in his a wallet a few snapshots, and one of these is incriminating. Suspect number two has in his pocket a cell phone, the call log of which shows a call to the same incriminating number. In addition, a number of photos are stored in the memory of the cell phone, and one of these is incriminating. Under established law, the police may seize and examine the phone bill and the snapshots in the wallet without obtaining a warrant, but under the Court's holding today, the information stored in the cell phone is out.

While the Court's approach leads to anomalies, I do not see a workable alternative. Law enforcement officers need clear rules regarding searches incident to arrest, and it would take many cases and many years for the courts to develop more nuanced rules. And during that time, the nature of the electronic devices that ordinary Americans carry on their persons would continue to change.

Notes, Comments, and Questions

Although the Court considered a different question in *Carpenter v. United States* (Chapter 5)—the issue was whether a "search" occurred at all when police obtained historical mobile phone location data—students likely noticed that the majority opinions in *Carpenter* and *Riley* (both by Chief Justice Roberts) made similar observations about the importance of protecting the privacy of data related to modern telephones. As Justice Alito noted in his *Riley* concurrence, the Court will occasionally reach results that are not satisfying to anyone desiring perfect theoretical coherence in the Court's Fourth Amendment jurisprudence. The Court must decide the cases before it, and its case-by-case balance of competing interests (such as privacy and crime control) will depend on the facts of individual cases, as well as the march of technological change.

Let's reconsider Jay-Z's predicament in "99 Problems." If an officer arrests Jay-Z for reckless driving after catching him driving 75 in a 55 mph zone, can the officer search the trunk for drugs?

What if instead the officer stops Jay-Z for speeding, looks up the license plate, and sees that Los Angeles County has an outstanding warrant for Jay-Z's arrest for the crime of marijuana possession. Now can the officer search the trunk?

Two additional points to consider:

When an unarrested third party is near a car, there may be authority for a "sweep" (to quickly search the vehicle for dangerous items third parties could use).

When an unarrested third party is at a house that police wish to search, police likely can secure the house temporarily as they seek a warrant (to prevent mischief by, say, Chimel's wife). This rule applies only if police have probable cause; otherwise, they cannot obtain a warrant.

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2.10: Chapter 11 - The Warrant Requirement- Exceptions (Part 3)

Waiving the Warrant Requirement: Consent

As is true of most constitutional rights, the right to be free from warrantless searches can be waived. Police investigations rely every day on such consent. Owners of vehicles and luggage allow officers to search their effects, and occupants of houses allow officers to enter and look around. There is no dispute about the principle that genuine consent serves as a valid substitute for a search warrant. The controversial questions include what is necessary for consent to be valid, who may provide valid consent, and whether certain police tactics render otherwise-valid consent ineffective.

Supreme Court of the United States

Merle R. Schneckloth v. Robert Clyde Bustamonte

Decided May 29, 1973 – 412 U.S. 218

Mr. Justice STEWART delivered the opinion of the Court.

It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is "per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. The constitutional question in the present case concerns the definition of "consent" in this Fourth and Fourteenth Amendment context.

I

The respondent was brought to trial in a California court upon a charge of possessing a check with intent to defraud. He moved to suppress the introduction of certain material as evidence against him on the ground that the material had been acquired through an unconstitutional search and seizure. In response to the motion, the trial judge conducted an evidentiary hearing where it was established that the material in question had been acquired by the State under the following circumstances:

While on routine patrol in Sunnyvale, California, at approximately 2:40 in the morning, Police Officer James Rand stopped an automobile when he observed that one headlight and its license plate light were burned out. Six men were in the vehicle. Joe Alcala and the respondent, Robert Bustamonte, were in the front seat with Joe Gonzales, the driver. Three older men were seated in the rear. When, in response to the policeman's question, Gonzales could not produce a driver's license, Officer Rand asked if any of the other five had any evidence of identification. Only Alcala produced a license, and he explained that the car was his brother's. After the six occupants had stepped out of the car at the officer's request and after two additional policemen had arrived, Officer Rand asked Alcala if he could search the car. Alcala replied, "Sure, go ahead." Prior to the search no one was threatened with arrest and, according to Officer Rand's uncontradicted testimony, it "was all very congenial at this time." Gonzales testified that Alcala actually helped in the search of the car, by opening the trunk and glove compartment. In Gonzales' words: "[T]he police officer asked Joe [Alcala], he goes, 'Does the trunk open?' And Joe said, 'Yes.' He went to the car and got the keys and opened up the trunk." Wadded up under the left rear seat, the police officers found three checks that had previously been stolen from a car wash.

The trial judge denied the motion to suppress, and the checks in question were admitted in evidence at Bustamonte's trial. On the basis of this and other evidence he was convicted, and the California Court of Appeal for the First Appellate District affirmed the conviction. The California Supreme Court denied review.

Thereafter, the respondent sought a writ of habeas corpus in a federal district court. It was denied. On appeal, the Court of Appeals for the Ninth Circuit, relying on its prior decisions set aside the District Court's order. The appellate court reasoned that a consent was a waiver of a person's Fourth and Fourteenth Amendment rights, and that the State was under an obligation to demonstrate, not only that the consent had been uncoerced, but that it had been given with an understanding that it could

be freely and effectively withheld. Consent could not be found, the court held, solely from the absence of coercion and a verbal expression of assent. Since the District Court had not determined that Alcala had known that his consent could have been withheld and that he could have refused to have his vehicle searched, the Court of Appeals vacated the order denying the writ and remanded the case for further proceedings. We granted certiorari to determine whether the Fourth and Fourteenth Amendments require the showing thought necessary by the Court of Appeals.

II

It is important to make it clear at the outset what is not involved in this case. The respondent concedes that a search conducted pursuant to a valid consent is constitutionally permissible. [W]e [have] recognized that a search authorized by consent is wholly valid. And similarly the State concedes that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."

The precise question in this case, then, is what must the prosecution prove to demonstrate that a consent was "voluntarily" given.

A

The most extensive judicial exposition of the meaning of "voluntariness" has been developed in those cases in which the Court has had to determine the "voluntariness" of a defendant's confession for purposes of the Fourteenth Amendment.

Those cases yield no talismanic definition of "voluntariness," mechanically applicable to the host of situations where the question has arisen. "The notion of 'voluntariness,'" Mr. Justice Frankfurter once wrote, "is itself an amphibian." It cannot be taken literally to mean a "knowing" choice. "Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind." It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of "voluntariness."

This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.[1]

B

Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants. Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject

of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

The approach of the Ninth Circuit finds no support in any of our decisions that have attempted to define the meaning of "voluntariness." Its ruling, that the State must affirmatively prove that the subject of the search knew that he had a right to refuse consent, would, in practice, create serious doubt whether consent searches could continue to be conducted. There might be rare cases where it could be proved from the record that a person in fact affirmatively knew of his right to refuse—such as a case where he announced to the police that if he didn't sign the consent form, "you [police] are going to get a search warrant;" or a case where by prior experience and training a person had clearly and convincingly demonstrated such knowledge. But more commonly where there was no evidence of any coercion, explicit or implicit, the prosecution would nevertheless be unable to demonstrate that the subject of the search in fact had known of his right to refuse consent.

The very object of the inquiry—the nature of a person's subjective understanding—underlines the difficulty of the prosecution's burden under the rule applied by the Court of Appeals in this case. Any defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent. And the near impossibility of meeting this prosecutorial burden suggests why this Court has never accepted any such litmus-paper test of voluntariness.

One alternative that would go far toward proving that the subject of a search did know he had a right to refuse consent would be to advise him of that right before eliciting his consent. That, however, is a suggestion that has been almost universally repudiated by both federal and state courts, and, we think, rightly so. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. And, while surely a closer question, these situations are still immeasurably, far removed from "custodial interrogation" where, in *Miranda v. Arizona[,* 384 U.S. 436 (1966)] we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation. Indeed, in language applicable to the typical consent search, we refused to extend the need for warnings.

Consequently, we cannot accept the position of the Court of Appeals in this case that proof of knowledge of the right to refuse consent is a necessary prerequisite to demonstrating a "voluntary" consent. Rather it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches.

In short, neither this Court's prior cases, nor the traditional definition of "voluntariness" requires proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search.

C

It is said, however, that a "consent" is a "waiver" of a person's rights under the Fourth and Fourteenth Amendments. The argument is that by allowing the police to conduct a search, a person "waives" whatever right he had to prevent the police from searching. It is argued that under the doctrine of *Johnson v. Zerbst*, 304 U.S. 458 (1938), to establish such a "waiver" the State must demonstrate "an intentional relinquishment or abandonment of a known right or privilege."

But these standards were enunciated in *Johnson* in the context of the safeguards of a fair criminal trial. Our cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection. As Mr. Justice Black once observed for the Court: "'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law." With respect to procedural due process, for example, the Court has acknowledged that waiver is possible, while explicitly leaving open the question whether a "knowing and intelligent" waiver need be shown.

The requirement of a "knowing" and "intelligent" waiver was articulated in a case involving the validity of a defendant's decision to forego a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process. *Johnson v. Zerbst* dealt with the denial of counsel in a federal criminal trial.

Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial. Hence, the standard of a knowing and intelligent waiver has most often been applied to test the validity of a waiver of counsel, either at trial, or upon a guilty plea. The guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial, and any alleged waiver must meet the strict standard of an intentional relinquishment of a "known" right. But the "trial" guarantees that have been applied to the "pretrial" stage of the criminal process are similarly designed to protect the fairness of the trial itself.

There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Rather, the Fourth Amendment protects the "security of one's privacy against arbitrary intrusion by the police ...." The Fourth Amendment "is not an adjunct to the ascertainment of truth." The guarantees of the Fourth Amendment stand "as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone."

Nor can it even be said that a search, as opposed to an eventual trial, is somehow "unfair" if a person consents to a search. While the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search. The actual conduct of the search may be precisely the same as if the police had obtained a warrant. And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment.

D

Much of what has already been said disposes of the argument that the Court's decision in the *Miranda* case requires the conclusion that knowledge of a right to refuse is an indispensable element of a valid consent. The considerations that informed the Court's holding in *Miranda* are simply inapplicable in the present case. In *Miranda* the Court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation.

In this case, there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite. There is no reason to believe, under circumstances such as are present here, that the response to a policeman's question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response.

It is also argued that the failure to require the Government to establish knowledge as a prerequisite to a valid consent, will relegate the Fourth Amendment to the special province of "the sophisticated, [the] knowledgeable and the privileged." We cannot agree. The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights; and the voluntariness of any statement taken under those conditions has been carefully scrutinized to determine whether it was in fact voluntarily given.

E

Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Because the California court followed these principles in affirming the respondent's conviction, and because the Court of Appeals for the Ninth Circuit in remanding for an evidentiary hearing required more, its judgment must be reversed.

Mr. Justice DOUGLAS, dissenting.

I agree with the Court of Appeals that "verbal assent" to a search is not enough, that the fact that consent was given to the search does not imply that the suspect knew that the alternative of a refusal existed. As that court stated:

"[U]nder many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law."

[W]hether Alcala knew he had the right to refuse, we do not know. All the Court of Appeals did was to remand the case to the District Court for a finding—and if necessary, a hearing on that issue.

I would let the case go forward on that basis. The long, time-consuming contest in this Court might well wash out. At least we could be assured that, if it came back, we would not be rendering an advisory opinion. Had I voted to grant this petition, I would suggest we dismiss it as improvidently granted. But, being in the minority, I am bound by the Rule of Four.

Mr. Justice BRENNAN, dissenting.

[T]he search of the vehicle can be justified solely on the ground that the owner's brother gave his consent—that is, that he waived his Fourth Amendment right "to be secure" against an otherwise "unreasonable" search. The Court holds today that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence. In my view, the Court's conclusion is supported neither by "linguistics," nor by "epistemology," nor, indeed, by "common sense." I respectfully dissent.

Mr. Justice MARSHALL, dissenting.

I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made. But today the Court reaches the curious result that one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search. I cannot agree, and therefore dissent.

I believe that the Court misstates the true issue in this case. That issue is not, as the Court suggests whether the police overbore Alcala's will in eliciting his consent, but rather, whether a simple statement of assent to search, without more, should be sufficient to permit the police to search and thus act as a relinquishment of Alcala's constitutional right to exclude the police. This Court has always scrutinized with great care claims that a person has forgone the opportunity to assert constitutional rights. I see no reason to give the claim that a person consented to a search any less rigorous scrutiny. Every case in this Court involving this kind of search has heretofore spoken of consent as a waiver. Perhaps one skilled in linguistics or epistemology can disregard those comments, but I find them hard to ignore.

The Court assumes that the issue in this case is: what are the standards by which courts are to determine that consent is voluntarily given? It then imports into the law of search and seizure standards developed to decide entirely different questions about coerced confessions.

In contrast, this case deals not with "coercion," but with "consent," a subtly different concept to which different standards have been applied in the past. Freedom from coercion is a substantive right, guaranteed by the Fifth and Fourteenth Amendments. Consent, however, is a mechanism by which substantive requirements, otherwise applicable, are avoided. In the context of the Fourth Amendment, the relevant substantive requirements are that searches be conducted only after evidence justifying them has been submitted to an impartial magistrate for a determination of probable cause. There are, of course, exceptions to these requirements based on a variety of exigent circumstances that make it impractical to invalidate a search simply because the police failed to get a warrant. But none of the exceptions relating to the overriding needs of law enforcement are applicable when a search is justified solely by consent. On the contrary, the needs of law enforcement are significantly more attenuated, for probable cause to search may be lacking but a search permitted if the subject's consent has been obtained. Thus, consent searches are permitted, not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights. Our prior decisions simply do not support the view that a meaningful choice has been made solely because no coercion was brought to bear on the subject.

My approach to the case is straight-forward and, to me, obviously required by the notion of consent as a relinquishment of Fourth Amendment rights. I am at a loss to understand why consent "cannot be taken literally to mean a 'knowing' choice." In fact, I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all.

I must conclude with some reluctance that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course it would be "practical" for the police to ignore

the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

Notes, Comments, and Questions

The Court has affirmed the principles of *Schneckloth v. Bustamonte* repeatedly. The most prominent cases have involved searches aboard public buses.

The Court addressed consent searches on Greyhound buses in *United States v. Drayton,* 536 U.S. 194 (2002). There, the Court held that police officers could board a bus and ask for permission to search the property of passengers, as long as under the totality of the circumstances the officers obtained valid consent. The majority reiterated that officers need not advise passengers of their right to leave or to refuse consent. Previously, in *Florida v. Bostick*, 501 U.S.429 (1991), the Court held that officers may approach bus passengers at random to ask questions and request their consent to searches, provided "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *See also Ohio v. Robinette*, 519 U.S. 33 (1996) (rejecting rule created by Ohio judges that required officers at traffic stops to state "'At this time you legally are free to go' or [] words of similar import" before initiating extra questioning or seeking consent to search).

Consider the following scenarios:

A police officer assigned to be a "school resource officer" at a high school confronts a student who has been sent to the principal's office for disrespectful classroom behavior. The officer says, "You must be on drugs to act so stupid. Let me see what's in that backpack, and then you can go see the principal." If the student hands over the backpack, does the officer have valid consent to search it? Why or why not?

A police officer has probable cause to believe that drugs are being stored at a certain house. The officer, without a warrant, knocks on the door. When someone answers, the officer says, "I could get a warrant to search this house for drugs, but I'd rather save myself the trouble. If you let me look around the house and I don't find anything, I'll move on to other business. But if you refuse, I'll be back soon with a warrant, and my partner and I will search this place from top to bottom." If the person at the door admits the officer inside, does the officer have valid consent to enter and search the house? Why or why not?

Now imagine that two people are present when police request consent to enter a home. One person consents while the other says, "Stay out!" Consent or no consent? Why or why not? The Court addresses this issue in the next case.

Supreme Court of the United States

Georgia v. Scott Fitz Randolph

Decided March 22, 2006 – 547 U.S. 103

Justice SOUTER delivered the opinion of the Court.

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.

I

Respondent Scott Randolph and his wife, Janet, separated in late May 2001, when she left the marital residence in Americus, Georgia, and went to stay with her parents in Canada, taking their son and some belongings. In July, she returned to the Americus house with the child, though the record does not reveal whether her object was reconciliation or retrieval of remaining possessions.

On the morning of July 6, she complained to the police that after a domestic dispute her husband took their son away, and when

officers reached the house she told them that her husband was a cocaine user whose habit had caused financial troubles. She mentioned the marital problems and said that she and their son had only recently returned after a stay of several weeks with her parents. Shortly after the police arrived, Scott Randolph returned and explained that he had removed the child to a neighbor's house out of concern that his wife might take the boy out of the country again; he denied cocaine use, and countered that it was in fact his wife who abused drugs and alcohol.

One of the officers, Sergeant Murray, went with Janet Randolph to reclaim the child, and when they returned she not only renewed her complaints about her husband's drug use, but also volunteered that there were "'items of drug evidence'" in the house. Sergeant Murray asked Scott Randolph for permission to search the house, which he unequivocally refused.

The sergeant turned to Janet Randolph for consent to search, which she readily gave. She led the officer upstairs to a bedroom that she identified as Scott's, where the sergeant noticed a section of a drinking straw with a powdery residue he suspected was cocaine. He then left the house to get an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search and apply for a warrant. When Sergeant Murray returned to the house, Janet Randolph withdrew her consent. The police took the straw to the police station, along with the Randolphs. After getting a search warrant, they returned to the house and seized further evidence of drug use, on the basis of which Scott Randolph was indicted for possession of cocaine.

He moved to suppress the evidence, as products of a warrantless search of his house unauthorized by his wife's consent over his express refusal. The trial court denied the motion, ruling that Janet Randolph had common authority to consent to the search.

The Court of Appeals of Georgia reversed and was itself sustained by the State Supreme Court, principally on the ground that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." The Supreme Court of Georgia acknowledged this Court's holding in *Matlock [,* 415 U.S. 164 (1974)] that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared" and found *Matlock* distinguishable just because Scott Randolph was not "absent" from the colloquy on which the police relied for consent to make the search. The State Supreme Court stressed that the officers in *Matlock* had not been "faced with the physical presence of joint occupants, with one consenting to the search and the other objecting." It held that an individual who chooses to live with another assumes a risk no greater than "'an inability to control access to the premises during [his] absence,'" and does not contemplate that his objection to a request to search commonly shared premises, if made, will be overlooked.

We granted certiorari to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search. We now affirm.

II

To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se,* one "jealously and carefully drawn" exception recognizes the validity of searches with the voluntary consent of an individual possessing authority. That person might be the householder against whom evidence is sought or a fellow occupant who shares common authority over property, when the suspect is absent, and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant. None of our co-occupant consent-to-search cases, however, has presented the further fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained. The significance of such a refusal turns on the underpinnings of the co-occupant consent rule, as recognized since *Matlock*.

A

The defendant in that case was arrested in the yard of a house where he lived with a Mrs. Graff and several of her relatives, and was detained in a squad car parked nearby. When the police went to the door, Mrs. Graff admitted them and consented to a search of the house. In resolving the defendant's objection to use of the evidence taken in the warrantless search, we said that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."

The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules. *Matlock* accordingly not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests.

B

Matlock's example of common understanding is readily apparent. When someone comes to the door of a domestic dwelling with a baby at her hip, as Mrs. Graff did, she shows that she belongs there, and that fact standing alone is enough to tell a law enforcement officer or any other visitor that if she occupies the place along with others, she probably lives there subject to the assumption tenants usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. As *Matlock* put it, shared tenancy is understood to include an "assumption of risk," on which police officers are entitled to rely, and although some group living together might make an exceptional arrangement that no one could admit a guest without the agreement of all, the chance of such an eccentric scheme is too remote to expect visitors to investigate a particular household's rules before accepting an invitation to come in. So, *Matlock* relied on what was usual and placed no burden on the police to eliminate the possibility of atypical arrangements, in the absence of reason to doubt that the regular scheme was in place.

It is also easy to imagine different facts on which, if known, no common authority could sensibly be suspected. A person on the scene who identifies himself, say, as a landlord or a hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant. A tenant in the ordinary course does not take rented premises subject to any formal or informal agreement that the landlord may let visitors into the dwelling, and a hotel guest customarily has no reason to expect the manager to allow anyone but his own employees into his room. In these circumstances, neither state-law property rights, nor common contractual arrangements, nor any other source points to a common understanding of authority to admit third parties generally without the consent of a person occupying the premises. And when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent; "a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted," but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents' bedroom.

C

To begin with, it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions.

Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior, a fact reflected in a standard formulation of domestic property law, that "[e]ach cotenant ... has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants." [T]here is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.

D

Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. Accordingly, in the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches, the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place.

E

There are two loose ends, the first being the explanation given in *Matlock* for the constitutional sufficiency of a co-tenant's consent to enter and search: it "rests ... on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right ...." If *Matlock's* co-tenant is giving permission "in his own right," how can his "own right" be eliminated by another tenant's objection? The answer appears in the very footnote from which the quoted statement is taken: the "right" to admit the police to which *Matlock* refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. Thus, to ask whether the consenting tenant has the right to admit the police when a

physically present fellow tenant objects is not to question whether some property right may be divested by the mere objection of another. It is, rather, the question whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection. The *Matlock* Court did not purport to answer this question.

The second loose end is the significance of *Matlock* and *Rodriguez* after today's decision.[2] Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. For the very reason that *Rodriguez* held it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, we think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. There is no ready reason to believe that efforts to invite a refusal would make a difference in many cases, whereas every co-tenant consent case would turn into a test about the adequacy of the police's efforts to consult with a potential objector. Better to accept the formalism of distinguishing *Matlock* from this case than to impose a requirement, time consuming in the field and in the courtroom, with no apparent systemic justification. The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent, albeit imprudently, a fact that undercuts any argument that the police should try to locate a suspected inhabitant because his denial of consent would be a foregone conclusion.

III

This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained.

The judgment of the Supreme Court of Georgia is therefore affirmed.

Chief Justice ROBERTS, with whom Justice SCALIA joins, dissenting.

The Court creates constitutional law by surmising what is typical when a social guest encounters an entirely atypical situation. The rule the majority fashions does not implement the high office of the Fourth Amendment to protect privacy, but instead provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room. And the cost of affording such random protection is great, as demonstrated by the recurring cases in which abused spouses seek to authorize police entry into a home they share with a nonconsenting abuser.

The correct approach to the question presented is clearly mapped out in our precedents: The Fourth Amendment protects privacy. If an individual shares information, papers, *or places* with another, he assumes the risk that the other person will in turn share access to that information or those papers *or places* with the government. And just as an individual who has shared illegal plans or incriminating documents with another cannot interpose an objection when that other person turns the information over to the government, just because the individual happens to be present at the time, so too someone who shares a place with another cannot interpose an objection when that person decides to grant access to the police, simply because the objecting individual happens to be present.

A warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it. Co-occupants have

"assumed the risk that one of their number might permit [a] common area to be searched." Just as Mrs. Randolph could walk upstairs, come down, and turn her husband's cocaine straw over to the police, she can consent to police entry and search of what is, after all, her home, too.

* * *

As the *Randolph* majority noted, police may rely on the "consent of an occupant who shares, or is reasonably believed to share, authority over the area in common." In other words, warrantless entry is valid—that is, reasonable—"when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, *but who in fact does not do so*." *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (emphasis added).

In *Randolph*, the Court decided that when one occupant consents to a search and another occupant concurrently refuses consent, the refusal gets priority. A clever student might ask, what happens if the occupant who refuses consent somehow disappears from the scene? If he takes a short walk, for example, or is rushed to the hospital after suffering a heart attack, does his refusal keep working?

Supreme Court of the United States

Walter Fernandez v. California

Decided Feb. 25, 2014 – 571 U.S. 292

Justice ALITO delivered the opinion of the Court.

Our cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. In *Georgia v. Randolph* we recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, we consider whether *Randolph* applies if the objecting occupant is absent when another occupant consents. Our opinion in *Randolph* took great pains to emphasize that its holding was limited to situations in which the objecting occupant is physically present. We therefore refuse to extend *Randolph* to the very different situation in this case, where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared.

I

A

The events involved in this case occurred in Los Angeles in October 2009. After observing Abel Lopez cash a check, petitioner Walter Fernandez approached Lopez and asked about the neighborhood in which he lived. When Lopez responded that he was from Mexico, Fernandez laughed and told Lopez that he was in territory ruled by the "D.F.S.," *i.e.,* the "Drifters" gang. Petitioner then pulled out a knife and pointed it at Lopez' chest. Lopez raised his hand in self-defense, and petitioner cut him on the wrist.

Lopez ran from the scene and called 911 for help, but petitioner whistled, and four men emerged from a nearby apartment building and attacked Lopez. After knocking him to the ground, they hit and kicked him and took his cell phone and his wallet, which contained $400 in cash.

A police dispatch reported the incident and mentioned the possibility of gang involvement, and two Los Angeles police officers, Detective Clark and Officer Cirrito, drove to an alley frequented by members of the Drifters. A man who appeared scared walked by the officers and said: "'[T]he guy is in the apartment.'" The officers then observed a man run through the alley and into the building to which the man was pointing. A minute or two later, the officers heard sounds of screaming and fighting coming from that building.

After backup arrived, the officers knocked on the door of the apartment unit from which the screams had been heard. Roxanne Rojas answered the door. She was holding a baby and appeared to be crying. Her face was red, and she had a large bump on her nose. The officers also saw blood on her shirt and hand from what appeared to be a fresh injury. Rojas told the police that she had been in a fight. Officer Cirrito asked if anyone else was in the apartment, and Rojas said that her 4–year–old son was the only other person present.

After Officer Cirrito asked Rojas to step out of the apartment so that he could conduct a protective sweep, petitioner appeared at

the door wearing only boxer shorts. Apparently agitated, petitioner stepped forward and said, "'You don't have any right to come in here. I know my rights.'" Suspecting that petitioner had assaulted Rojas, the officers removed him from the apartment and then placed him under arrest. Lopez identified petitioner as his initial attacker, and petitioner was taken to the police station for booking.

Approximately one hour after petitioner's arrest, Detective Clark returned to the apartment and informed Rojas that petitioner had been arrested. Detective Clark requested and received both oral and written consent from Rojas to search the premises. In the apartment, the police found Drifters gang paraphernalia, a butterfly knife, clothing worn by the robbery suspect, and ammunition. Rojas' young son also showed the officers where petitioner had hidden a sawed-off shotgun.

B

Petitioner was charged with robbery, infliction of corporal injury on a spouse, cohabitant, or child's parent, possession of a firearm by a felon, possession of a short-barreled shotgun, and felony possession of ammunition.

Before trial, petitioner moved to suppress the evidence found in the apartment, but after a hearing, the court denied the motion. Petitioner then pleaded *nolo contendere* to the firearms and ammunition charges. On the remaining counts—for robbery and infliction of corporal injury—he went to trial and was found guilty by a jury. The court sentenced him to 14 years of imprisonment.

The California Court of Appeal affirmed. Because *Randolph* did not overturn our prior decisions recognizing that an occupant may give effective consent to search a shared residence, the court agreed with the majority of the federal circuits that an objecting occupant's physical presence is "indispensable to the decision in *Randolph*." And because petitioner was not present when Rojas consented, the court held that petitioner's suppression motion had been properly denied.

The California Supreme Court denied the petition for review, and we granted certiorari.

II

A

"Consent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." It would be unreasonable—indeed, absurd—to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search. The owner of a home has a right to allow others to enter and examine the premises, and there is no reason why the owner should not be permitted to extend this same privilege to police officers if that is the owner's choice. Where the owner believes that he or she is under suspicion, the owner may want the police to search the premises so that their suspicions are dispelled. This may be particularly important where the owner has a strong interest in the apprehension of the perpetrator of a crime and believes that the suspicions of the police are deflecting the course of their investigation. An owner may want the police to search even where they lack probable cause, and if a warrant were always required, this could not be done. And even where the police could establish probable cause, requiring a warrant despite the owner's consent would needlessly inconvenience everyone involved—not only the officers and the magistrate but also the occupant of the premises, who would generally either be compelled or would feel a need to stay until the search was completed.

B

While consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search, we recognized a narrow exception to this rule in *Georgia v. Randolph*. The Court reiterated the proposition that a person who shares a residence with others assumes the risk that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." But the Court held that "*a physically present inhabitant's* express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant." The Court's opinion went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present.

III

In this case, petitioner was not present when Rojas consented, but petitioner still contends that *Randolph* is controlling. He advances two main arguments. First, he claims that his absence should not matter since he was absent only because the police had taken him away. Second, he maintains that it was sufficient that he objected to the search while he was still present. Such an

objection, he says, should remain in effect until the objecting party "no longer wishes to keep the police out of his home." Neither of these arguments is sound.

We first consider the argument that the presence of the objecting occupant is not necessary when the police are responsible for his absence. In *Randolph,* the Court suggested in dictum that consent by one occupant might not be sufficient if "there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." We do not believe the statement should be read to suggest that improper motive may invalidate objectively justified removal. Hence, it does not govern here.

This brings us to petitioner's second argument, viz., that his objection, made at the threshold of the premises that the police wanted to search, remained effective until he changed his mind and withdrew his objection. This argument is inconsistent with *Randolph*'s reasoning in at least two important ways. First, the argument cannot be squared with the "widely shared social expectations" or "customary social usage" upon which the *Randolph* holding was based.

It seems obvious that the calculus of this hypothetical caller would likely be quite different if the objecting tenant was not standing at the door. When the objecting occupant is standing at the threshold saying "stay out," a friend or visitor invited to enter by another occupant can expect at best an uncomfortable scene and at worst violence if he or she tries to brush past the objector. But when the objector is not on the scene (and especially when it is known that the objector will not return during the course of the visit), the friend or visitor is much more likely to accept the invitation to enter. Thus, petitioner's argument is inconsistent with *Randolph*'s reasoning.

Second, petitioner's argument would create the very sort of practical complications that *Randolph* sought to avoid. The *Randolph* Court recognized that it was adopting a "formalis[tic]" rule, but it did so in the interests of "simple clarity" and administrability.

The rule that petitioner would have us adopt would produce a plethora of practical problems. For one thing, there is the question of duration. Petitioner argues that an objection, once made, should last until it is withdrawn by the objector, but such a rule would be unreasonable. Suppose that a husband and wife owned a house as joint tenants and that the husband, after objecting to a search of the house, was convicted and sentenced to a 15–year prison term. Under petitioner's proposed rule, the wife would be unable to consent to a search of the house 10 years after the date on which her husband objected. We refuse to stretch *Randolph* to such strange lengths.

Nor are we persuaded to hold that an objection lasts for a "reasonable" time. "[I]t is certainly unusual for this Court to set forth precise time limits governing police action" and what interval of time would be reasonable in this context? A week? A month? A year? Ten years?

Petitioner's rule would also require the police and ultimately the courts to determine whether, after the passage of time, an objector still had "common authority" over the premises, and this would often be a tricky question. Suppose that an incarcerated objector and a consenting co-occupant were joint tenants on a lease. If the objector, after incarceration, stopped paying rent, would he still have "common authority," and would his objection retain its force? Would it be enough that his name remained on the lease? Would the result be different if the objecting and consenting lessees had an oral month-to-month tenancy?

Another problem concerns the procedure needed to register a continuing objection. Would it be necessary for an occupant to object while police officers are at the door? If presence at the time of consent is not needed, would an occupant have to be present at the premises when the objection was made? Could an objection be made pre-emptively? Could a person like Scott Randolph, suspecting that his estranged wife might invite the police to view his drug stash and paraphernalia, register an objection in advance? Could this be done by posting a sign in front of the house? Could a standing objection be registered by serving notice on the chief of police?

Finally, there is the question of the particular law enforcement officers who would be bound by an objection. Would this set include just the officers who were present when the objection was made? Would it also apply to other officers working on the same investigation? Would it extend to officers who were unaware of the objection? How about officers assigned to different but arguably related cases? Would it be limited by law enforcement agency?

If *Randolph* is taken at its word—that it applies only when the objector is standing in the door saying "stay out" when officers propose to make a consent search—all of these problems disappear.

Putting the exception the Court adopted in *Randolph* to one side, the lawful occupant of a house or apartment should have the right to invite the police to enter the dwelling and conduct a search. Any other rule would trample on the rights of the occupant who is willing to consent. Such an occupant may want the police to search in order to dispel "suspicion raised by sharing quarters

with a criminal." And an occupant may want the police to conduct a thorough search so that any dangerous contraband can be found and removed. In this case, for example, the search resulted in the discovery and removal of a sawed-off shotgun to which Rojas' 4–year–old son had access.

Denying someone in Rojas' position the right to allow the police to enter *her* home would also show disrespect for her independence. Having beaten Rojas, petitioner would bar her from controlling access to her own home until such time as he chose to relent. The Fourth Amendment does not give him that power.

The judgment of the California Court of Appeal is affirmed.

Justice GINSBURG, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

This case calls for a straightforward application of *Randolph*. The police officers in *Randolph* were confronted with a scenario closely resembling the situation presented here. After Walter Fernandez, while physically present at his home, rebuffed the officers' request to come in, the police removed him from the premises and then arrested him, albeit with cause to believe he had assaulted his cohabitant, Roxanne Rojas. At the time of the arrest, Rojas said nothing to contradict Fernandez' refusal. About an hour later, however, and with no attempt to obtain a search warrant, the police returned to the apartment and prevailed upon Rojas to sign a consent form authorizing search of the premises.

In this case, the police could readily have obtained a warrant to search the shared residence. The Court does not dispute this, but instead disparages the warrant requirement as inconvenient, burdensome, entailing delay "[e]ven with modern technological advances."

Although the police have probable cause and could obtain a warrant with dispatch, if they can gain the consent of someone other than the suspect, why should the law insist on the formality of a warrant? Because the Framers saw the neutral magistrate as an essential part of the criminal process shielding all of us, good or bad, saint or sinner, from unchecked police activity.

I would honor the Fourth Amendment's warrant requirement and hold that Fernandez' objection to the search did not become null upon his arrest and removal from the scene. "There is every reason to conclude that securing a warrant was entirely feasible in this case, and no reason to contract the Fourth Amendment's dominion."

Notes, Comments, and Questions

Justice Souter, who wrote for the majority in *Randolph*, retired before *Fernandez* was decided. In addition, Justice Kennedy, who voted with the *Randolph* majority, supported the *Fernandez* majority in its limitation of the holding of *Randolph* to its unusual facts. Justice Breyer, who concurred with the Court's judgement in *Randolph* but did not endorse all of the majority's reasoning, also joined Justice Alito's majority opinion in *Fernandez*. In short, while *Randolph* remains good law, its reasoning may not have support from a current majority of the Court, and its holding is unlikely to be applied to new fact patterns.

Beyond the somewhat esoteric questions presented by *Randolph* and *Fernandez*, the broader issue of consent inspires intense disagreements. In particular, dissenting Justices question whether people can really "terminate encounters" with police officers as easily as majority opinions seems to suggest, and they argue that refusing consent is not always practical (or even possible), particularly among portions of the populations already uneasy with police. Observers note that gender, among other factors, affects whether one has the confidence to deny consent. *See* David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. Crim L. & Criminology 51 (2009) (reporting on random survey of Boston residents concerning sidewalks and buses, finding that "women and young people feel less free to leave than other groups").

On the other hand, robust cooperation with police is essential to the prevention and detection of crime. If police needed a warrant every time they searched a car, bag, or house, investigations would be slowed considerably. This reality encourages Justices to avoid placing high hurdles in the path of officers who seek consent from members of the public.

The Authority of Co-Occupants and Co-Owners to Consent to Searches

Students, generally familiar with shared housing, frequently ask about the scope of authority possessed by a co-occupant to consent to searches of shared living quarters. In particular, when two or more students share a common living room and kitchen yet have individual bedrooms, can one resident of a shared apartment allow police to search the entire premises? The answer is that residents may authorize searches of areas over which they have control, whether sole control or shared control. Accordingly, in the apartment described above, a resident could permit police to search the living room, the kitchen, and her own personal

bedroom, but she would not have authority to authorize searches of someone else's bedroom.

The same principle applies to items that are shared or are lent by an owner to another person. Someone permitted to use and carry a backpack—whether the sole owner, a co-owner, or a borrower—may authorize police to search the bag.

Recall that police can rely on apparent authority—a search is reasonable as long as officers reasonably believe they receive valid consent. Nonetheless, officers should be careful when entering shared premises with consent to learn what areas are controlled by the consenting resident.

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2.11: Chapter 12 - The Warrant Requirement- Exceptions (Part 4)

Warrant Exception: Exigent Circumstances

The Court has grouped a handful of recurring situations under the umbrella term “exigent circumstances.” This exception allows police to conduct searches without warrants as long as officers have probable cause to believe that one of the approved kinds of unusual situations—that is, exigent circumstances—exists. For all the categories of exigent circumstances, the Court has decided that seeking a warrant would be impossible, or at least impractical. The key categories are: (1) hot pursuit of a fleeing criminal suspect, (2) protection of public safety from immediate threats, and (3) preservation of evidence (that officers have probable cause to believe is subject to seizure and will be found on the premises) from destruction.

We begin with hot pursuit.

Exigent Circumstances: Hot Pursuit

Supreme Court of the United States

Warden, Maryland Penitentiary v. Bennie Joe Hayden

Decided May 29, 1967 – 387 U.S. 294

Mr. Justice BRENNAN delivered the opinion of the Court.

We review in this case the validity of the proposition that there is under the Fourth Amendment a “distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.”

A Maryland court sitting without a jury convicted respondent of armed robbery. Items of his clothing, a cap, jacket, and trousers, among other things, were seized during a search of his home, and were admitted in evidence without objection. After unsuccessful state court proceedings, he sought and was denied federal habeas corpus relief in the District Court for Maryland. A divided panel of the Court of Appeals for the Fourth Circuit reversed. The Court of Appeals held that respondent was correct in his contention that the clothing seized was improperly admitted in evidence because the items had “evidential value only” and therefore were not lawfully subject to seizure. We granted certiorari. We reverse.

I

About 8 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took some $363 and ran. Two cab drivers in the vicinity, attracted by shouts of “Holdup,” followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was [Black,] about 5’ 8” tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to police who were proceeding to the scene of the robbery. Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection.[1]

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer who, according to the District Court, “was searching the cellar for a man or the money” found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the

pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All these items of evidence were introduced against respondent at his trial.

II

We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, "the exigencies of the situation made that course imperative." The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

[T]he seizures occurred prior to or immediately contemporaneous with Hayden's arrest, as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before the police arrived. The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.

It is argued that, while the weapons, ammunition, and cap may have been seized in the course of a search for weapons, the officer who seized the clothing was searching neither for the suspect nor for weapons when he looked into the washing machine in which he found the clothing. But even if we assume, although we do not decide, that the exigent circumstances in this case made lawful a search without warrant only for the suspect or his weapons, it cannot be said on this record that the officer who found the clothes in the washing machine was not searching for weapons. He testified that he was searching for the man or the money, but his failure to state explicitly that he was searching for weapons, in the absence of a specific question to that effect, can hardly be accorded controlling weight. He knew that the robber was armed and he did not know that some weapons had been found at the time he opened the machine. In these circumstances the inference that he was in fact also looking for weapons is fully justified.

III

We come, then, to the question whether, even though the search was lawful, the Court of Appeals was correct in holding that the seizure and introduction of the items of clothing violated the Fourth Amendment because they are "mere evidence." The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by courts and commentators. The Court of Appeals, however, felt "obligated to adhere to it." We today reject the distinction as based on premises no longer accepted as rules governing the application of the Fourth Amendment.

Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same "papers and effects" may be "mere evidence" in one case and "instrumentality" in another.

The judgment of the Court of Appeals is reversed.

Notes, Comments, and Questions

Hot pursuit allows officers to follow a fleeing felon into a house. The Court has explained that "'hot pursuit' means some sort of a chase, but it need not be an extended hue and cry 'in and about (the) public streets.'" *United States v. Santana*, 427 U.S. 38 (1976).

After entering a home in hot pursuit, police may look around to protect themselves, find the suspect, find weapons, etc. The Court in *Hayden* even allows an officer to search a washing machine around the time the suspect was caught elsewhere. Consider the

following scenario:

Police have probable cause to arrest a suspect for a misdemeanor. The suspect flees, and police give chase. If the suspect enters a home, may police follow? Why or why not? *See Lange v. California*, 141 S. Ct. 2011 (2021), in which the Court declined to extend the exception to *all* fleeing misdemeananor suspects. The Court left open the possibility that *some* misdemeanants might be covered. The crime at issue in *Lange* was failing to comply with a police signal.

In addition to its appearance in criminal procedure law, "hot pursuit" is a term of art in international law. A "backgrounder" published by the Council on Foreign Relations (CFR) describes the doctrine as follows: "The doctrine generally pertains to the law of the seas and the ability of one state's navy to pursue a foreign ship that has violated laws and regulations in its territorial waters (twelve nautical miles from shore), even if the ship flees to the high seas." Quoting Professor Michael P. Scharf, the CFR document explained further: "It means you are literally and temporally in pursuit and following the tail of a fugitive. ... [A state] is allowed to temporarily violate borders to make an apprehension under those circumstances."

Students interested in further information can review the 1982 UN Convention on the Law of the Sea, which covers hot pursuit in Article 111, along with the 1958 Convention on the High Seas, which covers the doctrine in Article 23. Students will notice similarities among the international law doctrine and our domestic criminal procedure rule. Under each, state agents are permitted to briefly enter otherwise prohibited areas for law enforcement purposes. On the other hand, application of "hot pursuit" on land (for example, entering a foreign country to capture or kill a wanted terrorist) is disputed in international law.

In the next case, the Court considers whether a "routine felony arrest" constitutes exigent circumstances and accordingly allows warrantless entry of a home in which police have probable cause to believe the felony suspect will be found. Students should consider that even in the Bronx in 1970—the location and year of the search at issue—the crime rate was not so high that arresting a man suspected of murdering someone two days earlier during an armed robbery had become "routine." What then made this scenario different from "hot pursuit" and other sorts of exigent circumstances in the eyes of the Justices?

Supreme Court of the United States

Theodore Payton v. New York

Decided April 15, 1980 – 445 U.S. 573

Mr. Justice STEVENS delivered the opinion of the Court.

These appeals challenge the constitutionality of New York statutes that authorize police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest.

I

On January 14, 1970, after two days of intensive investigation, New York detectives had assembled evidence sufficient to establish probable cause to believe that Theodore Payton had murdered the manager of a gas station two days earlier. At about 7:30 a.m. on January 15, six officers went to Payton's apartment in the Bronx, intending to arrest him. They had not obtained a warrant. Although light and music emanated from the apartment, there was no response to their knock on the metal door. They summoned emergency assistance and, about 30 minutes later, used crowbars to break open the door and enter the apartment. No one was there. In plain view, however, was a .30-caliber shell casing that was seized and later admitted into evidence at Payton's murder trial.

In due course Payton surrendered to the police, was indicted for murder, and moved to suppress the evidence taken from his apartment. The trial judge held that the warrantless and forcible entry was authorized by the New York Code of Criminal Procedure, and that the evidence in plain view was properly seized. He found that exigent circumstances justified the officers' failure to announce their purpose before entering the apartment as required by the statute. He had no occasion, however, to decide whether those circumstances also would have justified the failure to obtain a warrant, because he concluded that the warrantless entry was adequately supported by the statute without regard to the circumstances. The Appellate Division, First Department, summarily affirmed. The New York Court of Appeals affirmed the conviction[] of [] Payton.

Before addressing the narrow question presented by these appeals, we put to one side other related problems that are *not* presented today. Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The Court of Appeals majority treated [] *Payton's* []

case[] as involving [a] routine arrest in which there was ample time to obtain a warrant, and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as "exigent circumstances," that would justify a warrantless entry into a home for the purpose of either arrest or search.

Nor do these cases raise any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect. The police broke into Payton's apartment intending to arrest Payton. We also note that it [is not] argued that the police lacked probable cause to believe that [Payton] was at home when they entered. Finally, we are dealing with [an] entr[y] into [a] home[] made without the consent of any occupant.

II

It is familiar history that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment. It is [] perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment. Almost a century ago the Court stated in resounding terms that the principles reflected in the Amendment "reached farther than the concrete form" of the specific cases that gave it birth, and "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."

The simple language of the Amendment applies equally to seizures of persons and to seizures of property. Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items. As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.

It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. [T]his distinction has equal force when the seizure of a person is involved. [T]he critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their ... houses ... shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

IV

The parties have argued at some length about the practical consequences of a warrant requirement as a precondition to a felony arrest in the home. In the absence of any evidence that effective law enforcement has suffered in those States that already have such a requirement, we are inclined to view such arguments with skepticism. More fundamentally, however, such arguments of policy must give way to a constitutional command that we consider to be unequivocal.

Finally, we note the State's suggestion that only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake, and since such a warrant requirement is manifestly impractical, there need be no warrant of any kind. We find this ingenious argument unpersuasive. It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Because no arrest warrant was obtained, the judgments must be reversed and the cases remanded to the New York Court of Appeals for further proceedings not inconsistent with this opinion.

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, dissenting.

The Court today holds that absent exigent circumstances officers may never enter a home during the daytime to arrest for a dangerous felony unless they have first obtained a warrant. This hard-and-fast rule, founded on erroneous assumptions concerning the intrusiveness of home arrest entries, finds little or no support in the common law or in the text and history of the Fourth Amendment. I respectfully dissent.

Today's decision distorts the historical meaning of the Fourth Amendment, by proclaiming for the first time a rigid warrant requirement for all nonexigent home arrest entries. The history of the Fourth Amendment does not support the rule announced today. At the time that Amendment was adopted the constable possessed broad inherent powers to arrest. The limitations on those powers derived, not from a warrant "requirement," but from the generally ministerial nature of the constable's office at common law. Far from restricting the constable's arrest power, the institution of the warrant was used to expand that authority by giving the constable delegated powers of a superior officer such as a justice of the peace. Hence at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects.

In fact, it was the abusive use of the warrant power, rather than any excessive zeal in the discharge of peace officers' inherent authority, that precipitated the Fourth Amendment. That Amendment grew out of colonial opposition to the infamous general warrants known as writs of assistance, which empowered customs officers to search at will, and to break open receptacles or packages, wherever they suspected uncustomed goods to be. The writs did not specify where searches could occur and they remained effective throughout the sovereign's lifetime. In effect, the writs placed complete discretion in the hands of executing officials. Customs searches of this type were beyond the inherent power of common-law officials and were the subject of court suits when performed by colonial customs agents not acting pursuant to a writ.

That the Framers were concerned about warrants, and not about the constable's inherent power to arrest, is also evident from the text and legislative history of the Fourth Amendment. That provision first reaffirms the basic principle of common law, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." The Amendment does not here purport to limit or restrict the peace officer's inherent power to arrest or search, but rather assumes an existing right against actions in excess of that inherent power and ensures that it remain inviolable. [I]t was not generally considered "unreasonable" at common law for officers to break doors in making warrantless felony arrests. The Amendment's second clause is directed at the actions of officers taken in their ministerial capacity pursuant to writs of assistance and other warrants. In contrast to the first Clause, the second Clause does purport to alter colonial practice: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That the Fourth Amendment was directed towards safeguarding the rights at common law, and restricting the warrant practice which gave officers vast new powers beyond their inherent authority, is evident from the legislative history of that provision. As originally drafted by James Madison, it was directed *only* at warrants; so deeply ingrained was the basic common-law premise that it was not even expressed:

"The rights of the people to be secured in their persons[,] their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 1 Annals of Cong. 452 (1789).

In sum, the background, text, and legislative history of the Fourth Amendment demonstrate that the purpose was to restrict the abuses that had developed with respect to warrants; the Amendment preserved common-law rules of arrest. Because it was not considered generally unreasonable at common law for officers to break doors to effect a warrantless felony arrest, I do not believe that the Fourth Amendment was intended to outlaw the types of police conduct at issue in the present cases.

Today's decision rests, in large measure, on the premise that warrantless arrest entries constitute a particularly severe invasion of personal privacy. I do not dispute that the home is generally a very private area or that the common law displayed a special "reverence ... for the individual's right of privacy in his house." However, the Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere. It is necessary in each case to assess realistically the actual extent of invasion of constitutionally protected privacy. Further, all arrests involve serious intrusions into an individual's privacy and dignity. Yet we settled in *[United States v.] Watson* [423 U.S. 411 (1976)], that the intrusiveness of a public arrest is not enough to mandate the obtaining of a warrant. The inquiry in the present case, therefore, is whether the incremental intrusiveness that results from an arrest's being made *in the dwelling* is enough to support an inflexible constitutional rule requiring warrants for such arrests whenever exigent circumstances are not present.

Today's decision ignores the carefully crafted restrictions on the common-law power of arrest entry and thereby overestimates the dangers inherent in that practice. At common law, absent exigent circumstances, entries to arrest could be made only for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors. Further, it seems generally accepted that entries could be made only during daylight hours. And, in my view, the officer entering to arrest must have reasonable grounds to believe, not only that the arrestee has committed a crime, but also that the person suspected is present in the house at the time of the entry.

These four restrictions on home arrests—felony, knock and announce, daytime, and stringent probable cause—constitute powerful and complementary protections for the privacy interests associated with the home. The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes. The knock-and-announce and daytime requirements protect individuals against the fear, humiliation, and embarrassment of being aroused from their beds in states of partial or complete undress. And these requirements allow the arrestee to surrender at his front door, thereby maintaining his dignity and preventing the officers from entering other rooms of the dwelling. The stringent probable-cause requirement would help ensure against the possibility that the police would enter when the suspect was not home, and, in searching for him, frighten members of the family or ransack parts of the house, seizing items in plain view. In short, these requirements, taken together, permit an individual suspected of a serious crime to surrender at the front door of his dwelling and thereby avoid most of the humiliation and indignity that the Court seems to believe necessarily accompany a house arrest entry.

While exaggerating the invasion of personal privacy involved in home arrests, the Court fails to account for the danger that its rule will "severely hamper effective law enforcement." The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers. [P]olice will sometimes delay making an arrest, even after probable cause is established, in order to be sure that they have enough evidence to convict. Then, if they suddenly have to arrest, they run the risk that the subsequent exigency will not excuse their prior failure to obtain a warrant. This problem cannot effectively be cured by obtaining a warrant as soon as probable cause is established because of the chance that the warrant will go stale before the arrest is made.

Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community. The police could reduce the likelihood of escape by staking out all possible exits until the circumstances become clearly exigent or a warrant is obtained. But the costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.

The uncertainty inherent in the exigent-circumstances determination burdens the judicial system as well. In the case of searches, exigent circumstances are sufficiently unusual that this Court has determined that the benefits of a warrant outweigh the burdens imposed, including the burdens on the judicial system. In contrast, arrests recurringly involve exigent circumstances, and this Court has heretofore held that a warrant can be dispensed with without undue sacrifice in Fourth Amendment values. The situation should be no different with respect to arrests in the home. Under today's decision, whenever the police have made a warrantless home arrest there will be the possibility of "endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like."

Our cases establish that the ultimate test under the Fourth Amendment is one of "reasonableness." I cannot join the Court in declaring unreasonable a practice which has been thought entirely reasonable by so many for so long.

Notes, Comments, and Questions

Consider the "routine felony arrest" in other locations. Do the police need a search warrant to enter third party's home? Suspect's place of employment? Suspect's privately-owned business? Suspect's girlfriend's home? Suspect's parent's home?

Exigent Circumstances: Public Safety

The next category of exigent circumstances includes situations in which police believe public safety is at immediate risk. For example, when operators receive a 911 call reporting an ongoing assault, police need not seek a warrant before heading to the crime scene and, if necessary, entering a home. Firefighters and emergency medical personnel also enter buildings without warrants to provide prompt aid. Similarly, officers who hear screams coming from a house or perceive other evidence of imminent danger may have probable cause that justifies warrantless entry. In these situations, police could not effectively "serve and

protect" without an exception to the warrant requirement.

Supreme Court of the United States

Brigham City, Utah v. Charles W. Stuart

Decided May 22, 2006 – 547 U.S. 398

Chief Justice ROBERTS delivered the opinion of the [unanimous] Court.

In this case we consider whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. We conclude that they may.

I

This case arises out of a melee that occurred in a Brigham City, Utah, home in the early morning hours of July 23, 2000. At about 3 a.m., four police officers responded to a call regarding a loud party at a residence. Upon arriving at the house, they heard shouting from inside, and proceeded down the driveway to investigate. There, they observed two juveniles drinking beer in the backyard. They entered the backyard, and saw—through a screen door and windows—an altercation taking place in the kitchen of the home. According to the testimony of one of the officers, four adults were attempting, with some difficulty, to restrain a juvenile. The juvenile eventually "broke free, swung a fist and struck one of the adults in the face." The officer testified that he observed the victim of the blow spitting blood into a nearby sink. The other adults continued to try to restrain the juvenile, pressing him up against a refrigerator with such force that the refrigerator began moving across the floor. At this point, an officer opened the screen door and announced the officers' presence. Amid the tumult, nobody noticed. The officer entered the kitchen and again cried out, and as the occupants slowly became aware that the police were on the scene, the altercation ceased.

The officers subsequently arrested respondents and charged them with contributing to the delinquency of a minor, disorderly conduct, and intoxication. In the trial court, respondents filed a motion to suppress all evidence obtained after the officers entered the home, arguing that the warrantless entry violated the Fourth Amendment. The court granted the motion, and the Utah Court of Appeals affirmed.

We granted certiorari in light of differences among state courts and the Courts of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation.

II

It is a "'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" Nevertheless, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. We have held, for example, that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, to prevent the imminent destruction of evidence, or to engage in "'hot pursuit'" of a fleeing suspect. "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."

One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. "'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

Respondents do not take issue with these principles, but instead advance two reasons why the officers' entry here was unreasonable. First, they argue that the officers were more interested in making arrests than quelling violence. They urge us to consider, in assessing the reasonableness of the entry, whether the officers were "indeed motivated primarily by a desire to save lives and property." The Utah Supreme Court also considered the officers' subjective motivations relevant.

Our cases have repeatedly rejected this approach. An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed *objectively,* justify [the] action." The officer's subjective motivation is irrelevant. It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent

further violence.

As respondents note, we have held in the context of programmatic searches conducted without individualized suspicion—such as checkpoints to combat drunk driving or drug trafficking—that "an inquiry into *programmatic* purpose" is sometimes appropriate. But this inquiry is directed at ensuring that the purpose behind the *program* is not "ultimately indistinguishable from the general interest in crime control." It has nothing to do with discerning what is in the mind of the individual officer conducting the search.

Respondents further contend that their conduct was not serious enough to justify the officers' intrusion into the home. They rely on *Welsh v. Wisconsin,* 466 U.S. 740 (1984), in which we held that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." This contention, too, is misplaced. *Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated. There, the "only potential emergency" confronting the officers was the need to preserve evidence (*i.e.,* the suspect's blood-alcohol level)—an exigency that we held insufficient under the circumstances to justify entry into the suspect's home. Here, the officers were confronted with *ongoing* violence occurring *within* the home. *Welsh* did not address such a situation.

We think the officers' entry here was plainly reasonable under the circumstances. The officers were responding, at 3 o'clock in the morning, to complaints about a loud party. As they approached the house, they could hear from within "an altercation occurring, some kind of a fight." "It was loud and it was tumultuous." The officers heard "thumping and crashing" and people yelling "stop, stop" and "get off me." As the trial court found, "it was obvious that ... knocking on the front door" would have been futile. The noise seemed to be coming from the back of the house; after looking in the front window and seeing nothing, the officers proceeded around back to investigate further. They found two juveniles drinking beer in the backyard. From there, they could see that a fracas was taking place inside the kitchen. A juvenile, fists clenched, was being held back by several adults. As the officers watch, he breaks free and strikes one of the adults in the face, sending the adult to the sink spitting blood.

In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.

The manner of the officers' entry was also reasonable. After witnessing the punch, one of the officers opened the screen door and "yelled in police." When nobody heard him, he stepped into the kitchen and announced himself again. Only then did the tumult subside. The officer's announcement of his presence was at least equivalent to a knock on the screen door. Indeed, it was probably the only option that had even a chance of rising above the din. Under these circumstances, there was no violation of the Fourth Amendment's knock-and-announce rule. Furthermore, once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.

Accordingly, we reverse the judgment of the Supreme Court of Utah, and remand the case for further proceedings not inconsistent with this opinion.

* * *

In *Michigan v. Fisher*, the majority (in a brief unsigned opinion, issued without oral argument), held that the law set forth in cases like *Brigham City* easily justified the warrantless entry at issue. However, while *Brigham City* was decided by a unanimous Court, the facts of *Fisher* inspired two Justices to dissent. Regardless of which opinion one finds more persuasive in *Fisher*, students can use this case to see approximately where different judges will draw the line between exigent circumstances—in which public safety concerns allow warrantless entry—and day-to-day law enforcement scenarios requiring warrants.

Supreme Court of the United States

Michigan v. Jeremy Fisher

Dec. 7, 2009 – 558 U.S. 45

PER CURIAM.

Police officers responded to a complaint of a disturbance near Allen Road in Brownstown, Michigan. Officer Christopher Goolsby later testified that, as he and his partner approached the area, a couple directed them to a residence where a man was "going

crazy." Upon their arrival, the officers found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. (It is disputed whether they noticed this immediately upon reaching the house, but undisputed that they noticed it before the allegedly unconstitutional entry.) Through a window, the officers could see respondent, Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.

The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand, and they asked him whether he needed medical attention. Fisher ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. Officer Goolsby then pushed the front door partway open and ventured into the house. Through the window of the open door he saw Fisher pointing a long gun at him. Officer Goolsby withdrew.

Fisher was charged under Michigan law with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The trial court concluded that Officer Goolsby violated the Fourth Amendment when he entered Fisher's house, and granted Fisher's motion to suppress the evidence obtained as a result—that is, Officer Goolsby's statement that Fisher pointed a rifle at him. The Michigan Court of Appeals initially remanded for an evidentiary hearing, after which the trial court reinstated its order. The Court of Appeals then affirmed. Because the decision of the Michigan Court of Appeals is indeed contrary to our Fourth Amendment case law, particularly *Brigham City v. Stuart*, we grant the State's petition for certiorari and reverse.

"[T]he ultimate touchstone of the Fourth Amendment," we have often said, "is 'reasonableness.'" Therefore, although "searches and seizures inside a home without a warrant are presumptively unreasonable," that presumption can be overcome. For example, "the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable."

Brigham City identified one such exigency: "the need to assist persons who are seriously injured or threatened with such injury." Thus, law enforcement officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." This "emergency aid exception" does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises. It requires only "an objectively reasonable basis for believing" that "a person within [the house] is in need of immediate aid."

A straightforward application of the emergency aid exception, as in *Brigham City,* dictates that the officer's entry was reasonable. Just as in *Brigham City,* the police officers here were responding to a report of a disturbance. Just as in *Brigham City,* when they arrived on the scene they encountered a tumultuous situation in the house—and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City,* the officers could see violent behavior inside. Although Officer Goolsby and his partner did not see punches thrown, as did the officers in *Brigham City,* they did see Fisher screaming and throwing things. It would be objectively reasonable to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage. In short, we find it as plain here as we did in *Brigham City* that the officer's entry was reasonable under the Fourth Amendment.

The Michigan Court of Appeals, however, thought the situation "did not rise to a level of emergency justifying the warrantless intrusion into a residence." Although the Court of Appeals conceded that "there was evidence an injured person was on the premises," it found it significant that "the mere drops of blood did not signal a likely serious, life-threatening injury." The court added that the cut Officer Goolsby observed on Fisher's hand "likely explained the trail of blood" and that Fisher "was very much on his feet and apparently able to see to his own needs."

Even a casual review of *Brigham City* reveals the flaw in this reasoning. Officers do not need ironclad proof of "a likely serious, life-threatening" injury to invoke the emergency aid exception. The only injury police could confirm in *Brigham City* was the bloody lip they saw the juvenile inflict upon the adult. Fisher argues that the officers here could not have been motivated by a perceived need to provide medical assistance, since they never summoned emergency medical personnel. This would have no bearing, of course, upon their need to ensure that Fisher was not endangering someone else in the house. Moreover, even if the failure to summon medical personnel conclusively established that Goolsby did not subjectively believe, when he entered the house, that Fisher or someone else was seriously injured (which is doubtful), the test, as we have said, is not what Goolsby believed, but whether there was "an objectively reasonable basis for believing" that medical assistance was needed, or persons were in danger.

It was error for the Michigan Court of Appeals to replace that objective inquiry into appearances with its hindsight determination that there was in fact no emergency. It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But "[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." It sufficed to invoke the emergency aid

exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else. The Michigan Court of Appeals required more than what the Fourth Amendment demands.

The petition for certiorari is granted. The judgment of the Michigan Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice STEVENS, with whom Justice SOTOMAYOR joins, dissenting.

On October 31, 2003, Jeremy Fisher pointed a rifle at Officer Christopher Goolsby when Goolsby attempted to force his way into Fisher's home without a warrant. Fisher was charged with assault with a dangerous weapon and possession of a dangerous weapon during the commission of a felony. The charges were dismissed after the trial judge granted a motion to suppress evidence of the assault because it was the product of Goolsby's unlawful entry. In 2005 the Michigan Court of Appeals held that the trial court had erred because it had decided the suppression motion without conducting a full evidentiary hearing. On remand, the trial court conducted such a hearing and again granted the motion to suppress.

As a matter of Michigan law it is well settled that police officers may enter a home without a warrant "when they reasonably believe that a person within is in need of immediate aid." We have stated the rule in the same way under federal law and have explained that a warrantless entry is justified by the "'need to protect or preserve life or avoid serious injury.'" The State bears the burden of proof on that factual issue and relied entirely on the testimony of Officer Goolsby in its attempt to carry that burden. Since three years had passed, Goolsby was not sure about certain facts—such as whether Fisher had a cut on his hand—but he did remember that Fisher repeatedly swore at the officers and told them to get a warrant, and that Fisher was screaming and throwing things. Goolsby also testified that he saw "mere drops" of blood outside Fisher's home and that he did not ask whether anyone else was inside. Goolsby did not testify that he had any reason to believe that anyone else was in the house. Thus, the factual question was whether Goolsby had "an objectively reasonable basis for believing that [Fisher was] seriously injured or imminently threatened with such injury."

After hearing the testimony, the trial judge was "even more convinced" that the entry was unlawful. He noted the issue was "whether or not there was a reasonable basis to [enter the house] or whether [Goolsby] was just acting on some possibilities" and evidently found the record supported the latter rather than the former. He found the police decision to leave the scene and not return for several hours—without resolving any potentially dangerous situation and without calling for medical assistance—inconsistent with a reasonable belief that Fisher was in need of immediate aid. In sum, the one judge who heard Officer Goolsby's testimony was not persuaded that Goolsby had an objectively reasonable basis for believing that entering Fisher's home was necessary to avoid *serious* injury.

The Michigan Court of Appeals affirmed, concluding that the State had not met its burden. Perhaps because one judge dissented, the Michigan Supreme Court initially granted an application for leave to appeal. After considering briefs and oral argument, however, the majority of that Court vacated its earlier order because it was "no longer persuaded that the questions presented should be reviewed by this Court."

Today, without having heard Officer Goolsby's testimony, this Court decides that the trial judge got it wrong. I am not persuaded that he did, but even if we make that assumption, it is hard to see how the Court is justified in micromanaging the day-to-day business of state tribunals making fact-intensive decisions of this kind. We ought not usurp the role of the factfinder when faced with a close question of the reasonableness of an officer's actions, particularly in a case tried in a state court. I therefore respectfully dissent.

* * *

In *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), the Court considered whether after a dangerous (possibly suicidal) man was removed from his home, police could confiscate firearms from the home pursuant to a "community caretaking function." The Court had held in *Cady v. Dombrowski*, 413 U. S. 433 (1973) that the community caretaking function allowed police to search an impounded vehicle for an unsecured firearm. The Court held that entering the home and seizing the weapons was *not* justified by the exigent circumstances exception. The Court reasoned that prior caselaw about car searches did not apply to homes, which enjoy greater protection. Then, the Court distinguished cases such as *Brigham City* and *Fisher*, in which police perceived immediate dangers and couly not sensibly take time to obtain warrants, from the scenario presented.[2] The weapons, sitting in an empty house, did not justify a warrantless search of the home. The concurring opinion of Justice Kavanaugh provides further discussion of what scenarios (such as reasonable fear that an old man has fallen inside his house and needs help) would justify warrantless searches of homes.

Exigent Circumstances: Preserving Evidence from Destruction

Our next category of exigent circumstances includes situations in which police have probable cause to believe (1) that items subject to seizure are in a particular place and (2) that waiting for a warrant would put the evidence at serious risk of destruction. Common scenarios involve suspects who may be about to flush drugs down the toilet, burn documents, or tamper with electronic devices.

Supreme Court of the United States

Kentucky v. Hollis Deshaun King

Decided May 16, 2011 – 563 U.S. 452

Justice ALITO delivered the opinion of the Court.

It is well established that "exigent circumstances," including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant. In this case, we consider whether this rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. The Kentucky Supreme Court held that the exigent circumstances rule does not apply in the case at hand because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. We reject this interpretation of the exigent circumstances rule. The conduct of the police prior to their entry into the apartment was entirely lawful. They did not violate the Fourth Amendment or threaten to do so. In such a situation, the exigent circumstances rule applies.

I

A

This case concerns the search of an apartment in Lexington, Kentucky. Police officers set up a controlled buy of crack cocaine outside an apartment complex. Undercover Officer Gibbons watched the deal take place from an unmarked car in a nearby parking lot. After the deal occurred, Gibbons radioed uniformed officers to move in on the suspect. He told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and he urged them to "hurry up and get there" before the suspect entered an apartment.

In response to the radio alert, the uniformed officers drove into the nearby parking lot, left their vehicles, and ran to the breezeway. Just as they entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana. At the end of the breezeway, the officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered. Gibbons had radioed that the suspect was running into the apartment on the right, but the officers did not hear this statement because they had already left their vehicles. Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment.

Officer Steven Cobb, one of the uniformed officers who approached the door, testified that the officers banged on the left apartment door "as loud as [they] could" and announced, "'This is the police'" or "'Police, police, police.'" Cobb said that "[a]s soon as [the officers] started banging on the door," they "could hear people inside moving," and "[i]t sounded as [though] things were being moved inside the apartment." These noises, Cobb testified, led the officers to believe that drug-related evidence was about to be destroyed.

At that point, the officers announced that they "were going to make entry inside the apartment." Cobb then kicked in the door, the officers entered the apartment, and they found three people in the front room: respondent Hollis King, respondent's girlfriend, and a guest who was smoking marijuana. The officers performed a protective sweep of the apartment during which they saw marijuana and powder cocaine in plain view. In a subsequent search, they also discovered crack cocaine, cash, and drug paraphernalia.

Police eventually entered the apartment on the right. Inside, they found the suspected drug dealer who was the initial target of their investigation.

B

In the Fayette County Circuit Court, a grand jury charged respondent with trafficking in marijuana, first-degree trafficking in a controlled substance, and second-degree persistent felony offender status. Respondent filed a motion to suppress the evidence from the warrantless search, but the Circuit Court denied the motion. The court sentenced respondent to 11 years' imprisonment. The Kentucky Court of Appeals affirmed. The Supreme Court of Kentucky reversed.

II

A

Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured. "It is a 'basic principle of Fourth Amendment law,'" we have often said, "'that searches and seizures inside a home without a warrant are presumptively unreasonable.'" But we have also recognized that this presumption may be overcome in some circumstances because "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" Accordingly, the warrant requirement is subject to certain reasonable exceptions.

One well-recognized exception applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." This Court has identified several exigencies that may justify a warrantless search of a home. [W]hat is relevant here—the need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search.

B

Over the years, lower courts have developed an exception to the exigent circumstances rule, the so-called "police-created exigency" doctrine. Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was "created" or "manufactured" by the conduct of the police.

In applying this exception for the "creation" or "manufacturing" of an exigency by the police, courts require something more than mere proof that fear of detection by the police caused the destruction of evidence. An additional showing is obviously needed because, as the Eighth Circuit has recognized, "in some sense the police always create the exigent circumstances." That is to say, in the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement. Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain. Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police. Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.

Presumably for the purpose of avoiding such a result, the lower courts have held that the police-created exigency doctrine requires more than simple causation, but the lower courts have not agreed on the test to be applied.

III

Despite the welter of tests devised by the lower courts, the answer to the question presented in this case follows directly and clearly from the principle that permits warrantless searches in the first place. As previously noted, warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.

Some lower courts have adopted a rule that is similar to the one that we recognize today. But others, including the Kentucky Supreme Court, have imposed additional requirements that are unsound and that we now reject.

Bad faith. Some courts, including the Kentucky Supreme Court, ask whether law enforcement officers "'deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement.'"

This approach is fundamentally inconsistent with our Fourth Amendment jurisprudence. "Our cases have repeatedly rejected" a subjective approach, asking only whether "the circumstances, viewed *objectively,* justify the action." "Indeed, we have never held, outside limited contexts such as an "inventory search or administrative inspection ..., that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment."

The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."

Reasonable foreseeability. Some courts, again including the Kentucky Supreme Court, hold that police may not rely on an exigency if "'it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances.'" Courts applying this test have invalidated warrantless home searches on the ground that it was reasonably foreseeable that police officers, by knocking on the door and announcing their presence, would lead a drug suspect to destroy evidence.

Contrary to this reasoning, however, we have rejected the notion that police may seize evidence without a warrant only when they come across the evidence by happenstance. Adoption of a reasonable foreseeability test would also introduce an unacceptable degree of unpredictability. For example, whenever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them. Under a reasonable foreseeability test, it would be necessary to quantify the degree of predictability that must be reached before the police-created exigency doctrine comes into play.

A simple example illustrates the difficulties that such an approach would produce. Suppose that the officers in the present case did not smell marijuana smoke and thus knew only that there was a 50% chance that the fleeing suspect had entered the apartment on the left rather than the apartment on the right. Under those circumstances, would it have been reasonably foreseeable that the occupants of the apartment on the left would seek to destroy evidence upon learning that the police were at the door? Or suppose that the officers knew only that the suspect had disappeared into one of the apartments on a floor with 3, 5, 10, or even 20 units? If the police chose a door at random and knocked for the purpose of asking the occupants if they knew a person who fit the description of the suspect, would it have been reasonably foreseeable that the occupants would seek to destroy evidence?

We have noted that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." The reasonable foreseeability test would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges who would be required to determine after the fact whether the destruction of evidence in response to a knock on the door was reasonably foreseeable based on what the officers knew at the time.

Probable cause and time to secure a warrant. Some courts, in applying the police-created exigency doctrine, fault law enforcement officers if, after acquiring evidence that is sufficient to establish probable cause to search particular premises, the officers do not seek a warrant but instead knock on the door and seek either to speak with an occupant or to obtain consent to search.

This approach unjustifiably interferes with legitimate law enforcement strategies. There are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired.

Standard or good investigative tactics. Finally, some lower court cases suggest that law enforcement officers may be found to have created or manufactured an exigency if the court concludes that the course of their investigation was "contrary to standard or good law enforcement practices [or to the policies or practices of their jurisdictions]." This approach fails to provide clear guidance for law enforcement officers and authorizes courts to make judgments on matters that are the province of those who are responsible for federal and state law enforcement agencies.

Respondent argues for a rule that differs from those discussed above, but his rule is also flawed. Respondent contends that law enforcement officers impermissibly create an exigency when they "engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." In respondent's view, relevant factors include the officers' tone of voice in announcing their presence and the forcefulness of their knocks. But the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.

If respondent's test were adopted, it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. The Fourth Amendment does not

require the nebulous and impractical test that respondent proposes.

For these reasons, we conclude that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment. This holding provides ample protection for the privacy rights that the Amendment protects.

When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. When the police knock on a door but the occupants choose not to respond or to speak, "the investigation will have reached a conspicuously low point," and the occupants "will have the kind of warning that even the most elaborate security system cannot provide." And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.

Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.

IV

We now apply our interpretation of the police-created exigency doctrine to the facts of this case.

A

We need not decide whether exigent circumstances existed in this case. Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency. The trial court and the Kentucky Court of Appeals found that there was a real exigency in this case, but the Kentucky Supreme Court expressed doubt on this issue, observing that there was "certainly some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed." The Kentucky Supreme Court "assum[ed] for the purpose of argument that exigent circumstances existed," and it held that the police had impermissibly manufactured the exigency.

We, too, assume for purposes of argument that an exigency existed. We decide only the question on which the Kentucky Supreme Court ruled and on which we granted certiorari: Under what circumstances do police impermissibly create an exigency? Any question about whether an exigency actually existed is better addressed by the Kentucky Supreme Court on remand.

B

In this case, we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment. Officer Cobb testified without contradiction that the officers "banged on the door as loud as [they] could" and announced either "'Police, police, police'" or "'This is the police.'" This conduct was entirely consistent with the Fourth Amendment, and we are aware of no other evidence that might show that the officers either violated the Fourth Amendment or threatened to do so (for example, by announcing that they would break down the door if the occupants did not open the door voluntarily).

Like the court below, we assume for purposes of argument that an exigency existed. Because the officers in this case did not violate or threaten to violate the Fourth Amendment prior to the exigency, we hold that the exigency justified the warrantless search of the apartment.

The judgment of the Kentucky Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice GINSBURG, dissenting.

The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant. I dissent from the Court's reduction of the Fourth Amendment's force.

This case involves a principal exception to the warrant requirement, the exception applicable in "exigent circumstances." "[C]arefully delineated," the exception should govern only in genuine emergency situations. Circumstances qualify as "exigent"

when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape. The question presented: May police, who could pause to gain the approval of a neutral magistrate, dispense with the need to get a warrant by themselves creating exigent circumstances? I would answer no, as did the Kentucky Supreme Court. The urgency must exist, I would rule, when the police come on the scene, not subsequent to their arrival, prompted by their own conduct.

That heavy burden has not been carried here. There was little risk that drug-related evidence would have been destroyed had the police delayed the search pending a magistrate's authorization. As the Court recognizes, "[p]ersons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police." Nothing in the record shows that, prior to the knock at the apartment door, the occupants were apprehensive about police proximity.

In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as "'entitled to special protection.'" Home intrusions, the Court has said, are indeed "the chief evil against which … the Fourth Amendment is directed." "'[S]earches and seizures inside a home without a warrant are [therefore] presumptively unreasonable.'" How "secure" do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?

As above noted, to justify the police activity in this case, Kentucky invoked the once-guarded exception for emergencies "in which the delay necessary to obtain a warrant … threaten[s] 'the destruction of evidence.'" To fit within this exception, "police action literally must be [taken] 'now or never' to preserve the evidence of the crime."

The existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on "actions taken by the police *preceding* the warrantless search." "[W]asting a clear opportunity to obtain a warrant," therefore, "disentitles the officer from relying on subsequent exigent circumstances."

Under an appropriately reined-in "emergency" or "exigent circumstances" exception, the result in this case should not be in doubt. The target of the investigation's entry into the building, and the smell of marijuana seeping under the apartment door into the hallway, the Kentucky Supreme Court rightly determined, gave the police "probable cause … sufficient … to obtain a warrant to search the … apartment." As that court observed, nothing made it impracticable for the police to post officers on the premises while proceeding to obtain a warrant authorizing their entry.

I [] would not allow an expedient knock to override the warrant requirement. Instead, I would accord that core requirement of the Fourth Amendment full respect. When possible, "a warrant must generally be secured," the Court acknowledges. There is every reason to conclude that securing a warrant was entirely feasible in this case, and no reason to contract the Fourth Amendment's dominion.

* * *

In our next chapter, we will review limits to the exigent circumstances exception, including one case, *Welsh v. Wisconsin*, 466 U.S. 740 (1984), in which the prosecution unsuccessfully raised three different exigent circumstances theories—hot pursuit, safety, and preservation of evidence. We will also examine, more generally, the issue presented by cases in which police desire evidence of the amount of alcohol in a suspect's blood.

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2.12: Chapter 13 - The Warrant Requirement- Exceptions (Part 5)

Exigent Circumstance: Drunk Driving

Questions concerning the scope of the "exigent circumstances" exception to the warrant requirement have arisen repeatedly in the context of drunk driving cases. These cases commonly involve a special kind of evidence—alcohol in the blood of a driver—at risk of being destroyed by the body's metabolism.

Supreme Court of the United States

Missouri v. Tyler G. McNeely

Decided April 17, 2013 – 569 U.S. 141

Justice SOTOMAYOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and IV, and an opinion with respect to Part[] III, in which Justice SCALIA, Justice GINSBURG, and Justice KAGAN join.

In *Schmerber v. California,* 384 U.S. 757 (1966), this Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

I

While on highway patrol at approximately 2:08 a.m., a Missouri police officer stopped Tyler McNeely's truck after observing it exceed the posted speed limit and repeatedly cross the centerline. The officer noticed several signs that McNeely was intoxicated, including McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. McNeely acknowledged to the officer that he had consumed "a couple of beers" at a bar and he appeared unsteady on his feet when he exited the truck. After McNeely performed poorly on a battery of field-sobriety tests and declined to use a portable breath-test device to measure his blood alcohol concentration (BAC), the officer placed him under arrest.

The officer began to transport McNeely to the station house. But when McNeely indicated that he would again refuse to provide a breath sample, the officer changed course and took McNeely to a nearby hospital for blood testing. The officer did not attempt to secure a warrant. Upon arrival at the hospital, the officer asked McNeely whether he would consent to a blood test. Reading from a standard implied consent form, the officer explained to McNeely that under state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. McNeely nonetheless refused. The officer then directed a hospital lab technician to take a blood sample, and the sample was secured at approximately 2:35 a.m. Subsequent laboratory testing measured McNeely's BAC at 0.154 percent, which was well above the legal limit of 0.08 percent.

McNeely was charged with driving while intoxicated (DWI). He moved to suppress the results of the blood test, arguing in relevant part that, under the circumstances, taking his blood for chemical testing without first obtaining a search warrant violated his rights under the Fourth Amendment. The trial court agreed. It concluded that the exigency exception to the warrant requirement did not apply because, apart from the fact that "[a]s in all cases involving intoxication, [McNeely's] blood alcohol was being metabolized by his liver," there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant. On appeal, the Missouri Court of Appeals stated an intention to reverse but transferred the case directly to the Missouri Supreme Court.

The Missouri Supreme Court affirmed. We granted certiorari to resolve a split of authority on the question whether the natural

dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations. We now affirm.

II

A

[T]he warrant requirement is subject to exceptions. "One well-recognized exception," and the one at issue in this case, "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, engage in "hot pursuit" of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause. As is relevant here, we have also recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant."

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. We apply this "finely tuned approach" to Fourth Amendment reasonableness in this context because the police action at issue lacks "the traditional justification that … a warrant … provides." Absent that established justification, "the fact-specific nature of the reasonableness inquiry" demands that we evaluate each case of alleged exigency based "on its own facts and circumstances."

Our decision in *Schmerber* applied this totality of the circumstances approach. In that case, the petitioner had suffered injuries in an automobile accident and was taken to the hospital. While he was there receiving treatment, a police officer arrested the petitioner for driving while under the influence of alcohol and ordered a blood test over his objection. After explaining that the warrant requirement applied generally to searches that intrude into the human body, we concluded that the warrantless blood test "in the present case" was nonetheless permissible because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"

In support of that conclusion, we observed that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." We added that "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." "Given these special facts," we found that it was appropriate for the police to act without a warrant. We further held that the blood test at issue was a reasonable way to recover the evidence because it was highly effective, "involve[d] virtually no risk, trauma, or pain," and was conducted in a reasonable fashion "by a physician in a hospital environment according to accepted medical practices." And in conclusion, we noted that our judgment that there had been no Fourth Amendment violation was strictly based "on the facts of the present record."

Thus, our analysis in *Schmerber* fits comfortably within our case law applying the exigent circumstances exception. In finding the warrantless blood test reasonable in *Schmerber,* we considered all of the facts and circumstances of the particular case and carefully based our holding on those specific facts.

B

The State properly recognizes that the reasonableness of a warrantless search under the exigency exception to the warrant requirement must be evaluated based on the totality of the circumstances. But the State nevertheless seeks a *per se* rule for blood testing in drunk-driving cases. The State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent. As a result, the State claims that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant.

It is true that as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated. This fact was essential to our holding in *Schmerber,* as we recognized that, under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence.

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber,* not to accept the "considerable overgeneralization" that a *per se* rule would reflect.

The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a "'now or never'" situation. In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner. Moreover, because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant. This reality undermines the force of the State's contention that we should recognize a categorical exception to the warrant requirement because BAC evidence "is actively being destroyed with every minute that passes." Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

The State's proposed *per se* rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple. We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.

Of course, there are important countervailing concerns. While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process. But adopting the State's *per se* approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions "to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement."

In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber,* it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

III

The remaining arguments advanced in support of a *per se* exigency rule are unpersuasive. The State and several of its *amici,* including the United States, express concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers deciding whether to conduct a blood test of a drunk-driving suspect without a warrant. While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. Moreover, a case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments.

Next, the State and the United States contend that the privacy interest implicated by blood draws of drunk-driving suspects is relatively minimal. That is so, they claim, both because motorists have a diminished expectation of privacy and because our cases have repeatedly indicated that blood testing is commonplace in society and typically involves "virtually no risk, trauma, or pain."

But the fact that people are "accorded less privacy in ... automobiles because of th[e] compelling governmental need for regulation," does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin. As to the nature of a blood test conducted in a medical setting by trained personnel, it is concededly less intrusive than other

bodily invasions we have found unreasonable. For that reason, we have held that medically drawn blood tests are reasonable in appropriate circumstances. We have never retreated, however, from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests.

Finally, the State and its *amici* point to the compelling governmental interest in combating drunk driving and contend that prompt BAC testing, including through blood testing, is vital to pursuit of that interest. They argue that is particularly so because, in addition to laws that make it illegal to operate a motor vehicle under the influence of alcohol, all 50 States and the District of Columbia have enacted laws that make it *per se* unlawful to operate a motor vehicle with a BAC of over 0.08 percent. "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." Certainly we do not. While some progress has been made, drunk driving continues to exact a terrible toll on our society.

But the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. To the extent that the State and its *amici* contend that applying the traditional Fourth Amendment totality-of-the-circumstances analysis to determine whether an exigency justified a warrantless search will undermine the governmental interest in preventing and prosecuting drunk-driving offenses, we are not convinced.

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

IV

The State argued before this Court that the fact that alcohol is naturally metabolized by the human body creates an exigent circumstance in every case. The State did not argue that there were exigent circumstances in this particular case because a warrant could not have been obtained within a reasonable amount of time. In his testimony before the trial court, the arresting officer did not identify any other factors that would suggest he faced an emergency or unusual delay in securing a warrant. He testified that he made no effort to obtain a search warrant before conducting the blood draw even though he was "sure" a prosecuting attorney was on call and even though he had no reason to believe that a magistrate judge would have been unavailable. The officer also acknowledged that he had obtained search warrants before taking blood samples in the past without difficulty. He explained that he elected to forgo a warrant application in this case only because he believed it was not legally necessary to obtain a warrant. Based on this testimony, the trial court concluded that there was no exigency and specifically found that, although the arrest took place in the middle of the night, "a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant."

The Missouri Supreme Court in turn affirmed that judgment, holding first that the dissipation of alcohol did not establish a *per se* exigency, and second that the State could not otherwise satisfy its burden of establishing exigent circumstances. In petitioning for certiorari to this Court, the State challenged only the first holding; it did not separately contend that the warrantless blood test was reasonable regardless of whether the natural dissipation of alcohol in a suspect's blood categorically justifies dispensing with the warrant requirement.

Here and in its own courts the State based its case on an insistence that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a nonconsensual blood test without any precondition for a warrant. That is incorrect.

Although the Missouri Supreme Court referred to this case as "unquestionably a routine DWI case," the fact that a particular drunk-driving stop is "routine" in the sense that it does not involve "'special facts,'" such as the need for the police to attend to a car accident, does not mean a warrant is required. Other factors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search. The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case.

Because this case was argued on the broad proposition that drunk-driving cases present a *per se* exigency, the arguments and the record do not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant. It suffices to say that the metabolization of

alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed. But that inquiry ought not to be pursued here where the question is not properly before this Court. Having rejected the sole argument presented to us challenging the Missouri Supreme Court's decision, we affirm its judgment.

We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

The judgment of the Missouri Supreme Court is affirmed.

Chief Justice ROBERTS, with whom Justice BREYER and Justice ALITO join, concurring in part and dissenting in part

[Chief Justice Roberts would have provided more robust guidance to law enforcement about precisely when warrantless nonconsensual blood draws are allowed. He wrote:

"A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test. I have no quarrel with the Court's 'totality of the circumstances' approach as a general matter; that is what our cases require. But the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases like the one before us."

"In my view, the proper rule is straightforward. Our cases establish that there is an exigent circumstances exception to the warrant requirement. That exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant. The natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence. That would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant."[1]]

Justice THOMAS, dissenting.

[Justice Thomas argued, "Because the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance. As a result, I would hold that a warrantless blood draw does not violate the Fourth Amendment." He noted that all parties agreed about the "rapid destruction of evidence" that "occurs in *every* situation where police have probable cause to arrest a drunk driver." He offered an evocative hypothetical:

"Officers are watching a warehouse and observe a worker carrying bundles from the warehouse to a large bonfire and throwing them into the blaze. The officers have probable cause to believe the bundles contain marijuana. Because there is only one person carrying the bundles, the officers believe it will take hours to completely destroy the drugs. During that time the officers likely could obtain a warrant. But it is clear that the officers need not sit idly by and watch the destruction of evidence while they wait for a warrant."]

* * *

The *McNeely* Court noted that to help enforce laws against drunk driving, states have enacted laws requiring drivers to submit to blood-alcohol tests in certain situations. Failure to submit to the test can lead to revocation of a driver's license even if the driver is never proven in court to have driven under the influence. In *Birchfield v. North Dakota*, the Court considered a particularly punitive state law that—had it survived constitutional scrutiny—could have undermined the Court's holding in *McNeely*.

Supreme Court of the United States

Danny Birchfield v. North Dakota

Decided June 23, 2016 – 136 S. Ct. 2160

Justice ALITO delivered the opinion of the Court.

Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions

of dollars in property damage every year. To fight this problem, all States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) that exceeds a specified level. But determining whether a driver's BAC is over the legal limit requires a test, and many drivers stopped on suspicion of drunk driving would not submit to testing if given the option. So every State also has long had what are termed "implied consent laws." These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State's drunk-driving laws.

In the past, the typical penalty for noncompliance was suspension or revocation of the motorist's license. The cases now before us involve laws that go beyond that and make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired. The question presented is whether such laws violate the Fourth Amendment's prohibition against unreasonable searches.

I

Because the cooperation of the test subject is necessary when a breath test is administered and highly preferable when a blood sample is taken, the enactment of laws defining intoxication based on BAC made it necessary for States to find a way of securing such cooperation. So-called "implied consent" laws were enacted to achieve this result. They provided that cooperation with BAC testing was a condition of the privilege of driving on state roads and that the privilege would be rescinded if a suspected drunk driver refused to honor that condition. The first such law was enacted by New York in 1953, and many other States followed suit not long thereafter. In 1962, the Uniform Vehicle Code also included such a provision. Today, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." Suspension or revocation of the motorist's driver's license remains the standard legal consequence of refusal. In addition, evidence of the motorist's refusal is admitted as evidence of likely intoxication in a drunk-driving prosecution.

In recent decades, the States and the Federal Government have toughened drunk-driving laws, and those efforts have corresponded to a dramatic decrease in alcohol-related fatalities. As of the early 1980's, the number of annual fatalities averaged 25,000; by 2014, the most recent year for which statistics are available, the number had fallen to below 10,000. One legal change has been further lowering the BAC standard from 0.10% to 0.08%. In addition, many States now impose increased penalties for recidivists and for drivers with a BAC level that exceeds a higher threshold. In North Dakota, for example, the standard penalty for first-time drunk-driving offenders is license suspension and a fine. But an offender with a BAC of 0.16% or higher must spend at least two days in jail. In addition, the State imposes increased mandatory minimum sentences for drunk-driving recidivists.

Many other States have taken a similar approach, but this new structure threatened to undermine the effectiveness of implied consent laws. If the penalty for driving with a greatly elevated BAC or for repeat violations exceeds the penalty for refusing to submit to testing, motorists who fear conviction for the more severely punished offenses have an incentive to reject testing. And in some States, the refusal rate is high. On average, over one-fifth of all drivers asked to submit to BAC testing in 2011 refused to do so. In North Dakota, the refusal rate for 2011 was a representative 21%.

To combat the problem of test refusal, some States have begun to enact laws making it a crime to refuse to undergo testing. North Dakota adopted a similar law, in 2013, after a pair of drunk-driving accidents claimed the lives of an entire young family and another family's 5- and 9-year-old boys. The Federal Government also encourages this approach as a means for overcoming the incentive that drunk drivers have to refuse a test.

II

Petitioner Danny Birchfield accidentally drove his car off a North Dakota highway on October 10, 2013. A state trooper arrived and watched as Birchfield unsuccessfully tried to drive back out of the ditch in which his car was stuck. The trooper approached, caught a strong whiff of alcohol, and saw that Birchfield's eyes were bloodshot and watery. Birchfield spoke in slurred speech and struggled to stay steady on his feet. At the trooper's request, Birchfield agreed to take several field sobriety tests and performed poorly on each. He had trouble reciting sections of the alphabet and counting backwards in compliance with the trooper's directions.

Believing that Birchfield was intoxicated, the trooper informed him of his obligation under state law to agree to a BAC test. Birchfield consented to a roadside breath test. The device used for this sort of test often differs from the machines used for breath tests administered in a police station and is intended to provide a preliminary assessment of the driver's BAC. Because the reliability of these preliminary or screening breath tests varies, many jurisdictions do not permit their numerical results to be admitted in a drunk-driving trial as evidence of a driver's BAC. In North Dakota, results from this type of test are "used only for determining whether or not a further test shall be given." In Birchfield's case, the screening test estimated that his BAC was

0.254%, more than three times the legal limit of 0.08%.

The state trooper arrested Birchfield for driving while impaired, gave the usual *Miranda* warnings, again advised him of his obligation under North Dakota law to undergo BAC testing, and informed him, as state law requires that refusing to take the test would expose him to criminal penalties. In addition to mandatory addiction treatment, sentences range from a mandatory fine of $500 (for first-time offenders) to fines of at least $2,000 and imprisonment of at least one year and one day (for serial offenders). These criminal penalties apply to blood, breath, and urine test refusals alike.

Although faced with the prospect of prosecution under this law, Birchfield refused to let his blood be drawn. Just three months before, Birchfield had received a citation for driving under the influence, and he ultimately pleaded guilty to that offense. This time he also pleaded guilty—to a misdemeanor violation of the refusal statute—but his plea was a conditional one: while Birchfield admitted refusing the blood test, he argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the test. The State District Court rejected this argument and imposed a sentence that accounted for his prior conviction. The sentence included 30 days in jail (20 of which were suspended and 10 of which had already been served), 1 year of unsupervised probation, $1,750 in fine and fees, and mandatory participation in a sobriety program and in a substance abuse evaluation.

On appeal, the North Dakota Supreme Court affirmed. The court found support for the test refusal statute in this Court's *McNeely* plurality opinion, which had spoken favorably about "acceptable 'legal tools' with 'significant consequences' for refusing to submit to testing."

We granted certiorari in order to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream.

III

[S]uccess for [] petitioner[] depends on the proposition that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued by a magistrate. If, on the other hand, such warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant. And by the same token, if such warrantless searches are constitutional, there is no obstacle under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding. We therefore begin by considering whether the searches demanded in these cases were consistent with the Fourth Amendment.

IV

The [Fourth] Amendment [] prohibits "unreasonable searches," and our cases establish that the taking of a blood sample or the administration of a breath test is a search. The question, then, is whether the warrantless searches at issue here were reasonable. "[T]he text of the Fourth Amendment does not specify when a search warrant must be obtained." But "this Court has inferred that a warrant must [usually] be secured." This usual requirement, however, is subject to a number of exceptions.

We have previously had occasion to examine whether one such exception—for "exigent circumstances"—applies in drunk-driving investigations. In *Schmerber v. California,* we held that drunk driving *may* present such an exigency. More recently, though, we have held that the natural dissipation of alcohol from the bloodstream does not *always* constitute an exigency justifying the warrantless taking of a blood sample. While emphasizing that the exigent-circumstances exception must be applied on a case-by-case basis, the [*Missouri v.] McNeely* Court noted that other exceptions to the warrant requirement "apply categorically" rather than in a "case-specific" fashion. One of these, as the *McNeely* opinion recognized, is the long-established rule that a warrantless search may be conducted incident to a lawful arrest. But the Court pointedly did not address any potential justification for warrantless testing of drunk-driving suspects except for the exception "at issue in th[e] case," namely, the exception for exigent circumstances.

In the [] case[] now before us, the driver[] w[as] [] told that [he was] required to submit to a search after being placed under arrest for drunk driving. We therefore consider how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests.

V

Blood and breath tests to measure blood alcohol concentration are not as new as searches of cell phones, but here, as in *Riley* [*v. California*], the founding era does not provide any definitive guidance as to whether they should be allowed incident to arrest.

Lacking such guidance, we engage in the same mode of analysis as in *Riley*: we examine "the degree to which [they] intrud[e] upon an individual's privacy and ... the degree to which [they are] needed for the promotion of legitimate governmental interests.'" We begin by considering the impact of breath and blood tests on individual privacy interests, and we will discuss each type of test in turn.

Years ago we said that breath tests do not "implicat[e] significant privacy concerns." That remains so today. First, the physical intrusion is almost negligible. Breath tests "do not require piercing the skin" and entail "a minimum of inconvenience." The effort is no more demanding than blowing up a party balloon.

In prior cases, we have upheld warrantless searches involving physical intrusions that were at least as significant as that entailed in the administration of a breath test. Just recently we described the process of collecting a DNA sample by rubbing a swab on the inside of a person's cheek as a "negligible" intrusion. We have also upheld scraping underneath a suspect's fingernails to find evidence of a crime, calling that a "very limited intrusion." A breath test is no more intrusive than either of these procedures.

Second, breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath. In this respect, they contrast sharply with the sample of cells collected by the swab in *Maryland v. King* [, 569 U.S. 435 (2013)]. Although the DNA obtained under the law at issue in that case could lawfully be used only for identification purposes, the process put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained. A breath test, by contrast, results in a BAC reading on a machine, nothing more. No sample of anything is left in the possession of the police.

Finally, participation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest. The act of blowing into a straw is not inherently embarrassing, nor are evidentiary breath tests administered in a manner that causes embarrassment. Again, such tests are normally administered in private at a police station, in a patrol car, or in a mobile testing facility, out of public view. Moreover, once placed under arrest, the individual's expectation of privacy is necessarily diminished. For all these reasons, "[a] breath test does not "implicat[e] significant privacy concerns."

Blood tests are a different matter. They "require piercing the skin" and extract a part of the subject's body. And while humans exhale air from their lungs many times per minute, humans do not continually shed blood. It is true, of course, that people voluntarily submit to the taking of blood samples as part of a physical examination, and the process involves little pain or risk. Nevertheless, for many, the process is not one they relish. It is significantly more intrusive than blowing into a tube. Perhaps that is why many States' implied consent laws specifically prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests or give motorists a measure of choice over which test to take.

In addition, a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

Having assessed the impact of breath and blood testing on privacy interests, we now look to the States' asserted need to obtain BAC readings for persons arrested for drunk driving.

The States and the Federal Government have a "paramount interest ... in preserving the safety of ... public highways." Although the number of deaths and injuries caused by motor vehicle accidents has declined over the years, the statistics are still staggering.

Alcohol consumption is a leading cause of traffic fatalities and injuries. During the past decade, annual fatalities in drunk-driving accidents ranged from 13,582 deaths in 2005 to 9,865 deaths in 2011. The most recent data report a total of 9,967 such fatalities in 2014—on average, one death every 53 minutes. Our cases have long recognized the "carnage" and "slaughter" caused by drunk drivers.

To deter potential drunk drivers and thereby reduce alcohol-related injuries, the States and the Federal Government have taken the series of steps that we recounted earlier. The law[] at issue in the present cases—which make it a crime to refuse to submit to a BAC test—are designed to provide an incentive to cooperate in such cases, and we conclude that they serve a very important function.

Petitioner[] contend[s] that the States and the Federal Government could combat drunk driving in other ways that do not have the same impact on personal privacy. [His] argument[] [is] unconvincing.

The chief argument on this score is that an officer making an arrest for drunk driving should not be allowed to administer a BAC

test unless the officer procures a search warrant or could not do so in time to obtain usable test results.

This argument contravenes our decisions holding that the legality of a search incident to arrest must be judged on the basis of categorical rules.

Petitioners next suggest[s] that requiring a warrant for BAC testing in every case in which a motorist is arrested for drunk driving would not impose any great burden on the police or the courts. But of course the same argument could be made about searching through objects found on the arrestee's possession, which our cases permit even in the absence of a warrant. What about the cigarette package in [*United States v.*] *Robinson*? What if a motorist arrested for drunk driving has a flask in his pocket? What if a motorist arrested for driving while under the influence of marijuana has what appears to be a marijuana cigarette on his person? What about an unmarked bottle of pills?

If a search warrant were required for every search incident to arrest that does not involve exigent circumstances, the courts would be swamped. And even if we arbitrarily singled out BAC tests incident to arrest for this special treatment, the impact on the courts would be considerable. The number of arrests every year for driving under the influence is enormous—more than 1.1 million in 2014. Particularly in sparsely populated areas, it would be no small task for courts to field a large new influx of warrant applications that could come on any day of the year and at any hour. In many jurisdictions, judicial officers have the authority to issue warrants only within their own districts, and in rural areas, some districts may have only a small number of judicial officers.

North Dakota, for instance, has only 51 state district judges spread across eight judicial districts. Those judges are assisted by 31 magistrates, and there are no magistrates in 20 of the State's 53 counties. At any given location in the State, then, relatively few state officials have authority to issue search warrants. Yet the State, with a population of roughly 740,000, sees nearly 7,000 drunk-driving arrests each year. With a small number of judicial officers authorized to issue warrants in some parts of the State, the burden of fielding BAC warrant applications 24 hours per day, 365 days of the year would not be the light burden that petitioner[] suggest[s].

In light of this burden and our prior search-incident-to-arrest precedents, petitioner[] would at a minimum have to show some special need for warrants for BAC testing. It is therefore appropriate to consider the benefits that such applications would provide. Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought.

How well would these functions be performed by the warrant applications that petitioners propose? In order to persuade a magistrate that there is probable cause for a search warrant, the officer would typically recite the same facts that led the officer to find that there was probable cause for arrest, namely, that there is probable cause to believe that a BAC test will reveal that the motorist's blood alcohol level is over the limit. [T]he facts that establish probable cause are largely the same from one drunk-driving stop to the next and consist largely of the officer's own characterization of his or her observations—for example, that there was a strong odor of alcohol, that the motorist wobbled when attempting to stand, that the motorist paused when reciting the alphabet or counting backwards, and so on. A magistrate would be in a poor position to challenge such characterizations.

As for the second function served by search warrants—delineating the scope of a search—the warrants in question here would not serve that function at all. In every case the scope of the warrant would simply be a BAC test of the arrestee. For these reasons, requiring the police to obtain a warrant in every case would impose a substantial burden but no commensurate benefit.

Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.

We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Neither respondents nor their *amici* dispute the effectiveness of breath tests in measuring BAC. Breath tests have been in common use for many years. Their results are admissible in court and are widely credited by juries, and respondents do not dispute their accuracy or utility. What, then, is the justification for warrantless blood tests?

One advantage of blood tests is their ability to detect not just alcohol but also other substances that can impair a driver's ability to operate a car safely. A breath test cannot do this, but police have other measures at their disposal when they have reason to

believe that a motorist may be under the influence of some other substance (for example, if a breath test indicates that a clearly impaired motorist has little if any alcohol in his blood). Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not.

A blood test also requires less driver participation than a breath test. In order for a technician to take a blood sample, all that is needed is for the subject to remain still, either voluntarily or by being immobilized. Thus, it is possible to extract a blood sample from a subject who forcibly resists, but many States reasonably prefer not to take this step. North Dakota, for example, tells us that it generally opposes this practice because of the risk of dangerous altercations between police officers and arrestees in rural areas where the arresting officer may not have backup. Under current North Dakota law, only in cases involving an accident that results in death or serious injury may blood be taken from arrestees who resist.

It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

A breath test may also be ineffective if an arrestee deliberately attempts to prevent an accurate reading by failing to blow into the tube for the requisite length of time or with the necessary force. But courts have held that such conduct qualifies as a refusal to undergo testing and it may be prosecuted as such. And again, a warrant for a blood test may be sought.

Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.

VI

Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. It is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context. Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioner[] do[es] not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.

It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Respondents and their *amici* all but concede this point. North Dakota emphasizes that its law makes refusal a misdemeanor and suggests that laws punishing refusal more severely would present a different issue. Borrowing from our Fifth Amendment jurisprudence, the United States suggests that motorists could be deemed to have consented to only those conditions that are "reasonable" in that they have a "nexus" to the privilege of driving and entail penalties that are proportional to severity of the violation. But in the Fourth Amendment setting, this standard does not differ in substance from the one that we apply, since reasonableness is always the touchstone of Fourth Amendment analysis. And applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.

VII

Our remaining task is to apply our legal conclusions to the [] case[] before us.

Petitioner Birchfield was criminally prosecuted for refusing a warrantless blood draw, and therefore the search he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. There is no indication in the record or briefing that a breath test would have failed to satisfy the State's interests in acquiring evidence to enforce its drunk-driving laws against Birchfield. And North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search. Unable to see any other basis on which to justify a warrantless test of Birchfield's blood, we conclude that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction must be reversed.

We accordingly reverse the judgment of the North Dakota Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

Justice THOMAS, concurring in judgment in part and dissenting in part.

The compromise the Court reaches today is not a good one. By deciding that some (but not all) warrantless tests revealing the blood alcohol concentration (BAC) of an arrested driver are constitutional, the Court contorts the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. The far simpler answer to the question presented is the one rejected in *Missouri v. McNeely*. Here, the tests revealing the BAC of a driver suspected of driving drunk are constitutional under the exigent-circumstances exception to the warrant requirement.

I

Today's decision chips away at a well-established exception to the warrant requirement. Until recently, we have admonished that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." Under our precedents, a search incident to lawful arrest "require[d] no additional justification." Not until the recent decision in *Riley v. California,* did the Court begin to retreat from this categorical approach because it feared that the search at issue, the "search of the information on a cell phone," bore "little resemblance to the type of brief physical search" contemplated by this Court's past search-incident-to-arrest decisions. I joined *Riley,* however, because the Court resisted the temptation to permit searches of some kinds of cellphone data and not others and instead asked more generally whether that entire "category of effects" was searchable without a warrant.

Today's decision begins where *Riley* left off. The Court purports to apply *Robinson* but further departs from its categorical approach by holding that warrantless breath tests to prevent the destruction of BAC evidence are constitutional searches incident to arrest, but warrantless blood tests are not. That hairsplitting makes little sense. Either the search-incident-to-arrest exception permits bodily searches to prevent the destruction of BAC evidence, or it does not.

The Court justifies its result—an arbitrary line in the sand between blood and breath tests—by balancing the invasiveness of the particular type of search against the government's reasons for the search. Such case-by-case balancing is bad for the People, who "through ratification, have already weighed the policy tradeoffs that constitutional rights entail." It is also bad for law enforcement officers, who depend on predictable rules to do their job, as Members of this Court have exhorted in the past.

Today's application of the search-incident-to-arrest exception is bound to cause confusion in the lower courts. The Court's choice to allow some (but not all) BAC searches is undeniably appealing, for it both reins in the pernicious problem of drunk driving and also purports to preserve some Fourth Amendment protections. But that compromise has little support under this Court's existing precedents.

II

The better (and far simpler) way to resolve these cases is by applying the *per se* rule that I proposed in *McNeely*. Under that approach, both warrantless breath and blood tests are constitutional because "the natural metabolization of [BAC] creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances."

Today's decision rejects *McNeely*'s arbitrary distinction between the destruction of evidence generally and the destruction of BAC evidence. But only for searches incident to arrest. The Court declares that such a distinction "between an arrestee's active destruction of evidence and the loss of evidence due to a natural process makes little sense." I agree. But it also "makes little sense" for the Court to reject *McNeely*'s arbitrary distinction only for searches incident to arrest and not also for exigent-circumstances searches when both are justified by identical concerns about the destruction of the same evidence. *McNeely*'s distinction is no less arbitrary for searches justified by exigent circumstances than those justified by search incident to arrest.

The Court was wrong in *McNeely,* and today's compromise is perhaps an inevitable consequence of that error. Both searches contemplated by the state laws at issue in these cases would be constitutional under the exigent-circumstances exception to the warrant requirement. I respectfully concur in the judgment in part and dissent in part.

Notes, Comments, and Questions

The Court in *Birchfield* holds implied blood-draw consent laws that result in criminal prosecution unconstitutional. What result if the implied consent law results in an administrative (rather than criminal) penalty? For example, suppose a state's implied consent law requires drivers arrested for drunk driving to consent to a breathalyzer, blood draw, saliva or urine analysis or have their license administratively revoked for one year. *See, e.g.*, 577.020, RSMo (2016).

In *Mitchell v. Wisconsin*, 139 S. Ct 2525 (2019), the Court issued a plurality opinion affirming the legality of a warrantless blood draw conducted by police after a suspect became unconscious. The plurality opinion—approved by four Justices—stated that when a driver is unconscious and cannot submit to a breath test, police may perform a blood draw under the exigent circumstances exception to the warrant requirement. The opinion relied upon *Schmerber v. California*, *Missouri v. McNeely*, and *Birchfield*. Justice Thomas, concurring in the judgment, would have held that the natural metabolism of alcohol by the human body always creates a *per se* exigency "once police have probable cause to believe the driver is drunk." Four Justices dissented, in two separate opinions.

Like the preceding cases, *Welsh v. Wisconsin* involves police investigation of drunk driving and an argument about whether the exigent circumstances exception justifies certain police activity. The key difference here is that instead of seeking to take a suspect's blood, the police in *Welsh* sought to enter his home to arrest him. In addition, this case illustrates the far more relaxed attitude toward drunk driving that was common among judges and legislators in the 1980s.

Supreme Court of the United States

Edward G. Welsh v. Wisconsin

Decided May 15, 1984 – 466 U.S. 740

Justice BRENNAN delivered the opinion of the Court.

Payton v. New York, 445 U.S. 573 (1980), held that, absent probable cause and exigent circumstances, warrantless arrests in the home are prohibited by the Fourth Amendment. But the Court in that case explicitly refused "to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." Certiorari was granted in this case to decide at least one aspect of the unresolved question: whether, and if so under what circumstances, the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest him for a nonjailable traffic offense.

I

A

Shortly before 9 o'clock on the rainy night of April 24, 1978, a lone witness, Randy Jablonic, observed a car being driven erratically. After changing speeds and veering from side to side, the car eventually swerved off the road and came to a stop in an open field. No damage to any person or property occurred. Concerned about the driver and fearing that the car would get back on the highway, Jablonic drove his truck up behind the car so as to block it from returning to the road. Another passerby also stopped at the scene, and Jablonic asked her to call the police. Before the police arrived, however, the driver of the car emerged from his vehicle, approached Jablonic's truck, and asked Jablonic for a ride home. Jablonic instead suggested that they wait for assistance in removing or repairing the car. Ignoring Jablonic's suggestion, the driver walked away from the scene.

A few minutes later, the police arrived and questioned Jablonic. He told one officer what he had seen, specifically noting that the driver was either very inebriated or very sick. The officer checked the motor vehicle registration of the abandoned car and learned that it was registered to the petitioner, Edward G. Welsh. In addition, the officer noted that the petitioner's residence was a short distance from the scene, and therefore easily within walking distance.

Without securing any type of warrant, the police proceeded to the petitioner's home, arriving about 9 p.m. When the petitioner's stepdaughter answered the door, the police gained entry into the house.[2] Proceeding upstairs to the petitioner's bedroom, they found him lying naked in bed. At this point, the petitioner was placed under arrest for driving or operating a motor vehicle while under the influence of an intoxicant. The petitioner was taken to the police station, where he refused to submit to a breath-analysis test.

B

As a result of these events, the petitioner was subjected to two separate but related proceedings: one concerning his refusal to submit to a breath test and the other involving the alleged code violation for driving while intoxicated. Under the Wisconsin Vehicle Code in effect in April 1978, one arrested for driving while intoxicated [] could be requested by a law enforcement officer to provide breath, blood, or urine samples for the purpose of determining the presence or quantity of alcohol. If such a request was made, the arrestee was required to submit to the appropriate testing or risk a revocation of operating privileges ... for 60 days.

C

[T]he State filed a criminal complaint against the petitioner for driving while intoxicated. The petitioner responded by filing a motion to dismiss the complaint, relying on his contention that the underlying arrest was invalid. After receiving evidence at a hearing on this motion in July 1980, the trial court concluded that the criminal complaint would not be dismissed because the existence of both probable cause and exigent circumstances justified the warrantless arrest. [T]he appellate court concluded that the warrantless arrest of the petitioner in his home violated the Fourth Amendment because the State, although demonstrating probable cause to arrest, had not established the existence of exigent circumstances. The Supreme Court of Wisconsin in turn reversed the Court of Appeals. Because of the important Fourth Amendment implications of the decision below, we granted certiorari.

II

[T]he Court decided in *Payton v. New York* that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. At the same time, the Court declined to consider the scope of any exception for exigent circumstances that might justify warrantless home arrests, thereby leaving to the lower courts the initial application of the exigent-circumstances exception. Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are “few in number and carefully delineated” and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions.

Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government’s interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

We [] conclude that the common-sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on “unreasonable searches and seizures,” and hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.

Application of this principle to the facts of the present case is relatively straightforward. The petitioner was arrested in the privacy of his own bedroom for a noncriminal, traffic offense. The State attempts to justify the arrest by relying on the hot-pursuit doctrine, on the threat to public safety, and on the need to preserve evidence of the petitioner’s blood-alcohol level. On the facts of this case, however, the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime. Moreover, because the petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to the public safety. Hence, the only potential emergency claimed by the State was the need to ascertain the petitioner’s blood-alcohol level.

Even assuming, however, that the underlying facts would support a finding of this exigent circumstance, mere similarity to other cases involving the imminent destruction of evidence is not sufficient. The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. This is the best indication of the State’s interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. Given this expression of the State’s interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner’s blood-alcohol level might have dissipated while the police obtained a warrant. To

allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.

III

The Supreme Court of Wisconsin let stand a warrantless, nighttime entry into the petitioner's home to arrest him for a civil traffic offense. Such an arrest, however, is clearly prohibited by the special protection afforded the individual in his home by the Fourth Amendment. The petitioner's arrest was therefore invalid, the judgment of the Supreme Court of Wisconsin is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice BLACKMUN, concurring.

I join the Court's opinion but add a personal observation.

I yield to no one in my profound personal concern about the unwillingness of our national consciousness to face up to—and to do something about—the continuing slaughter upon our Nation's highways, a good percentage of which is due to drivers who are drunk or semi-incapacitated because of alcohol or drug ingestion. I have spoken in these Reports to this point before. And it is amazing to me that one of our great States—one which, by its highway signs, proclaims to be diligent and emphatic in its prosecution of the drunken driver—still classifies driving while intoxicated as a civil violation that allows only a money forfeiture of not more than $300 so long as it is a first offense. The State, like the indulgent parent, hesitates to discipline the spoiled child very much, even though the child is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's act. Our personal convenience still weighs heavily in the balance, and the highway deaths and injuries continue. But if Wisconsin and other States choose by legislation thus to regulate their penalty structure, there is, unfortunately, nothing in the United States Constitution that says they may not do so.

Notes, Comments, and Questions

In 1984, the Court prohibited police from entering a house to arrest an apparently intoxicated man who had recently driven his car off the road and stumbled home. In 2016, the Court allowed states to demand—under threat of criminal prosecution—that motorists arrested for drunk driving submit to breath tests. The home entry was "unreasonable," and demanding the breath test is "reasonable."

Perhaps the results can be explained by Fourth Amendment doctrine that has remained constant since 1791. Students might also consider, however, that the decisions could result in part on changing attitudes toward drunk driving. What was a noncriminal violation in Wisconsin in the 1980s is now punished far more severely across the nation. The position articulated by Justice Blackmun in his dissent in *Welsh*, in which he chastised Wisconsin for its lax treatment of drunken drivers, has won widespread appeal among lawmakers, both those on the bench and those in legislatures. Mothers Against Drunk Driving, founded in 1980 after the founder's daughter was killed in a crash involving a drunk driver, won important legislative victories beginning in 1984, when Congress acted to force states to raise their drinking ages to 21 years.[3]

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2.13: Chapter 14 - The Warrant Requirement- Exceptions (Part 6)

THE FOURTH AMENDMENT

Chapter 14

The Warrant Requirement: Exceptions (Part 6)

Warrant Exception: Ports of Entry

When persons and items enter the United States from abroad, agents of the executive enjoy expansive authority to conduct searches and seizures without a warrant. The Court has repeatedly chosen to provide relatively little judicial oversight of the executive's use of that authority, especially when compared to oversight of common domestic policing.

We begin with the Court's approval of routine searches at the California-Mexico border. No quantum of evidence (or suspicion) is needed.

Supreme Court of the United States

United States v. Manuel Flores-Montano

Decided March 30, 2004 – 541 U.S. 149

Chief Justice REHNQUIST delivered the opinion of the [unanimous] Court.

Customs officials seized 37 kilograms—a little more than 81 pounds—of marijuana from respondent Manuel Flores-Montano's gas tank at the international border. The Court of Appeals for the Ninth Circuit, relying on an earlier decision by a divided panel of that court, held that the Fourth Amendment forbade the fuel tank search absent reasonable suspicion. We hold that the search in question did not require reasonable suspicion.

Respondent, driving a 1987 Ford Taurus station wagon, attempted to enter the United States at the Otay Mesa Port of Entry in southern California. A customs inspector conducted an inspection of the station wagon, and requested respondent to leave the vehicle. The vehicle was then taken to a secondary inspection station.

At the secondary station, a second customs inspector inspected the gas tank by tapping it, and noted that the tank sounded solid. Subsequently, the inspector requested a mechanic under contract with Customs to come to the border station to remove the tank. Within 20 to 30 minutes, the mechanic arrived. He raised the car on a hydraulic lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections. After the gas tank was removed, the inspector hammered off bondo (a putty-like hardening substance that is used to seal openings) from the top of the gas tank. The inspector opened an access plate underneath the bondo and found 37 kilograms of marijuana bricks. The process took 15 to 25 minutes.

A grand jury indicted respondent on one count of unlawfully importing marijuana and one count of possession of marijuana with intent to distribute. Relying on [Ninth Circuit precedent], the Court of Appeals held, *inter alia,* that removal of a gas tank requires reasonable suspicion in order to be consistent with the Fourth Amendment.

We granted certiorari and now reverse.

In [*United States v.*] *Molina-Tarazon,* [279 F.3d 709] the Court of Appeals decided a case presenting similar facts to the one at bar. It asked "whether [the removal and dismantling of the defendant's fuel tank] is a 'routine' border search for which no suspicion whatsoever is required." The Court of Appeals stated that "[i]n order to conduct a search that goes beyond the routine,

an inspector must have reasonable suspicion," and the "critical factor" in determining whether a search is "routine" is the "degree of intrusiveness."

The Court of Appeals seized on language from our opinion in *United States v. Montoya de Hernandez,* 473 U.S. 531 (1985), in which we used the word "routine" as a descriptive term in discussing border searches. The Court of Appeals took the term "routine," fashioned a new balancing test, and extended it to searches of vehicles. But the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles. Complex balancing tests to determine what is a "routine" search of a vehicle, as opposed to a more "intrusive" search of a person, have no place in border searches of vehicles.

The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." Congress, since the beginning of our Government, "has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.

That interest in protecting the borders is illustrated in this case by the evidence that smugglers frequently attempt to penetrate our borders with contraband secreted in their automobiles' fuel tank. Over the past 5 ½ fiscal years, there have been 18,788 vehicle drug seizures at the southern California ports of entry. Of those 18,788, gas tank drug seizures have accounted for 4,619 of the vehicle drug seizures, or approximately 25%. In addition, instances of persons smuggled in and around gas tank compartments are discovered at the ports of entry of San Ysidro and Otay Mesa at a rate averaging 1 approximately every 10 days.

Respondent asserts two main arguments with respect to his Fourth Amendment interests. First, he urges that he has a privacy interest in his fuel tank, and that the suspicionless disassembly of his tank is an invasion of his privacy. But on many occasions, we have noted that the expectation of privacy is less at the border than it is in the interior. We have long recognized that automobiles seeking entry into this country may be searched. It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile's passenger compartment.

Second, respondent argues that the Fourth Amendment "protects property as well as privacy" and that the disassembly and reassembly of his gas tank is a significant deprivation of his property interest because it may damage the vehicle. He does not, and on the record cannot, truly contend that the procedure of removal, disassembly, and reassembly of the fuel tank in this case or any other has resulted in serious damage to, or destruction of, the property. According to the Government, for example, in fiscal year 2003, 348 gas tank searches conducted along the southern border were negative (*i.e.,* no contraband was found), the gas tanks were reassembled, and the vehicles continued their entry into the United States without incident.

Respondent cites not a single accident involving the vehicle or motorist in the many thousands of gas tank disassemblies that have occurred at the border. A gas tank search involves a brief procedure that can be reversed without damaging the safety or operation of the vehicle. If damage to a vehicle were to occur, the motorist might be entitled to recovery. While the interference with a motorist's possessory interest is not insignificant when the Government removes, disassembles, and reassembles his gas tank, it nevertheless is justified by the Government's paramount interest in protecting the border.

For the reasons stated, we conclude that the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. While it may be true that some searches of property are so destructive as to require a different result, this was not one of them. The judgment of the United States Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice BREYER, concurring.

I join the Court's opinion in full. I also note that Customs keeps track of the border searches its agents conduct, including the reasons for the searches. This administrative process should help minimize concerns that gas tank searches might be undertaken in an abusive manner.

* * *

In addition to permitting extensive suspicionless searches and seizures at international borders, the Court has permitted similar searches and seizures at checkpoints some distance from the border. The fixed checkpoint at issue in the next case was 66 miles

north of the United States-Mexico border.

Supreme Court of the United States

United States v. Amado Martinez-Fuerte

Decided July 6, 1976 – 428 U.S. 543

Mr. Justice POWELL delivered the opinion of the Court.

Th[is] case[] involve[s] criminal prosecutions for offenses relating to the transportation of illegal Mexican aliens. [D]efendant was arrested at a permanent checkpoint operated by the Border Patrol away from the international border with Mexico, and [] sought the exclusion of certain evidence on the ground that the operation of the checkpoint was incompatible with the Fourth Amendment. [W]hether the Fourth Amendment was violated turns primarily on whether a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens. We hold today that such stops are consistent with the Fourth Amendment. We also hold that the operation of a fixed checkpoint need not be authorized in advance by a judicial warrant.

I

A

The respondents are defendants in three separate prosecutions resulting from arrests made on three different occasions at the permanent immigration checkpoint on Interstate 5 near San Clemente, Cal. Interstate 5 is the principal highway between San Diego and Los Angeles, and the San Clemente checkpoint is 66 road miles north of the Mexican border.

The "point" agent visually screens all northbound vehicles, which the checkpoint brings to a virtual, if not a complete, halt. Most motorists are allowed to resume their progress without any oral inquiry or close visual examination. In a relatively small number of cases the "point" agent will conclude that further inquiry is in order. He directs these cars to a secondary inspection area, where their occupants are asked about their citizenship and immigration status. The Government informs us that at San Clemente the average length of an investigation in the secondary inspection area is three to five minutes. A direction to stop in the secondary inspection area could be based on something suspicious about a particular car passing through the checkpoint, but the Government concedes that none of the three stops at issue was based on any articulable suspicion. During the period when these stops were made, the checkpoint was operating under a magistrate's "warrant of inspection," which authorized the Border Patrol to conduct a routine-stop operation at the San Clemente location.

We turn now to the particulars of the stops and the procedural history of the case. Respondent Amado Martinez-Fuerte approached the checkpoint driving a vehicle containing two female passengers. The women were illegal Mexican aliens who had entered the United States at the San Ysidro port of entry by using false papers and rendezvoused with Martinez-Fuerte in San Diego to be transported northward. At the checkpoint their car was directed to the secondary inspection area. Martinez-Fuerte produced documents showing him to be a lawful resident alien, but his passengers admitted being present in the country unlawfully. He was charged, *inter alia,* with two counts of illegally transporting aliens. He moved before trial to suppress all evidence stemming from the stop on the ground that the operation of the checkpoint was in violation of the Fourth Amendment. The motion to suppress was denied, and he was convicted on both counts after a jury trial.

Martinez-Fuerte appealed his conviction. The Court of Appeals held, with one judge dissenting, that the[] stop[] violated the Fourth Amendment, concluding that a stop for inquiry is constitutional only if the Border Patrol reasonably suspects the presence of illegal aliens on the basis of articulable facts. It reversed Martinez-Fuerte's conviction. We reverse and remand.

II

Before turning to the constitutional question, we examine the context in which it arises.

It has been national policy for many years to limit immigration into the United States. Interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems. The principal problem arises from surreptitious entries. The United States shares a border with Mexico that is almost 2,000 miles long, and much of the border area is uninhabited desert or thinly

populated arid land. Although the Border Patrol maintains personnel, electronic equipment, and fences along portions of the border, it remains relatively easy for individuals to enter the United States without detection. It also is possible for an alien to enter unlawfully at a port of entry by the use of falsified papers or to enter lawfully but violate restrictions of entry in an effort to remain in the country unlawfully. Once within the country, the aliens seek to travel inland to areas where employment is believed to be available, frequently meeting by prearrangement with friends or professional smugglers who transport them in private vehicles.

The Border Patrol conducts three kinds of inland traffic-checking operations in an effort to minimize illegal immigration. Permanent checkpoints are maintained at or near intersections of important roads leading away from the border. They operate on a coordinated basis designed to avoid circumvention by smugglers and others who transport the illegal aliens. Temporary checkpoints, which operate like permanent ones, occasionally are established in other strategic locations. Finally, roving patrols are maintained to supplement the checkpoint system.

We are concerned here with permanent checkpoints, the locations of which are chosen on the basis of a number of factors. The Border Patrol believes that to assure effectiveness, a checkpoint must be (i) distant enough from the border to avoid interference with traffic in populated areas near the border, (ii) close to the confluence of two or more significant roads leading away from the border, (iii) situated in terrain that restricts vehicle passage around the checkpoint, (iv) on a stretch of highway compatible with safe operation, and (v) beyond the 25-mile zone in which “border passes” are valid.[1]

III

The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual, a process evident in our previous cases dealing with Border Patrol traffic-checking operations.

In *Almeida-Sanchez v. United States*, [413 U.S. 266 (1973)], the question was whether a roving-patrol unit constitutionally could search a vehicle for illegal aliens simply because it was in the general vicinity of the border. We recognized that important law enforcement interests were at stake but held that searches by roving patrols impinged so significantly on Fourth Amendment privacy interests that a search could be conducted without consent only if there was probable cause to believe that a car contained illegal aliens, at least in the absence of a judicial warrant authorizing random searches by roving patrols in a given area. We held in *United States v. Ortiz*, [422 U.S. 891 (1975)], that the same limitations applied to vehicle searches conducted at a permanent checkpoint.

In *United States v. Brignoni-Ponce*, [422 U.S. 873 (1975)], however, we recognized that other traffic-checking practices involve a different balance of public and private interests and appropriately are subject to less stringent constitutional safeguards. The question was under what circumstances a roving patrol could stop motorists in the general area of the border for brief inquiry into their residence status. We found that the interference with Fourth Amendment interests involved in such a stop was “modest,” while the inquiry served significant law enforcement needs. We therefore held that a roving-patrol stop need not be justified by probable cause and may be undertaken if the stopping officer is “aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion” that a vehicle contains illegal aliens.

IV

It is agreed that checkpoint stops are “seizures” within the meaning of the Fourth Amendment. The defendants contend primarily that the routine stopping of vehicles at a checkpoint is invalid because *Brignoni-Ponce* must be read as proscribing any stops in the absence of reasonable suspicion. [W]e turn first to whether reasonable suspicion is a prerequisite to a valid stop, a question to be resolved by balancing the interests at stake.

A

Our previous cases have recognized that maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border. We note here only the substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints, a practice which the Government identifies as the most important of the traffic-checking operations. These checkpoints are located on important highways; in their absence such highways would offer illegal aliens a quick and safe route into the interior. Routine checkpoint inquiries apprehend many smugglers and illegal aliens who succumb to the lure of such highways. And the prospect of such inquiries forces others onto less efficient roads that

are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols.

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly.

B

While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited. The stop does intrude to a limited extent on motorists' right to "free passage without interruption," and arguably on their right to personal security. But it involves only a brief detention of travelers during which "'[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'"

Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search. This objective intrusion the stop itself, the questioning, and the visual inspection also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop. In *Ortiz*, we noted:

"[T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion."

In *Brignoni-Ponce*, we recognized that Fourth Amendment analysis in this context also must take into account the overall degree of interference with legitimate traffic. We concluded there that random roving-patrol stops could not be tolerated because they "would subject the residents of ... [border] areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. ... [They] could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road ...." There also was a grave danger that such unreviewable discretion would be abused by some officers in the field.

Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.

The defendants arrested at the San Clemente checkpoint suggest that its operation involves a significant extra element of intrusiveness in that only a small percentage of cars are referred to the secondary inspection area, thereby "stigmatizing" those diverted and reducing the assurances provided by equal treatment of all motorists. We think defendants overstate the consequences. Referrals are made for the sole purpose of conducting a routine and limited inquiry into residence status that cannot feasibly be made of every motorist where the traffic is heavy. The objective intrusion of the stop and inquiry thus remains minimal. Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature. Moreover, selective referrals rather than questioning the occupants of every car tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public.

C

The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of

such suspicion.

[Here,] we deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection. As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal. On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.

We further believe that it is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation. As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved.[2]

VI

In summary, we hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant. The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop. We have held that checkpoint searches are constitutional only if justified by consent or probable cause to search. And our holding today is limited to the type of stops described in this opinion. "[A]ny further detention ... must be based on consent or probable cause." None of the defendants in these cases argues that the stopping officers exceeded these limitations. We reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case with directions to affirm the conviction of Martinez-Fuerte.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

Today's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures. Consistent with this purpose to debilitate Fourth Amendment protections, the Court's decision today virtually empties the Amendment of its reasonableness requirement by holding that law enforcement officials manning fixed checkpoint stations who make standardless seizures of persons do not violate the Amendment. I dissent.

We are told today [] that motorists without number may be individually stopped, questioned, visually inspected, and then further detained without even a showing of articulable suspicion, let alone the heretofore constitutional minimum of reasonable suspicion, a result that permits search and seizure to rest upon "nothing more substantial than inarticulate hunches." This defacement of Fourth Amendment protections is arrived at by a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify the search and seizure. But that method is only a convenient cover for condoning arbitrary official conduct.

[T]he Court, without explanation, also ignores one major source of vexation. In abandoning any requirement of a minimum of reasonable suspicion, or even articulable suspicion, the Court in every practical sense renders meaningless, as applied to checkpoint stops, the *Brignoni-Ponce* holding that "standing alone [Mexican appearance] does not justify stopping all Mexican-Americans to ask if they are aliens." Since the objective is almost entirely the Mexican illegally in the country, checkpoint officials, uninhibited by any objective standards and therefore free to stop any or all motorists without explanation or excuse, wholly on whim, will perforce target motorists of Mexican appearance. The process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same "suspicious" physical and grooming characteristics of illegal Mexican aliens.

Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today's decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists. To be singled out for referral and to be detained and interrogated must be upsetting to any motorist. One wonders what actual experience supports my Brethren's conclusion that referrals "should not be frightening or offensive because of their public and relatively routine nature." In point of fact, referrals viewed in context, are not relatively routine; thousands are otherwise permitted to pass. But for the arbitrarily selected motorists who must suffer the delay and humiliation of detention and interrogation, the experience can obviously be upsetting. And that experience is particularly vexing for the motorist of Mexican ancestry who is selectively referred, knowing that the officers' target is the Mexican alien. That deep resentment will be stirred by a sense of unfair discrimination is not difficult to

foresee.[3]

In short, if a balancing process is required, the balance should be struck to require that Border Patrol officers act upon at least reasonable suspicion in making checkpoint stops. In any event, even if a different balance were struck, the Court cannot, without ignoring the Fourth Amendment requirement of reasonableness, justify wholly unguided seizures by officials manning the checkpoints.

The cornerstone of this society, indeed of any free society, is orderly procedure. The Constitution, as originally adopted, was therefore, in great measure, a procedural document. For the same reasons the drafters of the Bill of Rights largely placed their faith in procedural limitations on government action. The Fourth Amendment's requirement that searches and seizures be reasonable enforces this fundamental understanding in erecting its buffer against the arbitrary treatment of citizens by government. But to permit, as the Court does today, police discretion to supplant the objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of a government, for, as Mr. Justice Frankfurter reminded us, "[t]he history of American freedom is, in no small measure, the history of procedure."

Notes, Comments, and Questions

A police officer is 66 miles from the Canadian border. There is no checkpoint. The officer spots a car and is suspicious that it contains Canadians who are not legally in the United States. How much evidence must the officer have to stop the car to conduct a brief investigation of its occupants?

What is your authority for your answer to the previous question? If you do not have authority to which you can refer, review the Court's opinion in *Martinez-Fuerte*. In that opinion, which mostly concerned fixed checkpoints, the Court referred to prior law concerning roving patrols.

Opening another person's mail without permission is normally a serious invasion of privacy, and police normally must obtain a search warrant before opening a suspect's mail. A great deal of mail, however, is sent to the United States from abroad and accordingly crosses an international border. Here the Court considers whether agents may open such mail at will.

Supreme Court of the United States

United States v. Charles W. Ramsey

Decided June 6, 1977 – 431 U.S. 606

Mr. Justice REHNQUIST delivered the opinion of the Court.

Customs officials, acting with "reasonable cause to suspect" a violation of customs laws, opened for inspection incoming international letter-class mail without first obtaining a search warrant. A divided Court of Appeals for the District of Columbia Circuit held contrary to every other Court of Appeals which has considered the matter, that the Fourth Amendment forbade the opening of such mail without probable cause and a search warrant. We granted the Government's petition for certiorari to resolve this Circuit conflict. We now reverse.

I

Charles W. Ramsey and James W. Kelly jointly commenced a heroin-by-mail enterprise in the Washington, D.C., area. The process involved their procuring of heroin, which was mailed in letters from Bangkok, Thailand, and sent to various locations in the District of Columbia area for collection. Two of their suppliers, Sylvia Bailey and William Ward, who were located in West Germany, were engaged in international narcotics trafficking during the latter part of 1973 and the early part of 1974. West German agents, pursuant to court-authorized electronic surveillance, intercepted several trans-Atlantic conversations between Bailey and Ramsey during which their narcotics operation was discussed. By late January 1974, Bailey and Ward had gone to Thailand. Thai officials, alerted to their presence by West German authorities, placed them under surveillance. Ward was observed mailing letter-sized envelopes in six different mail boxes; five of these envelopes were recovered; and one of the addresses in Washington, D.C., was later linked to respondents. Bailey and Ward were arrested by Thai officials on February 2, 1974; among the items seized were eleven heroin-filed envelopes addressed to the Washington, D.C., area, and later connected with respondents.

Two days after this arrest of Bailey and Ward, Inspector George Kallnischkies, a United States customs officer in New York City, without any knowledge of the foregoing events, inspecting a sack of incoming international mail from Thailand, spotted eight envelopes that were bulky and which he believed might contain merchandise. The envelopes, all of which appeared to him to have been typed on the same typewriter, were addressed to four different locations in the Washington, D.C., area. Inspector Kallnischkies, based on the fact that the letters were from Thailand, a known source of narcotics, and were "rather bulky," suspected that the envelopes might contain merchandise or contraband rather than correspondence. He took the letters to an examining area in the post office, and felt one of the letters: It "felt like there was something in there, in the envelope. It was not just plain paper that the envelope is supposed to contain." He weighed one of the envelopes, and found it weighed 42 grams, some three to six times the normal weight of an airmail letter. Inspector Kallnischkies then opened that envelope:

"In there I saw some cardboard and between the cardboard, if I recall, there was a plastic bag containing a white powdered substance, which, based on experience, I knew from Thailand would be heroin. I went ahead and removed a sample. Gave it a field test, a Marquis Reagent field test, and I had a positive reaction for heroin." He proceeded to open the other seven envelopes which "in a lot of ways were identical"; examination revealed that at least the contents were in fact identical: each contained heroin.

Ramsey and Kelly were indicted, along with Bailey and Ward, in a 17-count indictment. Respondents moved to suppress the heroin. The District Court denied the motions, and after a bench trial on the stipulated record, respondents were found guilty and sentenced to imprisonment for what is in effect a term of 10 to 30 years. The Court of Appeals for the District of Columbia Circuit, one judge dissenting, reversed the convictions, holding that the "border search exception to the warrant requirement" applicable to persons, baggage, and mailed packages did not apply to the routine opening of international letter mail, and held that the Constitution requires that "before international letter mail is opened, a showing of probable cause be made to and a warrant secured from a neutral magistrate."

II

Congress and the applicable postal regulations authorized the actions undertaken in this case. [Title 19 U.S.C. § 482] authorizes customs officials to inspect, under the circumstances therein stated, incoming international mail. The "reasonable cause to suspect" test adopted by the statute is, we think, a practical test which imposes a less stringent requirement than that of "probable cause" imposed by the Fourth Amendment as a requirement for the issuance of warrants. Inspector Kallnischkies, at the time he opened the letters, knew that they were from Thailand, were bulky, were many times the weight of a normal airmail letter, and "felt like there was something in there." Under these circumstances, we have no doubt that he had reasonable "cause to suspect" that there was merchandise or contraband in the envelopes. The search, therefore, was plainly authorized by the statute.

Since the search in this case was authorized by statute, we are left simply with the question of whether the search, nevertheless violated the Constitution. Specifically, we need not decide whether Congress conceived the statute as a necessary precondition to the validity of the search or whether it was viewed, instead, as a limitation on otherwise existing authority of the Executive. Having acted pursuant to, and within the scope of, a congressional Act, Inspector Kallnischkies' searches were permissible unless they violated the Constitution.

III

A

That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration. This interpretation, that border searches were not subject to the warrant provisions of the Fourth Amendment and were "reasonable" within the meaning of that Amendment, has been faithfully adhered to by this Court. [We have] recognized the distinction between searches within this country, requiring probable cause, and border searches:

"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. *Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.* But those lawfully within the country ... have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

(Emphasis supplied.)

Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself. We reaffirm it now.

B

The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country. It is clear that there is nothing in the rationale behind the border-search exception which suggests that the mode of entry will be critical. It was conceded at oral argument that customs officials could search, without probable cause and without a warrant, envelopes carried by an entering traveler, whether in his luggage or on his person. Surely no different constitutional standard should apply simply because the envelopes were mailed not carried. The critical fact is that the envelopes cross the border and enter this country, not that that are brought in by one mode of transportation rather than another. It is their entry into this country from without it that makes a resulting search "reasonable."

We therefore conclude that the Fourth Amendment does not interdict the actions taken by Inspector Kallnischkies in opening and searching the eight envelopes. The judgment of the Court of Appeals is, therefore,

Reversed.

Mr. Justice STEVENS, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

The decisive question in this case is whether Congress has granted customs officials the authority to open and inspect personal letters entering the United States from abroad without the knowledge or consent of the sender or the addressee, and without probable cause to believe the mail contains contraband or dutiable merchandise.

If the Government is allowed to exercise the power it claims, the door will be open to the wholesale, secret examination of all incoming international letter mail. No notice would be necessary either before or after the search. Until Congress has made an unambiguous policy decision that such an unprecedented intrusion upon a vital method of personal communication is in the Nation's interest, this Court should not address the serious constitutional question it decides today. For it is settled that "when action taken by an inferior governmental agency was accomplished by procedures which raise serious constitutional questions, an initial inquiry will be made to determine whether or not 'the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use.'"

Accordingly, I would affirm the judgment of the Court of Appeals.

* * *

In the next case, the Court considers the treatment of a woman who flew to the United States from abroad and was suspected of smuggling drugs. Her unpleasant ordeal further illustrates the broad authority and discretion given to agents at the border.

Supreme Court of the United States

United States v. Rosa Elvira Montoya de Hernandez

Decided July 1, 1985 – 473 U.S. 531

Justice REHNQUIST delivered the opinion of the Court.

Respondent Rosa Elvira Montoya de Hernandez was detained by customs officials upon her arrival at the Los Angeles Airport on a flight from Bogota, Colombia. She was found to be smuggling 88 cocaine-filled balloons in her alimentary canal, and was convicted after a bench trial of various federal narcotics offenses. A divided panel of the United States Court of Appeals for the Ninth Circuit reversed her convictions, holding that her detention violated the Fourth Amendment to the United States Constitution because the customs inspectors did not have a "clear indication" of alimentary canal smuggling at the time she was detained. Because of a conflict in the decisions of the Courts of Appeals on this question and the importance of its resolution to

the enforcement of customs laws, we granted certiorari. We now reverse.

Respondent arrived at Los Angeles International Airport shortly after midnight, March 5, 1983, on Avianca Flight 080, a direct 10-hour flight from Bogota, Colombia. Her visa was in order so she was passed through Immigration and proceeded to the customs desk. At the customs desk she encountered Customs Inspector Talamantes, who reviewed her documents and noticed from her passport that she had made at least eight recent trips to either Miami or Los Angeles. Talamantes referred respondent to a secondary customs desk for further questioning. At this desk Talamantes and another inspector asked respondent general questions concerning herself and the purpose of her trip. Respondent revealed that she spoke no English and had no family or friends in the United States. She explained in Spanish that she had come to the United States to purchase goods for her husband's store in Bogota. The customs inspectors recognized Bogota as a "source city" for narcotics. Respondent possessed $5,000 in cash, mostly $50 bills, but had no billfold. She indicated to the inspectors that she had no appointments with merchandise vendors, but planned to ride around Los Angeles in taxicabs visiting retail stores such as J.C. Penney and K-Mart in order to buy goods for her husband's store with the $5,000.

Respondent admitted that she had no hotel reservations, but stated that she planned to stay at a Holiday Inn. Respondent could not recall how her airline ticket was purchased. When the inspectors opened respondent's one small valise they found about four changes of "cold weather" clothing. Respondent had no shoes other than the high-heeled pair she was wearing. Although respondent possessed no checks, waybills, credit cards, or letters of credit, she did produce a Colombian business card and a number of old receipts, waybills, and fabric swatches displayed in a photo album.

At this point Talamantes and the other inspector suspected that respondent was a "balloon swallower," one who attempts to smuggle narcotics into this country hidden in her alimentary canal. Over the years Inspector Talamantes had apprehended dozens of alimentary canal smugglers arriving on Avianca Flight 080.

The inspectors requested a female customs inspector to take respondent to a private area and conduct a patdown and strip search. During the search the female inspector felt respondent's abdomen area and noticed a firm fullness, as if respondent were wearing a girdle. The search revealed no contraband, but the inspector noticed that respondent was wearing two pairs of elastic underpants with a paper towel lining the crotch area.

When respondent returned to the customs area and the female inspector reported her discoveries, the inspector in charge told respondent that he suspected she was smuggling drugs in her alimentary canal. Respondent agreed to the inspector's request that she be x-rayed at a hospital but in answer to the inspector's query stated that she was pregnant. She agreed to a pregnancy test before the x ray. Respondent withdrew the consent for an x ray when she learned that she would have to be handcuffed en route to the hospital. The inspector then gave respondent the option of returning to Colombia on the next available flight, agreeing to an x ray, or remaining in detention until she produced a monitored bowel movement that would confirm or rebut the inspectors' suspicions. Respondent chose the first option and was placed in a customs office under observation. She was told that if she went to the toilet she would have to use a wastebasket in the women's restroom, in order that female customs inspectors could inspect her stool for balloons or capsules carrying narcotics. The inspectors refused respondent's request to place a telephone call.

Respondent sat in the customs office, under observation, for the remainder of the night. During the night customs officials attempted to place respondent on a Mexican airline that was flying to Bogota via Mexico City in the morning. The airline refused to transport respondent because she lacked a Mexican visa necessary to land in Mexico City. Respondent was not permitted to leave, and was informed that she would be detained until she agreed to an x ray or her bowels moved. She remained detained in the customs office under observation, for most of the time curled up in a chair leaning to one side. She refused all offers of food and drink, and refused to use the toilet facilities. The Court of Appeals noted that she exhibited symptoms of discomfort consistent with "heroic efforts to resist the usual calls of nature."

At the shift change at 4 o'clock the next afternoon, almost 16 hours after her flight had landed, respondent still had not defecated or urinated or partaken of food or drink. At that time customs officials sought a court order authorizing a pregnancy test, an x ray, and a rectal examination. The Federal Magistrate issued an order just before midnight that evening, which authorized a rectal examination and involuntary x ray, provided that the physician in charge considered respondent's claim of pregnancy. Respondent was taken to a hospital and given a pregnancy test, which later turned out to be negative. Before the results of the pregnancy test were known, a physician conducted a rectal examination and removed from respondent's rectum a balloon containing a foreign substance. Respondent was then placed formally under arrest. By 4:10 a.m. respondent had passed 6 similar balloons; over the next four days she passed 88 balloons containing a total of 528 grams of 80% pure cocaine hydrochloride.

After a suppression hearing the District Court admitted the cocaine in evidence against respondent. She was convicted of possession of cocaine with intent to distribute and unlawful importation of cocaine.

A divided panel of the United States Court of Appeals for the Ninth Circuit reversed respondent's convictions. The court noted that customs inspectors had a "justifiably high level of official skepticism" about respondent's good motives, but the inspectors decided to let nature take its course rather than seek an immediate magistrate's warrant for an x ray. Such a magistrate's warrant required a "clear indication" or "plain suggestion" that the traveler was an alimentary canal smuggler under previous decisions of the Court of Appeals. The court applied this required level of suspicion to respondent's case. The court questioned the "humanity" of the inspectors' decision to hold respondent until her bowels moved, knowing that she would suffer "many hours of humiliating discomfort" if she chose not to submit to the x-ray examination. The court concluded that under a "clear indication" standard "the evidence available to the customs officers when they decided to hold [respondent] for continued observation was insufficient to support the 16-hour detention."

The Government contends that the customs inspectors reasonably suspected that respondent was an alimentary canal smuggler, and this suspicion was sufficient to justify the detention. In support of the judgment below respondent argues, *inter alia,* that reasonable suspicion would not support respondent's detention, and in any event the inspectors did not reasonably suspect that respondent was carrying narcotics internally.

The Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. The permissibility of a particular law enforcement practice is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Here the seizure of respondent took place at the international border. Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.

Consistently, therefore, with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail may be opened without a warrant on less than probable cause. Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity, and boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever.

[There is] longstanding concern for the protection of the integrity of the border. This concern is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics, and in particular by the increasing utilization of alimentary canal smuggling. This desperate practice appears to be a relatively recent addition to the smugglers' repertoire of deceptive practices, and it also appears to be exceedingly difficult to detect. Congress had recognized these difficulties. Customs agents may "stop, search, and examine" any "vehicle, beast or person" upon which an officer suspects there is contraband or "merchandise which is subject to duty."

Balanced against the sovereign's interests at the border are the Fourth Amendment rights of respondent. Having presented herself at the border for admission, and having subjected herself to the criminal enforcement powers of the Federal Government, respondent was entitled to be free from unreasonable search and seizure. But not only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border.

We have not previously decided what level of suspicion would justify a seizure of an incoming traveler for purposes other than a routine border search. We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.

The "reasonable suspicion" standard has been applied in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause. It thus fits well into the situations involving alimentary canal smuggling at the border: this type of smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search, yet governmental interests in stopping smuggling at the border are high indeed. Under this standard officials at the border must have a "particularized and objective basis for suspecting the particular person" of alimentary canal smuggling.

The facts, and their rational inferences, known to customs inspectors in this case clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler. We need not belabor the facts, including respondent's implausible story, that supported this suspicion. The trained customs inspectors had encountered many alimentary canal smugglers and certainly

had more than an "inchoate and unparticularized suspicion or 'hunch,'" that respondent was smuggling narcotics in her alimentary canal. The inspectors' suspicion was a "'common-sense conclusio[n] about human behavior' upon which 'practical people,'—including government officials, are entitled to rely."

The final issue in this case is whether the detention of respondent was reasonably related in scope to the circumstances which justified it initially. In this regard we have cautioned that courts should not indulge in "unrealistic second-guessing," and we have noted that "creative judge[s], engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable." Authorities must be allowed "to graduate their response to the demands of any particular situation." Here, respondent was detained incommunicado for almost 16 hours before inspectors sought a warrant; the warrant then took a number of hours to procure, through no apparent fault of the inspectors. This length of time undoubtedly exceeds any other detention we have approved under reasonable suspicion. But we have also consistently rejected hard-and-fast time limits. Instead, "common sense and ordinary human experience must govern over rigid criteria."

The rudimentary knowledge of the human body which judges possess in common with the rest of humankind tells us that alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry*-type stops. It presents few, if any external signs; a quick frisk will not do, nor will even a strip search. In the case of respondent the inspectors had available, as an alternative to simply awaiting her bowel movement, an x ray. They offered her the alternative of submitting herself to that procedure. But when she refused that alternative, the customs inspectors were left with only two practical alternatives: detain her for such time as necessary to confirm their suspicions, a detention which would last much longer than the typical *Terry* stop, or turn her loose into the interior carrying the reasonably suspected contraband drugs.

The inspectors in this case followed this former procedure. They no doubt expected that respondent, having recently disembarked from a 10-hour direct flight with a full and stiff abdomen, would produce a bowel movement without extended delay. But her visible efforts to resist the call of nature, which the court below labeled "heroic," disappointed this expectation and in turn caused her humiliation and discomfort. Our prior cases have refused to charge police with delays in investigatory detention attributable to the suspect's evasive actions, and that principle applies here as well. Respondent alone was responsible for much of the duration and discomfort of the seizure.

Under these circumstances, we conclude that the detention in this case was not unreasonably long. It occurred at the international border, where the Fourth Amendment balance of interests leans heavily to the Government. At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives. In this regard the detention of a suspected alimentary canal smuggler at the border is analogous to the detention of a suspected tuberculosis carrier at the border: both are detained until their bodily processes dispel the suspicion that they will introduce a harmful agent into this country.

Respondent's detention was long, uncomfortable, indeed, humiliating; but both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country. "[T]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Here, by analogy, in the presence of articulable suspicion of smuggling in her alimentary canal, the customs officers were not required by the Fourth Amendment to pass respondent and her 88 cocaine-filled balloons into the interior. Her detention for the period of time necessary to either verify or dispel the suspicion was not unreasonable. The judgment of the Court of Appeals is therefore

Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

We confront a "disgusting and saddening episode" at our Nation's border. Shortly after midnight on March 5, 1983, the respondent Rosa Elvira Montoya De Hernandez was detained by customs officers because she fit the profile of an "alimentary canal smuggler." This profile did not of course give the officers probable cause to believe that De Hernandez was smuggling drugs into the country, but at most a "reasonable suspicion" that she might be engaged in such an attempt. After a thorough strip search failed to uncover any contraband, De Hernandez agreed to go to a local hospital for an abdominal x ray to resolve the matter. When the officers approached with handcuffs at the ready to lead her away, however, "she crossed her arms by her chest and began stepping backwards shaking her head negatively," protesting: "You are not going to put those on me. That is an insult to my character."

Stymied in their efforts, the officers decided on an alternative course: they would simply lock De Hernandez away in an adjacent manifest room "until her peristaltic functions produced a monitored bowel movement." The officers explained to De Hernandez that she could not leave until she had excreted by squatting over a wastebasket pursuant to the watchful eyes of two attending matrons. De Hernandez responded: "I will not submit to your degradation and I'd rather die." She was locked away with the matrons.

De Hernandez remained locked up in the room for almost *24 hours*. Three shifts of matrons came and went during this time. The room had no bed or couch on which she could lie, but only hard chairs and a table. The matrons told her that if she wished to sleep she could lie down on the hard, uncarpeted floor. De Hernandez instead "sat in her chair clutching her purse," "occasionally putting her head down on the table to nap." Most of the time she simply wept and pleaded "to go home." She repeatedly begged for permission "to call my husband and tell him what you are doing to me." Permission was denied. Sobbing, she insisted that she had to "make a phone call home so that she could talk to her children and to let them know that everything was all right." Permission again was denied. In fact, the matrons considered it highly "unusual" that "each time someone entered the search room, she would take out two small pictures of her children and show them to the person." De Hernandez also demanded that her attorney be contacted. Once again, permission was denied. As far as the outside world knew, Rosa de Hernandez had simply vanished. And although she already had been stripped and searched and probed, the customs officers decided about halfway through her ordeal to repeat that process—"to ensure the safety of the surveilling officers. The result was again negative."

After almost 24 hours had passed, someone finally had the presence of mind to consult a Magistrate and to obtain a court order for an x ray and a body-cavity search. De Hernandez, "very agitated," was handcuffed and led away to the hospital. A rectal examination disclosed the presence of a cocaine-filled balloon. At approximately 3:15 on the morning of March 6, *almost 27 hours after her initial detention,* De Hernandez was formally placed under arrest and advised of her *Miranda* rights. Over the course of the next four days she excreted a total of 88 balloons.

The issue [] is simply this: Does the Fourth Amendment permit an international traveler, citizen or alien, to be subjected to the sort of treatment that occurred in this case without the sanction of a judicial officer and based on nothing more than the "reasonable suspicion" of low-ranking investigative officers that something might be amiss? The Court today concludes that the Fourth Amendment grants such sweeping and unmonitored authority to customs officials. It reasons that "[t]he permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" The Court goes on to assert that the "balance of reasonableness is qualitatively different at the international border," and that searches and seizures in these circumstances may therefore be conducted without probable cause or a warrant. Thus a traveler at the Nation's border may be detained for criminal investigation merely if the authorities "reasonably suspect that the traveler is smuggling contraband." There are no "hard-and-fast time limits" for such investigative detentions, because "'common sense and ordinary human experience must govern over rigid criteria.'" Applying this "reasonableness" test to the instant case, the Court concludes that the "[r]espondent alone was responsible for much of the duration and discomfort of the seizure."

I dissent. Indefinite involuntary incommunicado detentions "for investigation" are the hallmark of a police state, not a free society. In my opinion, Government officials may no more confine a person at the border under such circumstances for purposes of criminal investigation than they may within the interior of the country. The nature and duration of the detention here may well have been tolerable for spoiled meat or diseased animals, but not for human beings held on simple suspicion of criminal activity. I believe such indefinite detentions can be "reasonable" under the Fourth Amendment only with the approval of a magistrate. I also believe that such approval can be given only upon a showing of probable cause.

At some point [] further investigation involves such severe intrusions on the values the Fourth Amendment protects that more stringent safeguards are required. For example, the length and nature of a detention may, at least when conducted for criminal-investigative purposes, ripen into something approximating a full-scale custodial arrest—indeed, the arrestee, unlike the detainee in cases such as this, is at least given such basic rights as a telephone call, warnings, a bed, a prompt hearing before the nearest federal magistrate, an appointed attorney, and consideration of bail. In addition, border detentions may involve the use of such highly intrusive investigative techniques as body-cavity searches, x-ray searches, and stomach-pumping.

I believe that detentions and searches falling into these more intrusive categories are presumptively "reasonable" within the meaning of the Fourth Amendment only if authorized by a judicial officer. We have, to be sure, held that executive officials need not obtain prior judicial authorization where exigent circumstances would make such authorization impractical and counterproductive. In so holding, however, we have reaffirmed the general rule that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." And even where a person has permissibly been taken into custody without a warrant, we have held that a prompt probable-cause determination by a detached magistrate is a constitutional "prerequisite to extended restraint of liberty following arrest."

There is no persuasive reason not to apply these principles to lengthy and intrusive criminal-investigative detentions occurring at the Nation's border. To be sure, the Court today invokes precedent stating that neither probable cause nor a warrant ever have been required for border searches. If this is the law as a general matter, I believe it is time that we reexamine its foundations.

Something has gone fundamentally awry in our constitutional jurisprudence when a neutral and detached magistrate's authorization is required before the authorities may inspect "the plumbing, heating, ventilation, gas, and electrical systems" in a person's home, investigate the back rooms of his workplace, or poke through the charred remains of his gutted garage, but *not* before they may hold him in indefinite involuntary isolation at the Nation's border to investigate whether he might be engaged in criminal wrongdoing. No less than those who conduct administrative searches, those charged with investigative duties at the border "should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks," because "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy." And unlike administrative searches, which typically involve "relatively limited invasion[s]" of individual privacy interests, many border searches carry grave potential for "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." The conditions of De Hernandez' detention in this case—indefinite confinement in a squalid back room cut off from the outside world, the absence of basic amenities that would have been provided to even the vilest of hardened criminals, repeated strip searches—in many ways surpassed the conditions of a full custodial arrest. Although the Court previously has declined to require a warrant for border searches involving "minor interference with privacy resulting from the mere stop for questioning," surely there is no parallel between such "minor" intrusions and the extreme invasion of personal privacy and dignity that occurs in detentions and searches such as that before us today.

The Court argues [] that the length and "discomfort" of De Hernandez' detention "resulted *solely* from the method by which she chose to smuggle illicit drugs into this country," and it speculates that only her "'heroic'" efforts prevented the detention from being brief and to the point. Although we now know that De Hernandez was indeed guilty of smuggling drugs internally, such *post hoc* rationalizations have no place in our Fourth Amendment jurisprudence, which demands that we "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." At the time the authorities simply had, at most, a reasonable suspicion that De Hernandez might be engaged in such smuggling. Neither the law of the land nor the law of nature supports the notion that petty government officials can require people to excrete on command; indeed, the Court relies elsewhere on "[t]he rudimentary knowledge of the human body" in sanctioning the "much longer than ... typical" duration of detentions such as this. And, with all respect to the Court, it is not "'unrealistic second-guessing,'" to predict that an innocent traveler, locked away in incommunicado detention in unfamiliar surroundings in a foreign land, might well be so frightened and exhausted as to be unable so to "cooperate" with the authorities.

The Court further appears to believe that such investigative practices are "reasonable," however, on the premise that a traveler's "expectation of privacy [is] less at the border than in the interior." This may well be so with respect to routine border inspections, but I do not imagine that decent and law-abiding international travelers have yet reached the point where they "expect" to be thrown into locked rooms and ordered to excrete into wastebaskets, held incommunicado until they cooperate, or led away in handcuffs to the nearest hospital for exposure to various medical procedures—all on nothing more than the "reasonable" suspicions of low-ranking enforcement agents. In fact, many people from around the world travel to our borders precisely to escape such unchecked executive investigatory discretion. What a curious first lesson in American liberty awaits them on their arrival.

In my opinion, allowing the Government to hold someone in indefinite, involuntary, incommunicado isolation without probable cause and a judicial warrant violates our constitutional charter whether the purpose is to extract ransom or to investigate suspected criminal activity. Nothing in the Fourth Amendment permits an exception for such actions at the Nation's border. It is tempting, of course, to look the other way in a case that so graphically illustrates the "veritable national crisis" caused by narcotics trafficking. But if there is one enduring lesson in the long struggle to balance individual rights against society's need to defend itself against lawlessness, it is that "[i]t is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end."

I dissent.

Notes, Comments, and Questions

Students should be aware of three ongoing controversies related to border enforcement: (1) the existence and significance of an "extended border" and areas known as the "functional equivalent" of the border, (2) the treatment of electronic devices crossing the border, and (3) the treatment of persons crossing the border seeking asylum or otherwise fleeing persecution and poverty.

The Functional Border and Extended Border

International airports and the land immediately surrounding those airports are treated as the "functional equivalent" of the border. Accordingly, a traveler flying from England to St. Louis could be subjected to the same searches permissible at the border itself.

More controversially, federal officials have argued that they possess search and seizure authority within 100 miles of international borders in an area known as the "extended border." *See, e.g.*, 8 C.F.R. § 287.1. If all authority granted to law enforcement at the physical border exists throughout the extended border, then people in New York City, Los Angeles, Houston, New Orleans, Seattle, Washington, D.C., and all of Florida could be subjected to suspicionless searches of their persons and effects at will. Civil libertarian organizations have accordingly decried the concept of the extended border, calling it an unlawful "Constitution-Free Zone."

The map below illustrates the ACLU's take on the extended border:



It is not clear precisely what authority federal officials claim to possess in the extended border—official guidance documents differ, and actual practice can diverge from such documents—nor is there robust judicial guidance. In an era of increasingly-vigorous immigration enforcement, this issue is attracting more attention.

Electronic Devices at or Near the Border

Referring to Supreme Court cases granting border officials wide discretion to search persons and effects entering and leaving the United States, federal officials have claimed to have authority to inspect electronic devices at the border. Privacy advocates have argued that searches conducted under this purported authority violate the Fourth Amendment.

Although some caselaw exists on this question, *see, e.g.*, *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc) (holding that reasonable suspicion is necessary to search electronic devices at border in certain cases); *Alasaad v. McAleenan*, 1:17-cv-11730-DJC (D. Mass. Nov. 12, 2019) (applying rule to larger class of searches); *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005) (allowing suspicionless searches), the law is not clear. Further litigation is ongoing.

In response to the risk of searches (which could expose lawful information such as trade secrets, personal correspondence, and embarrassing literature to inspection), some international travelers have begun wiping data from their computers and other devices before entering the United States; they can then download data from the cloud after clearing immigration and customs.

Treatment of Refugees, Asylum Seekers, and Other Migrants

The treatment of border crossers has received significant news coverage recently. In particular, the question of how the United States may treat migrants who claim to be fleeing persecution—especially migrants entering the United States with children—has

inspired intense debate. For example, U.S. Senator Kamala Harris visited the Otay Mesa Detention Facility[4] near San Diego in June 2018 and called the treatment of detainees “a crime against humanity that is being committed by the United States government.” As one might expect, Immigration and Customs Enforcement and Department of Homeland Security officials have disagreed with such assessments and have defended current practices as lawful exercises of the executive’s authority to enforce laws at the border. Immigration law and refugee policy are beyond the scope of this course. Students might nonetheless consider whether the Court’s decisions on how the Fourth Amendment restricts (or does not restrict) executive discretion with respect to searches and seizures at the border shed light on what other border enforcement tactics are and are not (and should be or should not be) lawful.

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2.14: Chapter 15 - The Warrant Requirement- Exceptions (Part 7)

Warrant Exception: Checkpoints

In this chapter, we consider two situations in which the Court has authorized warrantless searches: (1) checkpoints, generally aimed at protecting the public from intoxicated drivers, and (2) “protective sweeps” that police may conduct in association with an arrest. Note that sweeps are distinct from searches incident to lawful arrest and are governed by different rules.

We begin with vehicle checkpoints. Checkpoints involve stopping cars randomly—or otherwise selecting cars to stop without any specific reason to believe that the drivers are intoxicated or otherwise breaking the law or transporting items subject to seizure. Accordingly, vehicle checkpoints can be permissible only if the Court allows police seizures of persons and property without even reasonable suspicion, much less probable cause. The question is whether such seizures are “reasonable” under the Fourth Amendment.

Supreme Court of the United States

Michigan State Police v. Rick Sitz

Decided June 14, 1990 – 496 U.S. 444

Chief Justice REHNQUIST delivered the opinion of the Court.

This case poses the question whether a State’s use of highway sobriety checkpoints violates the Fourth and Fourteenth Amendments to the United States Constitution. We hold that it does not and therefore reverse the contrary holding of the Court of Appeals of Michigan.

Petitioners, the Michigan Department of State Police and its director, established a sobriety checkpoint pilot program in early 1986. The director appointed a Sobriety Checkpoint Advisory Committee comprising representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute. Pursuant to its charge, the advisory committee created guidelines setting forth procedures governing checkpoint operations, site selection, and publicity.

Under the guidelines, checkpoints would be set up at selected sites along state roads. All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist’s driver’s license and car registration and, if warranted, conduct further sobriety tests. Should the field tests and the officer’s observations suggest that the driver was intoxicated, an arrest would be made. All other drivers would be permitted to resume their journey immediately.

The first—and to date the only—sobriety checkpoint operated under the program was conducted in Saginaw County with the assistance of the Saginaw County Sheriff’s Department. During the 75-minute duration of the checkpoint’s operation, 126 vehicles passed through the checkpoint. The average delay for each vehicle was approximately 25 seconds. Two drivers were detained for field sobriety testing, and one of the two was arrested for driving under the influence of alcohol. A third driver who drove through without stopping was pulled over by an officer in an observation vehicle and arrested for driving under the influence.

On the day before the operation of the Saginaw County checkpoint, respondents filed a complaint in the Circuit Court of Wayne County seeking declaratory and injunctive relief from potential subjection to the checkpoints. Each of the respondents “is a licensed driver in the State of Michigan ... who regularly travels throughout the State in his automobile.” During pretrial proceedings, petitioners agreed to delay further implementation of the checkpoint program pending the outcome of this litigation.

After the trial, at which the court heard extensive testimony concerning, *inter alia,* the “effectiveness” of highway sobriety checkpoint programs, the court ruled that the Michigan program violated the Fourth Amendment. On appeal, the Michigan Court of Appeals affirmed the holding. After the Michigan Supreme Court denied petitioners’ application for leave to appeal, we granted certiorari.

Petitioners concede, correctly in our view, that a Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint. The question thus becomes whether such seizures are "reasonable" under the Fourth Amendment.

It is important to recognize what our inquiry is *not* about. No allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint. As pursued in the lower courts, the instant action challenges only the use of sobriety checkpoints generally. We address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers. Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard.

No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. "Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage."

Conversely, the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight. We reached a similar conclusion as to the intrusion on motorists subjected to a brief stop at a highway checkpoint for detecting illegal aliens. We see virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask. The trial court and the Court of Appeals, thus, accurately gauged the "objective" intrusion, measured by the duration of the seizure and the intensity of the investigation, as minimal.

With respect to what it perceived to be the "subjective" intrusion on motorists, however, the Court of Appeals found such intrusion substantial. The court first affirmed the trial court's finding that the guidelines governing checkpoint operation minimize the discretion of the officers on the scene. But the court also agreed with the trial court's conclusion that the checkpoints have the potential to generate fear and surprise in motorists. This was so because the record failed to demonstrate that approaching motorists would be aware of their option to make U-turns or turnoffs to avoid the checkpoints. On that basis, the court deemed the subjective intrusion from the checkpoints unreasonable.

We believe the Michigan courts misread our cases concerning the degree of "subjective intrusion" and the potential for generating fear and surprise. The "fear and surprise" to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the stop. This was made clear in *Martinez-Fuerte*.

Here, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle. The intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*.

In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment. The judgment of the Michigan Court of Appeals is accordingly reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Today, the Court rejects a Fourth Amendment challenge to a sobriety checkpoint policy in which police stop all cars and inspect all drivers for signs of intoxication without *any* individualized suspicion that a specific driver is intoxicated. The Court does so by balancing "the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped." [T]he Court misapplies that test by undervaluing the nature of the intrusion and exaggerating the law enforcement need to use the roadblocks to prevent drunken driving.

I do not dispute the immense social cost caused by drunken drivers, nor do I slight the government's efforts to prevent such tragic losses. Indeed, I would hazard a guess that today's opinion will be received favorably by a majority of our society, who would willingly suffer the minimal intrusion of a sobriety checkpoint stop in order to prevent drunken driving. But consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis.

"The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some 'balancing test' than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of

privacy whose protections could be breached only where the 'reasonable' requirements of the probable-cause standard were met. Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'"

In the face of the "momentary evil" of drunken driving, the Court today abdicates its role as the protector of that fundamental right. I respectfully dissent.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join as to Parts I and II, dissenting.

A sobriety checkpoint is usually operated at night at an unannounced location. Surprise is crucial to its method. The test operation conducted by the Michigan State Police and the Saginaw County Sheriff's Department began shortly after midnight and lasted until about 1 a.m. During that period, the 19 officers participating in the operation made two arrests and stopped and questioned 124 other unsuspecting and innocent drivers. It is, of course, not known how many arrests would have been made during that period if those officers had been engaged in normal patrol activities. However, the findings of the trial court, based on an extensive record and affirmed by the Michigan Court of Appeals, indicate that the net effect of sobriety checkpoints on traffic safety is infinitesimal and possibly negative.

Indeed, the record in this case makes clear that a decision holding these suspicionless seizures unconstitutional would not impede the law enforcement community's remarkable progress in reducing the death toll on our highways. Because the Michigan program was patterned after an older program in Maryland, the trial judge gave special attention to that State's experience. Over a period of several years, Maryland operated 125 checkpoints; of the 41,000 motorists passing through those checkpoints, only 143 persons (0.3%) were arrested. The number of man-hours devoted to these operations is not in the record, but it seems inconceivable that a higher arrest rate could not have been achieved by more conventional means. Yet, even if the 143 checkpoint arrests were assumed to involve a net increase in the number of drunken driving arrests per year, the figure would still be insignificant by comparison to the 71,000 such arrests made by Michigan State Police without checkpoints in 1984 alone.

Any relationship between sobriety checkpoints and an actual reduction in highway fatalities is even less substantial than the minimal impact on arrest rates. In light of these considerations, it seems evident that the Court today misapplies the balancing test. The Court overvalues the law enforcement interest in using sobriety checkpoints, undervalues the citizen's interest in freedom from random, unannounced investigatory seizures, and mistakenly assumes that there is "virtually no difference" between a routine stop at a permanent, fixed checkpoint and a surprise stop at a sobriety checkpoint.

This is a case that is driven by nothing more than symbolic state action—an insufficient justification for an otherwise unreasonable program of random seizures. Unfortunately, the Court is transfixed by the wrong symbol—the illusory prospect of punishing countless intoxicated motorists—when it should keep its eyes on the road plainly marked by the Constitution.

I respectfully dissent.

* * *

In the next case, the Court considered whether the holding of *Michigan v. Sitz* allows police to conduct random (suspicionless) stops of vehicles to check whether they contain illegal drugs. While a checkpoint for "drugged" drivers would almost surely have been permissible for the same reasons that the Court permitted drunk driving checkpoints, the question of a checkpoint for contraband or other evidence of crime proved more controversial.

Supreme Court of the United States

City of Indianapolis v. James Edmond

Decided Nov. 28, 2000 – 531 U.S. 32

Justice O'CONNOR delivered the opinion of the Court.

In *Michigan Dept. of State Police v. Sitz* and *United States v. Martinez-Fuerte*, we held that brief, suspicionless seizures at highway checkpoints for the purposes of combating drunk driving and intercepting illegal immigrants were constitutional. We now consider the constitutionality of a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics.

I

In August 1998, the city of Indianapolis began to operate vehicle checkpoints on Indianapolis roads in an effort to interdict unlawful drugs. The city conducted six such roadblocks between August and November that year, stopping 1,161 vehicles and arresting 104 motorists. Fifty-five arrests were for drug-related crimes, while 49 were for offenses unrelated to drugs. The overall "hit rate" of the program was thus approximately nine percent.

The parties stipulated to the facts concerning the operation of the checkpoints by the Indianapolis Police Department (IPD) for purposes of the preliminary injunction proceedings instituted below. At each checkpoint location, the police stop a predetermined number of vehicles. Approximately 30 officers are stationed at the checkpoint. Pursuant to written directives issued by the chief of police, at least one officer approaches the vehicle, advises the driver that he or she is being stopped briefly at a drug checkpoint, and asks the driver to produce a license and registration. The officer also looks for signs of impairment and conducts an open-view examination of the vehicle from the outside. A narcotics-detection dog walks around the outside of each stopped vehicle.

The directives instruct the officers that they may conduct a search only by consent or based on the appropriate quantum of particularized suspicion. The officers must conduct each stop in the same manner until particularized suspicion develops, and the officers have no discretion to stop any vehicle out of sequence. The city agreed in the stipulation to operate the checkpoints in such a way as to ensure that the total duration of each stop, absent reasonable suspicion or probable cause, would be five minutes or less.

Respondents James Edmond and Joell Palmer were each stopped at a narcotics checkpoint in late September 1998. Respondents then filed a lawsuit on behalf of themselves and the class of all motorists who had been stopped or were subject to being stopped in the future at the Indianapolis drug checkpoints. Respondents claimed that the roadblocks violated the Fourth Amendment of the United States Constitution and the search and seizure provision of the Indiana Constitution. Respondents requested declaratory and injunctive relief for the class, as well as damages and attorney's fees for themselves.

Respondents then moved for a preliminary injunction. Although respondents alleged that the officers who stopped them did not follow the written directives, they agreed to the stipulation concerning the operation of the checkpoints for purposes of the preliminary injunction proceedings. The parties also stipulated to certification of the plaintiff class. The United States District Court for the Southern District of Indiana agreed to class certification and denied the motion for a preliminary injunction, holding that the checkpoint program did not violate the Fourth Amendment. A divided panel of the United States Court of Appeals for the Seventh Circuit reversed, holding that the checkpoints contravened the Fourth Amendment. The panel denied rehearing. We granted certiorari and now affirm.

II

The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. While such suspicion is not an "irreducible" component of reasonableness, we have recognized only limited circumstances in which the usual rule does not apply. We have [] upheld brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens and at a sobriety checkpoint aimed at removing drunk drivers from the road. In addition we [have] suggested that a similar type of roadblock with the purpose of verifying drivers' licenses and vehicle registrations would be permissible. In none of these cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.

III

It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. Just as in *Place*,[1] an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search." Rather, what principally distinguishes these checkpoints from those we have previously approved is their primary purpose.

As petitioners concede, the Indianapolis checkpoint program unquestionably has the primary purpose of interdicting illegal narcotics. In their stipulation of facts, the parties repeatedly refer to the checkpoints as "drug checkpoints" and describe them as "being operated by the City of Indianapolis in an effort to interdict unlawful drugs in Indianapolis." In addition, the first document attached to the parties' stipulation is entitled "DRUG CHECKPOINT CONTACT OFFICER DIRECTIVES BY ORDER OF THE CHIEF OF POLICE." These directives instruct officers to "[a]dvise the citizen that they are being stopped briefly at a drug checkpoint."

The second document attached to the stipulation is entitled "1998 Drug Road Blocks" and contains a statistical breakdown of information relating to the checkpoints conducted. Further, according to Sergeant DePew, the checkpoints are identified with lighted signs reading, "'NARCOTICS CHECKPOINT ___ MILE AHEAD, NARCOTICS K–9 IN USE, BE PREPARED TO STOP.'" Finally, both the District Court and the Court of Appeals recognized that the primary purpose of the roadblocks is the interdiction of narcotics.

We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. [E]ach of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

Petitioners propose several ways in which the narcotics-detection purpose of the instant checkpoint program may instead resemble the primary purposes of the checkpoints in *Sitz* and *Martinez-Fuerte*. Petitioners state that the checkpoints in those cases had the same ultimate purpose of arresting those suspected of committing crimes. Securing the border and apprehending drunk drivers are, of course, law enforcement activities, and law enforcement officers employ arrests and criminal prosecutions in pursuit of these goals. If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.

Petitioners also emphasize the severe and intractable nature of the drug problem as justification for the checkpoint program. There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude. The law enforcement problems that the drug trade creates likewise remain daunting and complex, particularly in light of the myriad forms of spin-off crime that it spawns. The same can be said of various other illegal activities, if only to a lesser degree. But the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue. We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.

Nor can the narcotics-interdiction purpose of the checkpoints be rationalized in terms of a highway safety concern similar to that present in *Sitz*. The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs. Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.

The primary purpose of the Indianapolis narcotics checkpoints is in the end to advance "the general interest in crime control." We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.

Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example, as the Court of Appeals noted, the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route. The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction. While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.

Petitioners argue that the Indianapolis checkpoint program is justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations. If this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program. While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful. As a result, a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar. While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general

scheme are at issue.

It goes without saying that our holding today does nothing to alter the constitutional status of the sobriety and border checkpoints that we approved in *Sitz* and *Martinez-Fuerte*. The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program. When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, however, stops can only be justified by some quantum of individualized suspicion.

Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute. Nor does our opinion speak to other intrusions aimed primarily at purposes beyond the general interest in crime control. Our holding also does not impair the ability of police officers to act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose. Finally, we caution that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.

Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment. The judgment of the Court of Appeals is, accordingly, affirmed.

Chief Justice REHNQUIST, with whom Justice THOMAS joins, and with whom Justice SCALIA joins as to Part I, dissenting.

The State's use of a drug-sniffing dog, according to the Court's holding, annuls what is otherwise plainly constitutional under our Fourth Amendment jurisprudence: brief, standardized, discretionless, roadblock seizures of automobiles, seizures which effectively serve a weighty state interest with only minimal intrusion on the privacy of their occupants. Because these seizures serve the State's accepted and significant interests of preventing drunken driving and checking for driver's licenses and vehicle registrations, and because there is nothing in the record to indicate that the addition of the dog sniff lengthens these otherwise legitimate seizures, I dissent.

As it is nowhere to be found in the Court's opinion, I begin with blackletter roadblock seizure law. "The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." Roadblock seizures are consistent with the Fourth Amendment if they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Specifically, the constitutionality of a seizure turns upon "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

We first applied these principles in *Martinez-Fuerte,* which approved highway checkpoints for detecting illegal aliens. In *Michigan Dept. of State Police v. Sitz,* we upheld the State's use of a highway sobriety checkpoint after applying the framework set out in *Martinez-Fuerte*. This case follows naturally from *Martinez-Fuerte* and *Sitz*. Petitioners acknowledge that the "primary purpose" of these roadblocks is to interdict illegal drugs, but this fact should not be controlling. Even accepting the Court's conclusion that the checkpoints at issue in *Martinez-Fuerte* and *Sitz* were not primarily related to criminal law enforcement, the question whether a law enforcement purpose could support a roadblock seizure is not presented in this case. The District Court found that another "purpose of the checkpoints is to check driver's licenses and vehicle registrations," and the written directives state that the police officers are to "[l]ook for signs of impairment." The use of roadblocks to look for signs of impairment was validated by *Sitz,* and the use of roadblocks to check for driver's licenses and vehicle registrations was expressly recognized in *Delaware v. Prouse,* 440 U.S.648 (1979). That the roadblocks serve these legitimate state interests cannot be seriously disputed, as the 49 people arrested for offenses unrelated to drugs can attest. And it would be speculative to conclude—given the District Court's findings, the written directives, and the actual arrests—that petitioners would not have operated these roadblocks but for the State's interest in interdicting drugs.

Because of the valid reasons for conducting these roadblock seizures, it is constitutionally irrelevant that petitioners also hoped to interdict drugs. Once the constitutional requirements for a particular seizure are satisfied, the subjective expectations of those responsible for it, be it police officers or members of a city council, are irrelevant. It is the objective effect of the State's actions on the privacy of the individual that animates the Fourth Amendment. Because the objective intrusion of a valid seizure does not turn upon anyone's subjective thoughts, neither should our constitutional analysis.

With these checkpoints serving two important state interests, the remaining prongs of the balancing test are easily met. The seizure is objectively reasonable as it lasts, on average, two to three minutes and does not involve a search. The subjective intrusion is likewise limited as the checkpoints are clearly marked and operated by uniformed officers who are directed to stop every vehicle in the same manner. The only difference between this case and *Sitz* is the presence of the dog. We have already

held, however, that a "sniff test" by a trained narcotics dog is not a "search" within the meaning of the Fourth Amendment because it does not require physical intrusion of the object being sniffed and it does not expose anything other than the contraband items. And there is nothing in the record to indicate that the dog sniff lengthens the stop. Finally, the checkpoints' success rate—49 arrests for offenses unrelated to drugs—only confirms the State's legitimate interests in preventing drunken driving and ensuring the proper licensing of drivers and registration of their vehicles.

These stops effectively serve the State's legitimate interests; they are executed in a regularized and neutral manner; and they only minimally intrude upon the privacy of the motorists. They should therefore be constitutional.

* * *

In the next case, the Court considered a police checkpoint designed to find witnesses of a recent crime—a hit-and-run crash. Like *Indianapolis v. Edmond,* and unlike *Michigan v. Sitz*, the case involved stopping vehicles without any purpose of protecting the public from immediate hazards presented by their drivers. However, unlike *Edmond,* police did not hope to find evidence of wrongdoing by the drivers; instead, they hoped to learn whether the drivers had seen wrongdoing by someone else.

Supreme Court of the United States

Illinois v. Robert S. Lidster

Decided Jan. 13, 2004 – 540 U.S. 419

Justice BREYER delivered the opinion of the Court.

This Fourth Amendment case focuses upon a highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident. We hold that the police stops were reasonable, hence, constitutional.

I

The relevant background is as follows: On Saturday, August 23, 1997, just after midnight, an unknown motorist traveling eastbound on a highway in Lombard, Illinois, struck and killed a 70-year-old bicyclist. The motorist drove off without identifying himself. About one week later at about the same time of night and at about the same place, local police set up a highway checkpoint designed to obtain more information about the accident from the motoring public.

Police cars with flashing lights partially blocked the eastbound lanes of the highway. The blockage forced traffic to slow down, leading to lines of up to 15 cars in each lane. As each vehicle drew up to the checkpoint, an officer would stop it for 10 to 15 seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer. The flyer said "ALERT ... FATAL HIT & RUN ACCIDENT" and requested "ASSISTANCE IN IDENTIFYING THE VEHICLE AND DRIVER INVOLVED IN THIS ACCIDENT WHICH KILLED A 70 YEAR OLD BICYCLIST."

Robert Lidster, the respondent, drove a minivan toward the checkpoint. As he approached the checkpoint, his van swerved, nearly hitting one of the officers. The officer smelled alcohol on Lidster's breath. He directed Lidster to a side street where another officer administered a sobriety test and then arrested Lidster. Lidster was tried and convicted in Illinois state court of driving under the influence of alcohol.

Lidster challenged the lawfulness of his arrest and conviction on the ground that the government had obtained much of the relevant evidence through use of a checkpoint stop that violated the Fourth Amendment. The trial court rejected that challenge. But an Illinois appellate court reached the opposite conclusion. The Illinois Supreme Court agreed with the appellate court.

[W]e granted certiorari. We now reverse the Illinois Supreme Court's determination.

II

The Illinois Supreme Court basically held that our decision in *Edmond* governs the outcome of this case. We do not agree. *Edmond* involved a checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles.

The checkpoint stop here differs significantly from that in *Edmond*. The stop's primary law enforcement purpose was *not* to

determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.

Edmond's language, as well as its context, makes clear that the constitutionality of this latter, information-seeking kind of stop was not then before the Court. Neither do we believe, *Edmond* aside, that the Fourth Amendment would have us apply an *Edmond*-type rule of automatic unconstitutionality to brief, information-seeking highway stops of the kind now before us. For one thing, the fact that such stops normally lack individualized suspicion cannot by itself determine the constitutional outcome. As in *Edmond*, the stop here at issue involves a motorist. The Fourth Amendment does not treat a motorist's car as his castle. And special law enforcement concerns will sometimes justify highway stops without individualized suspicion. Moreover, unlike *Edmond,* the context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play. Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.

For another thing, information-seeking highway stops are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens will often react positively when police simply ask for their help as "responsible citizen[s]" to "give whatever information they may have to aid in law enforcement."

Further, the law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." That, in part, is because voluntary requests play a vital role in police investigatory work.

The importance of soliciting the public's assistance is offset to some degree by the need to stop a motorist to obtain that help—a need less likely present where a pedestrian, not a motorist, is involved. The difference is significant in light of our determinations that such an involuntary stop amounts to a "seizure" in Fourth Amendment terms. That difference, however, is not important enough to justify an *Edmond*-type rule here. After all, as we have said, the motorist stop will likely be brief. Any accompanying traffic delay should prove no more onerous than many that typically accompany normal traffic congestion. And the resulting voluntary questioning of a motorist is as likely to prove important for police investigation as is the questioning of a pedestrian. Given these considerations, it would seem anomalous were the law (1) ordinarily to allow police freely to seek the voluntary cooperation of pedestrians but (2) ordinarily to forbid police to seek similar voluntary cooperation from motorists.

Finally, we do not believe that an *Edmond*-type rule is needed to prevent an unreasonable proliferation of police checkpoints. Practical considerations—namely, limited police resources and community hostility to related traffic tieups—seem likely to inhibit any such proliferation. And, of course, the Fourth Amendment's normal insistence that the stop be reasonable in context will still provide an important legal limitation on police use of this kind of information-seeking checkpoint.

These considerations, taken together, convince us that an *Edmond*-type presumptive rule of unconstitutionality does not apply here. That does not mean the stop is automatically, or even presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances. And as this Court said in *Brown v. Texas*, 443 U.S.47 (1979), in judging reasonableness, we look to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

III

We now consider the reasonableness of the checkpoint stop before us in light of the factors just mentioned, an issue that, in our view, has been fully argued here. We hold that the stop was constitutional.

The relevant public concern was grave. Police were investigating a crime that had resulted in a human death. No one denies the police's need to obtain more information at that time. And the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort.

The stop advanced this grave public concern to a significant degree. The police appropriately tailored their checkpoint stops to fit important criminal investigatory needs. The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And police used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred.

Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed

objectively, each stop required only a brief wait in line—a very few minutes at most. Contact with the police lasted only a few seconds. Police contact consisted simply of a request for information and the distribution of a flyer. Viewed subjectively, the contact provided little reason for anxiety or alarm. The police stopped all vehicles systematically. And there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops.

For these reasons we conclude that the checkpoint stop was constitutional.

The judgment of the Illinois Supreme Court is [r]eversed.

Notes, Comments, and Questions

The Court made clear in *Indianapolis v. Edmond* that police may not establish checkpoints to investigate whether drivers are transporting illegal drugs. Consider a department that responds as follows:

Police post signs with text like "Drug Checkpoint Ahead" on public highways. Then, after observing drivers who promptly exit the highway after passing the sign, officers investigate the drivers for drug activity. Lawful? Why or why not?

See, e.g., *United States v. Williams*, 359 F.3d 1019 (8th Cir. 2004) (holding that because "there was no checkpoint," *Edmond* did not apply); *United States v. Neff*, 681 F.3d 1134 (10th Cir. 2012) (holding that the fake-checkpoint ruse was lawful but that "standing alone," a driver's choice to exit after seeing the sign "is insufficient to justify even a brief investigatory detention of a vehicle"); *compare State v. Mack*, 66 S.W.3d 706 (Mo. 2002) (finding that "it is reasonable to conclude that drivers with drugs would 'take the bait' and exit" and holding that stop was reasonable in part because "the checkpoint was set up in an isolated and sparsely populated area offering no services to motorists and was conducted on an evening that would otherwise have little traffic"); *with id.* at 710 (Stith, J., dissenting) (arguing that seizure was unreasonable under *Edmond*).

If a driver exiting the highway immediately after passing a "drug checkpoint ahead" sign is not sufficient to provide reasonable suspicion to justify a vehicle stop (as the Tenth Circuit held), what else should be necessary to justify the stop? In other words, what else must an officer observe after the car exits?

This tactic has attracted attention from the surveilled community. *See, e.g.*, Steve Elliot, "Cops Set Up Fake 'Drug Checkpoint' Signs; Detain and Search Drivers Who React," *Toke Signals* (Jan. 28, 2014); TJ Green, "Fake Drug Checkpoints Are Becoming More Devious," *Weed Blog* (May 3, 2012).

Warrant Exception: Protective Sweeps

Our final case for this chapter concerns "protective sweeps," which police may conduct along with an arrest to protect themselves and others from potential attackers who may be lying in wait. Students should carefully note how the protective sweeps doctrine differs from that regulating searches incident to lawful arrests.

Supreme Court of the United States

Maryland v. Jerome Edward Buie

Decided Feb. 28, 1990 – 494 U.S. 325

Justice WHITE delivered the opinion of the Court.

A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. In this case we must decide what level of justification is required by the Fourth and Fourteenth Amendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises. The Court of Appeals of Maryland held that a running suit seized in plain view during such a protective sweep should have been suppressed at respondent's armed robbery trial because the officer who conducted the sweep did not have probable cause to believe that a serious and demonstrable potentiality for danger existed. We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer "possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing" that the area swept harbored an individual posing a danger to the officer or others. We accordingly vacate

the judgment below and remand for application of this standard.

I

On February 3, 1986, two men committed an armed robbery of a Godfather's Pizza restaurant in Prince George's County, Maryland. One of the robbers was wearing a red running suit. That same day, Prince George's County police obtained arrest warrants for respondent Jerome Edward Buie and his suspected accomplice in the robbery, Lloyd Allen. Buie's house was placed under police surveillance.

On February 5, the police executed the arrest warrant for Buie. They first had a police department secretary telephone Buie's house to verify that he was home. The secretary spoke to a female first, then to Buie himself. Six or seven officers proceeded to Buie's house. Once inside, the officers fanned out through the first and second floors. Corporal James Rozar announced that he would "freeze" the basement so that no one could come up and surprise the officers. With his service revolver drawn, Rozar twice shouted into the basement, ordering anyone down there to come out. When a voice asked who was calling, Rozar announced three times: "this is the police, show me your hands." Eventually, a pair of hands appeared around the bottom of the stairwell and Buie emerged from the basement. He was arrested, searched, and handcuffed by Rozar. Thereafter, Detective Joseph Frolich entered the basement "in case there was someone else" down there. He noticed a red running suit lying in plain view on a stack of clothing and seized it.

The trial court denied Buie's motion to suppress the running suit, stating in part: "The man comes out from a basement, the police don't know how many other people are down there. He is charged with a serious offense." The State introduced the running suit into evidence at Buie's trial. A jury convicted Buie of robbery with a deadly weapon and using a handgun in the commission of a felony.

The Court of Special Appeals of Maryland affirmed the trial court's denial of the suppression motion. The court stated that Detective Frolich did not go into the basement to search for evidence, but to look for the suspected accomplice or anyone else who might pose a threat to the officers on the scene.

The Court of Appeals of Maryland reversed by a 4-to-3 vote. The court acknowledged that "when the intrusion is slight, as in the case of a brief stop and frisk on a public street, and the public interest in prevention of crime is substantial, reasonable articulable suspicion may be enough to pass constitutional muster." The court, however, stated that when the sanctity of the home is involved, the exceptions to the warrant requirement are few, and held: "[T]o justify a protective sweep of a home, the government must show that there is probable cause to believe that '"a serious and demonstrable potentiality for danger"' exists." The court went on to find that the State had not satisfied that probable-cause requirement.

II

It is not disputed that until the point of Buie's arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found, including the basement. "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." There is also no dispute that if Detective Frolich's entry into the basement was lawful, the seizure of the red running suit, which was in plain view and which the officer had probable cause to believe was evidence of a crime, was also lawful under the Fourth Amendment. The issue in this case is what level of justification the Fourth Amendment required before Detective Frolich could legally enter the basement to see if someone else was there.

Petitioner, the State of Maryland, argues that, under a general reasonableness balancing test, police should be permitted to conduct a protective sweep whenever they make an in-home arrest for a violent crime.

III

It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures. Our cases show that in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause. There are other contexts, however, where the public interest is such that neither a warrant nor probable cause is required.

Possessing an arrest warrant and probable cause to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found. Once he was found, however, the search for him was over, and there was no

longer that particular justification for entering any rooms that had not yet been searched.

That Buie had an expectation of privacy in those remaining areas of his house, however, does not mean such rooms were immune from entry. In the instant case, there is an [] interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

We agree with the State, as did the court below, that a warrant was not required. We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in *Terry* and *Long,* and as in those cases, we think this balance is the proper one.[2]

We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

IV

The type of search we authorize today is far removed from the "top-to-bottom" search involved in *Chimel;* moreover, it is decidedly not "automati[c]," but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.

V

We conclude that by requiring a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed, the Court of Appeals of Maryland applied an unnecessarily strict Fourth Amendment standard. The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. We therefore vacate the judgment below and remand this case to the Court of Appeals of Maryland for further proceedings not inconsistent with this opinion.

Justice STEVENS, concurring.

Today the Court holds that reasonable suspicion, rather than probable cause, is necessary to support a protective sweep while an arrest is in progress. I agree with that holding and with the Court's opinion, but I believe it is important to emphasize that the standard applies only to *protective* sweeps. Officers conducting such a sweep must have a reasonable basis for believing that their search will reduce the danger of harm to themselves or of violent interference with their mission; in short, the search must be protective.

In this case, to justify Officer Frolich's entry into the basement, it is the State's burden to demonstrate that the officers had a reasonable basis for believing not only that someone in the basement might attack them or otherwise try to interfere with the arrest, but also that it would be safer to go down the stairs instead of simply guarding them from above until respondent had been removed from the house. The fact that respondent offered no resistance when he emerged from the basement is somewhat inconsistent with the hypothesis that the danger of an attack by a hidden confederate persisted after the arrest. Moreover, Officer Rozar testified that he was not worried about any possible danger when he arrested Buie.

Indeed, were the officers concerned about safety, one would expect them to do what Officer Rozar did before the arrest: guard the basement door to prevent surprise attacks. As the Court indicates, Officer Frolich might, at the time of the arrest, reasonably have "look[ed] in" the already open basement door to ensure that no accomplice had followed Buie to the stairwell. But Officer Frolich did not merely "look in" the basement; he entered it. That strategy is sensible if one wishes to search the basement. It is a surprising choice for an officer, worried about safety, who need not risk entering the stairwell at all.

The State may thus face a formidable task on remand. However, the Maryland courts are better equipped than are we to review the record.

Justice KENNEDY, concurring.

The Court adopts the prudent course of explaining the general rule and permitting the state court to apply it in the first instance. The concurrence by JUSTICE STEVENS, however, makes the gratuitous observation that the State has a formidable task on remand. My view is quite to the contrary. Based on my present understanding of the record, I should think the officers' conduct here was in full accord with standard police safety procedure, and that the officers would have been remiss if they had not taken these precautions. This comment is necessary, lest by acquiescence the impression be left that JUSTICE STEVENS' views can be interpreted as authoritative guidance for application of our ruling to the facts of the case.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

While the Fourth Amendment protects a person's privacy interests in a variety of settings, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." The Court discounts the nature of the intrusion because it believes that the scope of the intrusion is limited. The Court explains that a protective sweep's scope is "narrowly confined to a cursory visual inspection of those places in which a person might be hiding" and confined in duration to a period "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." But these spatial and temporal restrictions are not particularly limiting. A protective sweep would bring within police purview virtually all personal possessions within the house not hidden from view in a small enclosed space. Police officers searching for potential ambushers might enter every room including basements and attics; open up closets, lockers, chests, wardrobes, and cars; and peer under beds and behind furniture. The officers will view letters, documents, and personal effects that are on tables or desks or are visible inside open drawers; books, records, tapes, and pictures on shelves; and clothing, medicines, toiletries and other paraphernalia not carefully stored in dresser drawers or bathroom cupboards. While perhaps not a "full-blown" or "top-to-bottom" search, a protective sweep is much closer to it than to a "limited patdown for weapons" or a "'frisk' of an automobile."

In light of the special sanctity of a private residence and the highly intrusive nature of a protective sweep, I firmly believe that police officers must have probable cause to fear that their personal safety is threatened by a hidden confederate of an arrestee before they may sweep through the entire home. Given the state-court determination that the officers searching Buie's home lacked probable cause to perceive such a danger and therefore were not lawfully present in the basement, I would affirm the state court's decision to suppress the incriminating evidence. I respectfully dissent.

Notes, Comments, and Questions

When comparing lawful "protective sweeps" with searches incident to lawful arrest, students should note (1) the physical scope of a protective sweep will often extend beyond the area in which a SILA is permissible, (2) because sweeps are permitted only to protect against dangers to those present during the arrest, police may search only areas in which an officer may reasonably suspect a person could be found, and (3) the searches must be "cursory inspections" of those spaces.

An open question related to prospective sweeps concerns whether police may conduct them upon entering a house with consent—or in other contexts unrelated to arrests.[3] Federal courts have reached divergent results.

Imagine police are investigating a brutal murder of a gang member and suspect that a rival gang is responsible. They obtain consent to enter the home of a witness in a "high-crime" neighborhood. May they "sweep" the house upon entry? Why or why not?

Consider a slightly modified version of the problem presented above. Here, police are investigating an allegation of insider trading that violates federal securities law. They obtain consent to enter the home of a witness in an exclusive gated community. May they "sweep" the house upon entry? Why or why not?

For courts permitting sweeps absent arrests, *see, e.g.*, *United States v. Fadual*, 16 F. Supp. 3d 270 (S.D.N.Y. 2014) (holding that "under certain circumstances, law enforcement officers may engage in a protective sweep where they gained entry through consent in the first instance" but that the sweep at issue was not lawful); *United States v. Miller*, 430 F.3d 93, 95 (2d Cir. 2005) (allowing sweeps made by the police pursuant to "lawful process, such as an order permitting or directing the officer to enter for the purpose of protecting a third party"); *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004) (allowing sweep of mobile home entered by police with consent). For courts holding sweeps unlawful absent an arrest, *see, e.g.*, *United States v. Torres-Castro*, 470 F.3d 992 (10th Cir. 2006) ("Following *Buie,* we held that such 'protective sweeps' are only permitted incident to an arrest.");

United States v. Waldner, 425 F.3d 514, 517 (8th Cir. 2005) (declining the invitation to "extend *Buie* further"); *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000) (holding search cannot be justified as protective sweep because when it occurred suspect "was *not* under arrest").

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2.15: Chapter 16 - The Warrant Requirement- Exceptions (Part 8)

Warrant Exception: Searches of Students & Public Employees

Although law enforcement officers conduct the bulk of the searches and seizures covered in this book, other government agents also perform searches and seizures outside the context of normal policing. In this chapter, we consider searches of public school students and public employees.

In public schools, teachers and other school officials must conduct searches to promote safety and to foster an environment conducive to education. Yet students do not forfeit all rights at school, and some searches of students and their effects are unreasonable. (Note that because the Fourth Amendment regulates only state actors, private school students are not protected against "unreasonable" school searches, unless the government is somehow involved.)

Supreme Court of the United States

New Jersey v. T.L.O.

Decided Jan. 15, 1985 – 469 U.S. 325

Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

I

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T.L.O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.

Mr. Choplick notified T.L.O.'s mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marihuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County. Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T.L.O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress. Although the court concluded that the Fourth Amendment did apply to searches carried out by school officials, ... the court concluded that the search conducted by Mr. Choplick was a reasonable one. The initial decision to open the purse was justified by Mr. Choplick's well-founded suspicion that T.L.O. had violated the rule forbidding smoking in the lavatory. Once the purse was open, evidence of

marihuana violations was in plain view, and Mr. Choplick was entitled to conduct a thorough search to determine the nature and extent of T.L.O.'s drug-related activities. Having denied the motion to suppress, the court on March 23, 1981, found T.L.O. to be a delinquent and on January 8, 1982, sentenced her to a year's probation.

On appeal from the final judgment of the Juvenile Court, a divided Appellate Division affirmed the trial court's finding that there had been no Fourth Amendment violation. T.L.O. appealed the Fourth Amendment ruling, and the Supreme Court of New Jersey reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in T.L.O.'s purse.

We granted the State of New Jersey's petition for certiorari. Although we originally granted certiorari to decide the issue of the appropriate remedy in juvenile court proceedings for unlawful school searches, our doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities prompted us to order reargument on that question. Having heard argument on the legality of the search of T.L.O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.

II

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials.

These two propositions—that the Fourth Amendment applies to the States through the Fourteenth Amendment, and that the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment—might appear sufficient to answer the suggestion that the Fourth Amendment does not proscribe unreasonable searches by school officials. On reargument, however, the State of New Jersey has argued that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them.

[T]his Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, Occupational Safety and Health Act inspectors, and even firemen entering privately owned premises to battle a fire, are all subject to the restraints imposed by the Fourth Amendment. Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren. Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment.

Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment, and the Due Process Clause of the Fourteenth Amendment. If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

III

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

We have recognized that even a limited search of the person is a substantial invasion of privacy. We have also recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

Of course, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise "illegitimate." To receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is "prepared to recognize as legitimate." The State of New Jersey has argued that because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property "unnecessarily" carried into a school. This argument has two factual premises: (1) the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment; and (2) the minimal interest of the child in bringing any items of personal property into the school. Both premises are severely flawed.

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a

violation of the law has occurred. However, “probable cause” is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although “both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, ... in certain limited circumstances neither is required.” Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although “reasonable,” do not rise to the level of probable cause. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider “whether the ... action was justified at its inception[;]” second, one must determine whether the search as actually conducted “was reasonably related in scope to the circumstances which justified the interference in the first place.” Under ordinary circumstances, a search of a student by a teacher or other school official will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

IV

There remains the question of the legality of the search in this case. Our review of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes.

The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second the search for marihuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marihuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention.

The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T.L.O.’s purse would therefore have “no direct bearing on the infraction” of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse. Second, even assuming that a search of T.L.O.’s purse might under some circumstances be reasonable in light of the accusation made against T.L.O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that T.L.O. had cigarettes in her purse. At best, according to the court, Mr. Choplick had “a good hunch.”

Both these conclusions are implausible. T.L.O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T.L.O.’s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T.L.O.’s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T.L.O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The relevance of T.L.O.’s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary “nexus” between the item searched for and the infraction under investigation. Thus, if Mr. Choplick in fact had a reasonable suspicion that T.L.O. had

cigarettes in her purse, the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation.

Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was not an "inchoate and unparticularized suspicion or 'hunch[;]'" rather, it was the sort of "common-sense conclusio[n] about human behavior" upon which "practical people"—including government officials—are entitled to rely. Of course, even if the teacher's report were true, T.L.O. *might* not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student. But the requirement of reasonable suspicion is not a requirement of absolute certainty: "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment ...." Because the hypothesis that T.L.O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also consistent with the teacher's accusation. Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T.L.O.'s purse to see if it contained cigarettes.

Our conclusion that Mr. Choplick's decision to open T.L.O.'s purse was reasonable brings us to the question of the further search for marihuana once the pack of cigarettes was located. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T.L.O. does not dispute the reasonableness of Mr. Choplick's belief that the rolling papers indicated the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T.L.O. in drug dealing. This argument, too, is unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T.L.O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence from T.L.O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is [r]eversed.

Justice BRENNAN, with whom Justice MARSHALL joins, concurring in part and dissenting in part.

I fully agree with Part II of the Court's opinion. Teachers, like all other government officials, must conform their conduct to the Fourth Amendment's protections of personal privacy and personal security. [T]his principle is of particular importance when applied to schoolteachers, for children learn as much by example as by exposition. It would be incongruous and futile to charge teachers with the task of embuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections.

I do not, however, otherwise join the Court's opinion. Today's decision sanctions school officials to conduct full-scale searches on a "reasonableness" standard whose only definite content is that it is *not* the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor even by a fair application of the "balancing test" it proclaims in this very opinion.

I emphatically disagree with the Court's decision to cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search. The Court's decision jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth Amendment—on the basis of its Rohrschach-like "balancing test." Use of such a "balancing test" to determine the standard for evaluating the validity of a full-scale search represents a sizable innovation in Fourth Amendment analysis. This innovation finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens. Moreover, even if this Court's historic understanding of the Fourth Amendment were mistaken and a balancing test of some kind were appropriate, any such test that gave adequate weight to the privacy and security interests protected by the Fourth Amendment would not reach the preordained result the Court's conclusory analysis reaches today. Therefore, because I believe that the balancing test used by the Court today

is flawed both in its inception and in its execution, I respectfully dissent.

In the past several Terms, this Court has produced a succession of Fourth Amendment opinions in which "balancing tests" have been applied to resolve various questions concerning the proper scope of official searches. The Court has begun to apply a "balancing test" to determine whether a particular category of searches intrudes upon expectations of privacy that merit Fourth Amendment protection. It applies a "balancing test" to determine whether a warrant is necessary to conduct a search. In today's opinion, it employs a "balancing test" to determine what standard should govern the constitutionality of a given category of searches.

All of these "balancing tests" amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences. And it may be that the real force underlying today's decision is the belief that the Court purports to reject—the belief that the unique role served by the schools justifies an exception to the Fourth Amendment on their behalf. If so, the methodology of today's decision may turn out to have as little influence in future cases as will its result, and the Court's departure from traditional Fourth Amendment doctrine will be confined to the schools.

On my view, the presence of the word "unreasonable" in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good. Full-scale searches unaccompanied by probable cause violate the Fourth Amendment. I do not pretend that our traditional Fourth Amendment doctrine automatically answers all of the difficult legal questions that occasionally arise. I do contend, however, that this Court has an obligation to provide some coherent framework to resolve such questions on the basis of more than a conclusory recitation of the results of a "balancing test." The Fourth Amendment itself supplies that framework and, because the Court today fails to heed its message, I must respectfully dissent.

* * *

In 2009, the Court applied the rule of *New Jersey v. T.L.O.* to a substantially more unpleasant set of facts.

Supreme Court of the United States

Safford Unified School District #1 v. April Redding

Decided June 25, 2009 – 557 U.S. 364

Justice SOUTER delivered the opinion of the Court.

The issue here is whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, we hold that the search did violate the Constitution.

I

The events immediately prior to the search in question began in 13-year-old Savana Redding's math class at Safford Middle School one October day in 2003. The assistant principal of the school, Kerry Wilson, came into the room and asked Savana to go to his office. There, he showed her a day planner, unzipped and open flat on his desk, in which there were several knives, lighters, a permanent marker, and a cigarette. Wilson asked Savana whether the planner was hers; she said it was, but that a few days before she had lent it to her friend, Marissa Glines. Savana stated that none of the items in the planner belonged to her.

Wilson then showed Savana four white prescription-strength ibuprofen 400-mg pills, and one over-the-counter blue naproxen 200-mg pill, all used for pain and inflammation but banned under school rules without advance permission. He asked Savana if she knew anything about the pills. Savana answered that she did not. Wilson then told Savana that he had received a report that she was giving these pills to fellow students; Savana denied it and agreed to let Wilson search her belongings. Helen Romero, an administrative assistant, came into the office, and together with Wilson they searched Savana's backpack, finding nothing.

At that point, Wilson instructed Romero to take Savana to the school nurse's office to search her clothes for pills. Romero and the nurse, Peggy Schwallier, asked Savana to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both

without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

Savana's mother filed suit against Safford Unified School District # 1, Wilson, Romero, and Schwallier for conducting a strip search in violation of Savana's Fourth Amendment rights. The individuals (hereinafter petitioners) moved for summary judgment, raising a defense of qualified immunity. The District Court for the District of Arizona granted the motion on the ground that there was no Fourth Amendment violation, and a panel of the Ninth Circuit affirmed. A closely divided Circuit sitting en banc, however, reversed. We granted certiorari and now affirm in part, reverse in part, and remand.

II

The Fourth Amendment "right of the people to be secure in their persons ... against unreasonable searches and seizures" generally requires a law enforcement officer to have probable cause for conducting a search.

In *T.L.O.,* we recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search" and held that for searches by school officials "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student and have held that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a "fair probability" or a "substantial chance" of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.

III

A

In this case, the school's policies strictly prohibit the nonmedical use, possession, or sale of any drug on school grounds, including "'[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.'" A week before Savana was searched, another student, Jordan Romero (no relation of the school's administrative assistant), told the principal and Assistant Principal Wilson that "certain students were bringing drugs and weapons on campus," and that he had been sick after taking some pills that "he got from a classmate." On the morning of October 8, the same boy handed Wilson a white pill that he said Marissa Glines had given him. He told Wilson that students were planning to take the pills at lunch.

Wilson learned from Peggy Schwallier, the school nurse, that the pill was Ibuprofen 400 mg, available only by prescription. Wilson then called Marissa out of class. Outside the classroom, Marissa's teacher handed Wilson the day planner, found within Marissa's reach, containing various contraband items. Wilson escorted Marissa back to his office.

In the presence of Helen Romero, Wilson requested Marissa to turn out her pockets and open her wallet. Marissa produced a blue pill, several white ones, and a razor blade. Wilson asked where the blue pill came from, and Marissa answered, "'I guess it slipped in when *she* gave me the IBU 400s.'" When Wilson asked whom she meant, Marissa replied, "'Savana Redding.'" Wilson then enquired about the day planner and its contents; Marissa denied knowing anything about them. Wilson did not ask Marissa any followup questions to determine whether there was any likelihood that Savana presently had pills: neither asking when Marissa received the pills from Savana nor where Savana might be hiding them.

Schwallier did not immediately recognize the blue pill, but information provided through a poison control hotline indicated that the pill was a 200-mg dose of an anti-inflammatory drug, generically called naproxen, available over the counter. At Wilson's direction, Marissa was then subjected to a search of her bra and underpants by Romero and Schwallier, as Savana was later on. The search revealed no additional pills.

It was at this juncture that Wilson called Savana into his office and showed her the day planner. Their conversation established that Savana and Marissa were on friendly terms: while she denied knowledge of the contraband, Savana admitted that the day planner was hers and that she had lent it to Marissa. Wilson had other reports of their friendship from staff members, who had identified Savana and Marissa as part of an unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom. Wilson had reason to connect the girls with this contraband, for Wilson knew

that Jordan Romero had told the principal that before the dance, he had been at a party at Savana's house where alcohol was served. Marissa's statement that the pills came from Savana was thus sufficiently plausible to warrant suspicion that Savana was involved in pill distribution.

This suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing. If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.

B

Here it is that the parties part company, with Savana's claim that extending the search at Wilson's behest to the point of making her pull out her underwear was constitutionally unreasonable. The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it. Romero and Schwallier directed Savana to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants. Although Romero and Schwallier stated that they did not see anything when Savana followed their instructions, we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen. The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be.

The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T.L.O.,* that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." The scope will be permissible, that is, when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that "students ... hid[e] contraband in or under their clothing" and cite a smattering of cases of students with contraband in their underwear. But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing. Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students from what Jordan Romero had gone through. Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.

We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

[The Court found qualified immunity warranted for Wilson, Romero, and Schwallier because "the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law." The case was remanded for resolution of the question of liability for the school district.]

Justice THOMAS, concurring in the judgment in part and dissenting in part.

By declaring the search unreasonable in this case, the majority has "'surrender[ed] control of the American public school system to public school students'" by invalidating school policies that treat all drugs equally and by second-guessing swift disciplinary decisions made by school officials. The Court's interference in these matters of great concern to teachers, parents, and students illustrates why the most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the complete restoration of the common-law doctrine of *in loco parentis*.

"[I]n the early years of public schooling," courts applied the doctrine of *in loco parentis* to transfer to teachers the authority of a parent to "'command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.'" So empowered, schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms. The perils of judicial policymaking inherent in applying Fourth Amendment protections to public schools counsel in favor of a return to the understanding that existed in this Nation's first public schools, which gave teachers discretion to craft the rules needed to carry out the disciplinary responsibilities delegated to them by parents.

If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand. There can be no doubt that a parent would have had the authority to conduct the search at issue in this case. Parents have "immunity from the strictures of the Fourth Amendment" when it comes to searches of a child or that child's belongings.

Restoring the common-law doctrine of *in loco parentis* would not, however, leave public schools entirely free to impose any rule they choose. "If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move." Indeed, parents and local government officials have proved themselves quite capable of challenging overly harsh school rules or the enforcement of sensible rules in insensible ways.

In the end, the task of implementing and amending public school policies is beyond this Court's function. Parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials. Preservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common sense is not a judicial monopoly or a Constitutional imperative.

Only then will teachers again be able to "'govern the[ir] pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn'" by making "'rules, giv[ing] commands, and punish[ing] disobedience'" without interference from judges. By deciding that it is better equipped to decide what behavior should be permitted in schools, the Court has undercut student safety and undermined the authority of school administrators and local officials. Even more troubling, it has done so in a case in which the underlying response by school administrators was reasonable and justified. I cannot join this regrettable decision. I, therefore, respectfully dissent from the Court's determination that this search violated the Fourth Amendment.

Notes, Comments, and Questions

April Redding sued the Safford Unified school district on behalf of her daughter, Savana. During the oral argument, some of the Justices asked questions that betrayed their lack of knowledge about modern middle school life. Justice Scalia, for example, inquired about some of the items classified as contraband at Savana's school. He said learning that a "black marker pencil" was contraband "astounded" him. Told by counsel that students use such markers "for sniffing," Justice Scalia replied, "Oh, is that what they do? ... They sniff them? ... Really?"

Justice Breyer, after trying to pin down the facts concerning how Savana was searched—and after suggesting that underwear might be a sensible place to hide pills—reminisced on his own school days.

"In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay?"

He continued, "And in my experience, too, people did sometimes stick things in my underwear."

The audience burst into laughter, and he clarified: "Or not *my* underwear. Whatever. ... I was the one who did it? I don't know."

Dahlia Lithwick, who covered the case for *Slate*, predicted as follows after the oral argument:

"When constitutional historians sit down someday to compile the definitive *Supreme Court Concordance of Not Getting It*, the entry directly next to Lilly Ledbetter ('Court fails utterly to understand realities of gender pay discrimination') will be Savana Redding ('Court compares strip searches of 13-year-old girls to *American Pie*-style locker-room hijinks'). After today's argument, it's plain the court will overturn a 9th Circuit Court of Appeals opinion finding a school's decision to strip-search a 13-year-old girl unconstitutional. That the school in question was looking for a prescription pill with the mind-altering force of a pair of Advil—and couldn't be bothered to call the child's mother first—hardly matters."

Having read the Court's opinion, we know that Lithwick's prediction was not correct. Justice Breyer, he of the hijinks memories, joined an eight-Justice majority finding that the school's behavior violated the Fourth Amendment. Although there was broad consensus for finding a violation, a smaller majority of Justices denied Savana money damages, holding that the school officials were protected by "qualified immunity," a doctrine discussed in Chapter 35.

Based on the standards set forth in *T.L.O.* and *Redding*, consider these potential actions by a school district:

May a school search the mobile phone of a student who was caught texting in class? Does it matter if the teachers search only to see who else was texting with the student or instead search the photos and other data on the phone? *See* Amy Vorenberg, *Indecent Exposure: Do Warrantless Searches of a Student's Cell Phone Violate the Fourth Amendment?*, 17 Berkeley J. Crim. L. 62 (2012).

What about random locker searches aimed at finding drugs? What about requiring students to use clear backpacks or to walk through metal detectors when entering the school building?

We now turn to searches of public employees. Supervisors of public employees have a duty to monitor the work of subordinates for the public interest. Beyond reducing waste, fraud, and abuse, supervisors have the day-to-day responsibility of managing staff so that offices accomplish their goals. It remains unclear what privacy rights public employees maintain at work.

In the context of a public employee whose electronic communications were searched by supervisors, the Court in 2010 avoided resolving important questions about public employee privacy. The Court found the searches at issue "reasonable," in part, because the employee's behavior was egregious and the response of the employer unsurprising. Students should note what issues are not decided by the Court, in addition to noting the holdings.

Supreme Court of the United States

City of Ontario, California v. Jeff Quon

Decided June 17, 2010 – 560 U.S. 746

Justice KENNEDY delivered the opinion of the Court.

This case involves the assertion by a government employer of the right, in circumstances to be described, to read text messages sent and received on a pager the employer owned and issued to an employee. The employee contends that the privacy of the messages is protected by the ban on "unreasonable searches and seizures" found in the Fourth Amendment to the United States Constitution, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. Though the case touches issues of farreaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable.

I

A

The City of Ontario (City) is a political subdivision of the State of California. The case arose out of incidents in 2001 and 2002 when respondent Jeff Quon was employed by the Ontario Police Department (OPD). He was a police sergeant and member of OPD's Special Weapons and Tactics (SWAT) Team. The City, OPD, and OPD's Chief, Lloyd Scharf, are petitioners here. As will be discussed, two respondents share the last name Quon. In this opinion "Quon" refers to Jeff Quon, for the relevant events mostly revolve around him.

In October 2001, the City acquired 20 alphanumeric pagers capable of sending and receiving text messages. Arch Wireless Operating Company provided wireless service for the pagers. Under the City's service contract with Arch Wireless, each pager was allotted a limited number of characters sent or received each month. Usage in excess of that amount would result in an additional fee. The City issued pagers to Quon and other SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations.

Before acquiring the pagers, the City announced a "Computer Usage, Internet and E–Mail Policy" (Computer Policy) that applied to all employees. Among other provisions, it specified that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." In March 2000, Quon signed a statement acknowledging that he had read and understood the Computer Policy.

The Computer Policy did not apply, on its face, to text messaging. Text messages share similarities with e-mails, but the two differ in an important way. In this case, for instance, an e-mail sent on a City computer was transmitted through the City's own data servers, but a text message sent on one of the City's pagers was transmitted using wireless radio frequencies from an individual pager to a receiving station owned by Arch Wireless. It was routed through Arch Wireless' computer network, where it remained until the recipient's pager or cellular telephone was ready to receive the message, at which point Arch Wireless transmitted the message from the transmitting station nearest to the recipient. After delivery, Arch Wireless retained a copy on its computer servers. The message did not pass through computers owned by the City.

Although the Computer Policy did not cover text messages by its explicit terms, the City made clear to employees, including Quon, that the City would treat text messages the same way as it treated e-mails. At an April 18, 2002, staff meeting at which Quon was present, Lieutenant Steven Duke, the OPD officer responsible for the City's contract with Arch Wireless, told officers that messages sent on the pagers "are considered e-mail messages. This means that [text] messages would fall under the City's policy as public information and [would be] eligible for auditing." Duke's comments were put in writing in a memorandum sent on April 29, 2002, by Chief Scharf to Quon and other City personnel.

Within the first or second billing cycle after the pagers were distributed, Quon exceeded his monthly text message character allotment. Duke told Quon about the overage, and reminded him that messages sent on the pagers were "considered e-mail and could be audited." Duke said, however, that "it was not his intent to audit [an] employee's text messages to see if the overage [was] due to work related transmissions." Duke suggested that Quon could reimburse the City for the overage fee rather than have Duke audit the messages. Quon wrote a check to the City for the overage. Duke offered the same arrangement to other employees who incurred overage fees.

Over the next few months, Quon exceeded his character limit three or four times. Each time he reimbursed the City. Quon and another officer again incurred overage fees for their pager usage in August 2002. At a meeting in October, Duke told Scharf that he had become "'tired of being a bill collector.'" Scharf decided to determine whether the existing character limit was too low—that is, whether officers such as Quon were having to pay fees for sending work-related messages—or if the overages were for personal messages. Scharf told Duke to request transcripts of text messages sent in August and September by Quon and the other employee who had exceeded the character allowance.

At Duke's request, an administrative assistant employed by OPD contacted Arch Wireless. After verifying that the City was the subscriber on the accounts, Arch Wireless provided the desired transcripts. Duke reviewed the transcripts and discovered that many of the messages sent and received on Quon's pager were not work related, and some were sexually explicit. Duke reported his findings to Scharf, who, along with Quon's immediate supervisor, reviewed the transcripts himself. After his review, Scharf referred the matter to OPD's internal affairs division for an investigation into whether Quon was violating OPD rules by pursuing personal matters while on duty.

The officer in charge of the internal affairs review was Sergeant Patrick McMahon. Before conducting a review, McMahon used Quon's work schedule to redact the transcripts in order to eliminate any messages Quon sent while off duty. He then reviewed the content of the messages Quon sent during work hours. McMahon's report noted that Quon sent or received 456 messages during work hours in the month of August 2002, of which no more than 57 were work related; he sent as many as 80 messages during a single day at work; and on an average workday, Quon sent or received 28 messages, of which only 3 were related to police business. The report concluded that Quon had violated OPD rules. Quon was allegedly disciplined.

B

Quon filed suit against petitioners in the United States District Court for the Central District of California. Among the allegations in the complaint was that petitioners violated respondent['s] Fourth Amendment rights by obtaining and reviewing the transcript of Jeff Quon's pager messages.

The parties filed cross-motions for summary judgment. The District Court denied petitioners' motion for summary judgment on the Fourth Amendment claims. The jury concluded that Scharf ordered the audit to determine the efficacy of the character limits. The District Court accordingly held that petitioners did not violate the Fourth Amendment. It entered judgment in their favor.

The United States Court of Appeals for the Ninth Circuit reversed in part. The panel agreed with the District Court that Jeff Quon had a reasonable expectation of privacy in his text messages but disagreed with the District Court about whether the search was reasonable. The Ninth Circuit denied a petition for rehearing en banc.

This Court granted the petition for certiorari filed by the City, OPD, and Chief Scharf challenging the Court of Appeals' holding that they violated the Fourth Amendment.

II

It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. The Fourth Amendment applies as well when the Government acts in its capacity as an employer.

The Court discussed this principle in *O'Connor [v. Ortega,* 480 U.S. 709 (1987)]. All Members of the Court agreed with the general principle that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." A majority of the Court further agreed that "'special needs, beyond the normal need for law enforcement,'" make the warrant and probable-cause requirement impracticable for government employers.

The *O'Connor* Court did disagree on the proper analytical framework for Fourth Amendment claims against government employers. A four-Justice plurality concluded that the correct analysis has two steps. First, because "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable," a court must consider "[t]he operational realities of the workplace" in order to determine whether an employee's Fourth Amendment rights are implicated. On this view, "the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." Next, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."

Justice SCALIA, concurring in the judgment, outlined a different approach. His opinion would have dispensed with an inquiry into "operational realities" and would conclude "that the offices of government employees ... are covered by Fourth Amendment protections as a general matter." But he would also have held "that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment."

Later, in the *Von Raab* decision, [*Treasury Employees v. Von Raab*, 489 U.S. 656 (1989)], the Court explained that "operational realities" could diminish an employee's privacy expectations, and that this diminution could be taken into consideration when assessing the reasonableness of a workplace search. In the two decades since *O'Connor,* however, the threshold test for determining the scope of an employee's Fourth Amendment rights has not been clarified further. Here, though they disagree on whether Quon had a reasonable expectation of privacy, both petitioners and respondents start from the premise that the *O'Connor* plurality controls. It is not necessary to resolve whether that premise is correct. The case can be decided by determining that the search was reasonable even assuming Quon had a reasonable expectation of privacy. The two *O'Connor* approaches—the plurality's and Justice SCALIA's—therefore lead to the same result here.

III

A

Before turning to the reasonableness of the search, it is instructive to note the parties' disagreement over whether Quon had a reasonable expectation of privacy. The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. In *Katz,* the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

[T]he Court [will] have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

A broad holding concerning employees' privacy expectations vis–à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds. For present purposes we assume several propositions *arguendo:* First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.

B

Even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a general matter, warrantless searches "are *per se* unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule. The Court has held that the "'special needs'" of the workplace justify one such exception.

Under the approach of the *O'Connor* plurality, when conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is "'justified at its inception'" and if "'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of'" the circumstances giving rise to the search. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach.

The search was justified at its inception because there were "reasonable grounds for suspecting that the search [was] necessary

for a noninvestigatory work-related purpose." As a jury found, Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. This was, as the Ninth Circuit noted, a "legitimate work-related rationale." The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications.

As for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use. The review was also not "'excessively intrusive.'" Although Quon had gone over his monthly allotment a number of times, OPD requested transcripts for only the months of August and September 2002. While it may have been reasonable as well for OPD to review transcripts of all the months in which Quon exceeded his allowance, it was certainly reasonable for OPD to review messages for just two months in order to obtain a large enough sample to decide whether the character limits were efficacious. And it is worth noting that during his internal affairs investigation, McMahon redacted all messages Quon sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts.

Furthermore, and again on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to assessing whether the search was too intrusive. Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises—and given that Quon had received no assurances of privacy—Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.

From OPD's perspective, the fact that Quon likely had only a limited privacy expectation, with boundaries that we need not here explore, lessened the risk that the review would intrude on highly private details of Quon's life. OPD's audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been. That the search did reveal intimate details of Quon's life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters. The search was permissible in its scope.

The Court of Appeals erred in finding the search unreasonable. It pointed to a "host of simple ways to verify the efficacy of the 25,000 character limit ... without intruding on [respondents'] Fourth Amendment rights." The panel suggested that Scharf "could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if [OPD] wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to [OPD] to review the redacted transcript."

This approach was inconsistent with controlling precedents. This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." That rationale "could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," because "judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished." The analytic errors of the Court of Appeals in this case illustrate the necessity of this principle. Even assuming there were ways that OPD could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable.

Because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable under the approach of the *O'Connor* plurality. For these same reasons—that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification—the Court also concludes that the search would be "regarded as reasonable and normal in the private-employer context" and would satisfy the approach of Justice SCALIA's concurrence. The search was reasonable, and the Court of Appeals erred by holding to the contrary. Petitioners did not violate Quon's Fourth Amendment rights.

The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

* * *

A recurring Fourth Amendment question for public employees and public school students is the permissibility of drug testing by employers and school officials. We consider that issue in our next chapter.

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2.16: Chapter 17 The Warrant Requirement - Exceptions

In this chapter, we continue our discussion of searches of public school students and public employees. First, we review when the Court has allowed for public employers and public schools to require that employees and students submit to drug tests. Then, we consider the question of when public hospitals may conduct drug tests of patients without consent.

Drug Testing of Public Employees

The next case concerns a government regulation providing for the drug testing of certain railroad employees after certain accidents.

Supreme Court of the United States

Samuel K. Skinner v. Railway Labor Executives' Association

Decided March 21, 1989 – 489 U.S. 602

Justice KENNEDY delivered the opinion of the Court.

The Federal Railroad Safety Act of 1970 authorizes the Secretary of Transportation to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." Finding that alcohol and drug abuse by railroad employees poses a serious threat to safety, the Federal Railroad Administration (FRA) has promulgated regulations that mandate blood and urine tests of employees who are involved in certain train accidents. The FRA also has adopted regulations that do not require, but do authorize, railroads to administer breath and urine tests to employees who violate certain safety rules. The question presented by this case is whether these regulations violate the Fourth Amendment.

I

The regulations prohibit covered employees from using or possessing alcohol or any controlled substance. The regulations further prohibit those employees from reporting for covered service while under the influence of, or impaired by, alcohol, while having a blood alcohol concentration of .04 or more, or while under the influence of, or impaired by, any controlled substance. To the extent pertinent here, two subparts of the regulations relate to testing. Subpart C, which is entitled "Post-Accident Toxicological Testing," is mandatory. It provides that railroads "shall take all practicable steps to assure that all covered employees of the railroad directly involved ... provide blood and urine samples for toxicological testing by FRA" upon the occurrence of certain specified events. Toxicological testing is required following a "major train accident," which is defined as any train accident that involves (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of $500,000 or more. The railroad has the further duty of collecting blood and urine samples for testing after an "impact accident," which is defined as a collision that results in a reportable injury, or in damage to railroad property of $50,000 or more. Finally, the railroad is also obligated to test after "[a]ny train incident that involves a fatality to any on-duty railroad employee."

After occurrence of an event which activates its duty to test, the railroad must transport all crew members and other covered employees directly involved in the accident or incident to an independent medical facility, where both blood and urine samples must be obtained from each employee. After the samples have been collected, the railroad is required to ship them by prepaid air freight to the FRA laboratory for analysis. The FRA proposes to place primary reliance on analysis of blood samples, as blood is "the only available body fluid ... that can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects." Urine samples are also necessary, however, because drug traces remain in the urine longer than in blood, and in some cases it will not be possible to transport employees to a medical facility before the time it takes for certain drugs to be eliminated from the bloodstream. In those instances, a "positive urine test, taken with specific information on the pattern of elimination for the particular drug and other information on the behavior of the employee and the circumstances of the accident, may be crucial to the determination of" the cause of an accident.

The regulations require that the FRA notify employees of the results of the tests and afford them an opportunity to respond in writing before preparation of any final investigative report. Employees who refuse to provide required blood or urine samples may

not perform covered service for nine months, but they are entitled to a hearing concerning their refusal to take the test.

Subpart D of the regulations, which is entitled "Authorization to Test for Cause," is permissive. It authorizes railroads to require covered employees to submit to breath or urine tests in certain circumstances not addressed by Subpart C. Breath or urine tests, or both, may be ordered (1) after a reportable accident or incident, where a supervisor has a "reasonable suspicion" that an employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or (2) in the event of certain specific rule violations, including noncompliance with a signal and excessive speeding. A railroad also may require breath tests where a supervisor has a "reasonable suspicion" that an employee is under the influence of alcohol, based upon specific, personal observations concerning the appearance, behavior, speech, or body odors of the employee. Where impairment is suspected, a railroad, in addition, may require urine tests, but only if two supervisors make the appropriate determination and where the supervisors suspect impairment due to a substance other than alcohol, at least one of those supervisors must have received specialized training in detecting the signs of drug intoxication.

Subpart D further provides that whenever the results of either breath or urine tests are intended for use in a disciplinary proceeding, the employee must be given the opportunity to provide a blood sample for analysis at an independent medical facility. If an employee declines to give a blood sample, the railroad may presume impairment, absent persuasive evidence to the contrary, from a positive showing of controlled substance residues in the urine. The railroad must, however, provide detailed notice of this presumption to its employees, and advise them of their right to provide a contemporaneous blood sample. As in the case of samples procured under Subpart C, the regulations set forth procedures for the collection of samples, and require that samples "be analyzed by a method that is reliable within known tolerances."

Respondents brought the instant suit in the United States District Court for the Northern District of California, seeking to enjoin the FRA's regulations on various statutory and constitutional grounds. In a ruling from the bench, the District Court granted summary judgment in petitioners' favor. A divided panel of the Court of Appeals for the Ninth Circuit reversed. We granted the federal parties' petition for a writ of certiorari to consider whether the regulations invalidated by the Court of Appeals violate the Fourth Amendment. We now reverse.

II

[The Court first determined that the drug testing regulation could be challenged under the Fourth Amendment even though the tests at issue were conducted by private railroads. The Court also found that the tests amounted to "searches."]

III

A

[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

We have recognized exceptions to [the warrant requirement] "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.

The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." It is undisputed that [] covered employees are engaged in safety-sensitive tasks. The FRA so found, and respondents conceded the point at oral argument.

The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also "require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed." The question that remains, then, is whether the Government's need to monitor compliance with these restrictions justifies the privacy intrusions at issue absent a warrant or individualized

suspicion.

B

Both the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees. Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.

We have recognized, moreover, that the government's interest in dispensing with the warrant requirement is at its strongest when, as here, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." As the FRA recognized, alcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible.

The Government's need to rely on private railroads to set the testing process in motion also indicates that insistence on a warrant requirement would impede the achievement of the Government's objective. Railroad supervisors are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence. "Imposing unwieldy warrant procedures ... upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable."

In sum, imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government's testing program. We do not believe that a warrant is essential to render the intrusions here at issue reasonable under the Fourth Amendment.

Our cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law. When the balance of interests precludes insistence on a showing of probable cause, we have usually required "some quantum of individualized suspicion" before concluding that a search is reasonable. We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.

By and large, intrusions on privacy under the FRA regulations are limited. The breath tests authorized by Subpart D of the regulations are even less intrusive than the blood tests prescribed by Subpart C. Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Like the blood-testing procedures mandated by Subpart C, which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, breath tests reveal no other facts in which the employee has a substantial privacy interest. In all the circumstances, we cannot conclude that the administration of a breath test implicates significant privacy concerns.

A more difficult question is presented by urine tests. Like breath tests, urine tests are not invasive of the body and, under the regulations, may not be used as an occasion for inquiring into private facts unrelated to alcohol or drug use. We recognize, however, that the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests. While we would not characterize these additional privacy concerns as minimal in most contexts, we note that the regulations endeavor to reduce the intrusiveness of the collection process. The regulations do not require that samples be furnished under the direct observation of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample. The sample is also collected in a medical environment, by personnel unrelated to the railroad employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination.

More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees. We do not suggest, of course, that the interest in bodily security enjoyed by those employed in a regulated industry must always be considered minimal. Here, however, the covered employees have long been a principal focus of regulatory concern. As the dissenting judge below noted: "The reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." We conclude, therefore,

that the testing procedures contemplated by Subparts C and D pose only limited threats to the justifiable expectations of privacy of covered employees.

By contrast, the Government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others. An impaired employee, the FRA found, will seldom display any outward "signs detectable by the lay person or, in many cases, even the physician." Indeed, while respondents posit that impaired employees might be detected without alcohol or drug testing, the premise of respondents' lawsuit is that even the occurrence of a major calamity will not give rise to a suspicion of impairment with respect to any particular employee.

While no procedure can identify all impaired employees with ease and perfect accuracy, the FRA regulations supply an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place. By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.

The testing procedures contemplated by Subpart C also help railroads obtain invaluable information about the causes of major accidents and to take appropriate measures to safeguard the general public. Positive test results would point toward drug or alcohol impairment on the part of members of the crew as a possible cause of an accident, and may help to establish whether a particular accident, otherwise not drug related, was made worse by the inability of impaired employees to respond appropriately. Negative test results would likewise furnish invaluable clues, for eliminating drug impairment as a potential cause or contributing factor would help establish the significance of equipment failure, inadequate training, or other potential causes, and suggest a more thorough examination of these alternatives. Tests performed following the rule violations specified in Subpart D likewise can provide valuable information respecting the causes of those transgressions, which the FRA found to involve "the potential for a serious train accident or grave personal injury, or both."

A requirement of particularized suspicion of drug or alcohol use would seriously impede an employer's ability to obtain this information, despite its obvious importance. Experience confirms the FRA's judgment that the scene of a serious rail accident is chaotic. Investigators who arrive at the scene shortly after a major accident has occurred may find it difficult to determine which members of a train crew contributed to its occurrence. Obtaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident. While events following the rule violations that activate the testing authority of Subpart D may be less chaotic, objective indicia of impairment are absent in these instances as well. Indeed, any attempt to gather evidence relating to the possible impairment of particular employees likely would result in the loss or deterioration of the evidence furnished by the tests. It would be unrealistic, and inimical to the Government's goal of ensuring safety in rail transportation, to require a showing of individualized suspicion in these circumstances.

We conclude that the compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns.

IV

The possession of unlawful drugs is a criminal offense that the Government may punish, but it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of those substances. Performing those tasks while impaired by alcohol is, of course, equally dangerous, though consumption of alcohol is legal in most other contexts. The Government may take all necessary and reasonable regulatory steps to prevent or deter that hazardous conduct, and since the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary, as in the case before us, to examine the body or its fluids to accomplish the regulatory purpose. The necessity to perform that regulatory function with respect to railroad employees engaged in safety-sensitive tasks, and the reasonableness of the system for doing so, have been established in this case.

In light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served

by toxicological tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees, we believe that it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired. We hold that the alcohol and drug tests contemplated by Subparts C and D of the FRA's regulations are reasonable within the meaning of the Fourth Amendment. The judgment of the Court of Appeals is accordingly reversed.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The issue in this case is not whether declaring a war on illegal drugs is good public policy. The importance of ridding our society of such drugs is, by now, apparent to all. Rather, the issue here is whether the Government's deployment in that war of a particularly Draconian weapon—the compulsory collection and chemical testing of railroad workers' blood and urine—comports with the Fourth Amendment. Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

In permitting the Government to force entire railroad crews to submit to invasive blood and urine tests, even when it lacks any evidence of drug or alcohol use or other wrongdoing, the majority today joins those shortsighted courts which have allowed basic constitutional rights to fall prey to momentary emergencies. The majority purports to limit its decision to postaccident testing of workers in "safety-sensitive" jobs. But the damage done to the Fourth Amendment is not so easily cabined. The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens. I therefore dissent.

Notes, Comments, and Questions

On the same day as *Skinner*, the Court decided *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), another case about drug testing public employees. A U.S. Customs Service program required drug testing of employees who sought promotion to jobs involving seizing illegal drugs or which required employees to carry firearms or handle classified materials. Again, the Court found the collection of urine samples to be a "search." Again, the Court upheld the policy, holding that it was "reasonable" for the government to mandate the tests because of its "compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." Comparing the practice to hypothetical searches of workers at "the United States Mint ... when they leave the workplace every day," the Court concluded that the "operational realities" of the Customs Service justified the testing.

By contrast, in *Chandler v. Miller*, 520 U.S. 305 (1997), the Court struck down a Georgia law requiring that candidates for certain state offices submit to drug tests. The state stressed "the incompatibility of unlawful drug use with holding high state office" and argued that "the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials." The Court was not persuaded, concluding, "[n]othing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity." The Court noted that political candidates "are subject to relentless scrutiny—by their peers, the public, and the press." The Justices stated that the suspicionless searches needed to track lower-profile employees—like those approved in *Skinner* and *Von Raab*—were not necessary for voters to vet candidates for election.

Drug Testing of Public School Students

The Court has repeatedly applied the reasoning of *Skinner* and *Von Raab* to public school policies that mandate the drug testing of certain students.

Supreme Court of the United States

Vernonia School District 47J v. Wayne Acton

Decided June 26, 1995 – 515 U.S. 646

Justice SCALIA delivered the opinion of the Court.

The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis

drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution.

I

A

Petitioner Vernonia School District 47J (District) operates one high school and three grade schools in the logging community of Vernonia, Oregon. As elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community.

Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture. This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted. At that point, District officials began considering a drug-testing program. They held a parent "input night" to discuss the proposed Student Athlete Drug Policy (Policy), and the parents in attendance gave their unanimous approval. The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

B

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.

The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, may be screened at the request of the District, but the identity of a particular student does not determine which drugs will be tested. The laboratory's procedures are 99.94% accurate. The District follows strict procedures regarding the chain of custody and access to test results. The laboratory does not know the identity of the students whose samples it tests. It is authorized to mail written test reports only to the superintendent and to provide test results to District personnel by telephone only after the requesting official recites a code confirming his authority. Only the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.

If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete's parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the

next athletic season. The student is then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.

C

In the fall of 1991, respondent James Acton, then a seventh grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments to the United States Constitution. After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action. The United States Court of Appeals for the Ninth Circuit reversed, holding that the Policy violated both the Fourth and Fourteenth Amendments. We granted certiorari.

II

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." [W]hether a particular search meets the reasonableness standard "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant [supported by probable cause]. A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

III

The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. 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.

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation."

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample), they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval." Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

IV

Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of. We recognized in *Skinner* that collecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." We noted, however, that the degree of intrusion depends upon the manner in which production of the urine sample is monitored. Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with

a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.

The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.

V

Finally, we turn to consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it. [T]he District Court held that because the District's program also called for drug testing in the absence of individualized suspicion, the District "must demonstrate a 'compelling need' for the program." The Court of Appeals appears to have agreed with this view. It is a mistake, however, to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.

That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor." And of course the effects of a drug-infested school are visited not just upon 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 user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an "artificially induced heart rate increase, [p]eripheral vasoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response," making them a "very dangerous drug when used during exercise of any type." Marijuana causes "[i]rregular blood pressure responses during changes in body position," "[r]eduction in the oxygen-carrying capacity of the blood," and "[i]nhibition of the normal sweating responses resulting in increased body temperature." Cocaine produces "[v]asoconstriction[,] [e]levated blood pressure," and "[p]ossible coronary artery spasms and myocardial infarction."

As for the immediacy of the District's concerns: We are not inclined to question—indeed, we could not possibly find clearly erroneous—the District Court's conclusion that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," that "[d]isciplinary actions had reached 'epidemic proportions,'" and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." That is an immediate crisis of greater proportions than existed in *Skinner,* where we upheld the Government's drug-testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. And of much greater proportions than existed in *Von Raab,* where there was no documented history of drug use by any customs officials.

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. Respondents' alternative entails substantial difficulties—if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory

drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.

VI

Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional.

We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care. Just as when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example), the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in; so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the findings of need made by the District Court, we conclude that in the present case it is.

We may note that the primary guardians of Vernonia's schoolchildren appear to agree. The record shows no objection to this districtwide program by any parents other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.

We [] vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

Justice O'CONNOR, with whom Justice STEVENS and Justice SOUTER join, dissenting.

The population of our Nation's public schools, grades 7 through 12, numbers around 18 million. By the reasoning of today's decision, the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search.

In justifying this result, the Court dispenses with a requirement of individualized suspicion on considered policy grounds. First, it explains that precisely because *every* student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing whom to test. Second, a broad-based search regime, the Court reasons, dilutes the accusatory nature of the search. In making these policy arguments, of course, the Court sidesteps powerful, countervailing privacy concerns. Blanket 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." Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of such a regime, one would think, are minimal.

But whether a blanket search is "better" than a regime based on individualized suspicion is not a debate in which we should engage. In my view, it is not open to judges or government officials to decide on policy grounds which is better and which is worse. For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual. Because that is not the case here, I dissent.

* * *

Seven years after deciding *Vernonia*, the Court considered a public school drug testing program that went beyond athletes and included participants in activities such as the debate team, band, and Future Farmers of America. While the district policy stated that students involved in any extracurricular activity could be tested, the record reflected that in practice testing was limited to participants in "competitive extracurricular activities."

Supreme Court of the United States

Board of Education of Independent School District No. 92 of Pottawatomie County v. Lindsay Earls

Decided June 27, 2002 – 536 U.S. 822

[In *Earls*, the Court applied the principles of *Vernonia* and upheld a suspicionless drug testing policy that required all students who participated in "competitive extracurricular activities"—a term with broad definition—to submit to drug testing. In an opinion by Justice Thomas, the five-Justice majority found no meaningful difference between the policies challenged in *Earls* and in *Vernonia* in the character of intrusion (based on a similar urine collection method) or the nature and immediacy of the government's concerns (based on the national drug problem and the factual findings about local conditions).

With respect to the students' privacy interest, the Court was untroubled by the application of *Vernonia* to a broader category of student activities. The Court noted that required physicals and communal undress common to athletes were not essential to its finding of a negligible privacy interest in *Vernonia*, and it concluded the interest remained negligible in *Earls* because the students "who participate[d] in competitive extracurricular activities voluntarily subject[ed] themselves to many of the same intrusions on their privacy as do athletes." The Court's analysis of the efficacy of the Policy's approach broadened *Vernonia's* holding:

"Finally, we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was "fueled by the 'role model' effect of athletes' drug use," such a finding was not essential to the holding. *Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students."

Four Justices sharply disagreed with the result:]

Justice GINSBURG, with whom Justice STEVENS, JUSTICE O'CONNOR, and Justice SOUTER join, dissenting.

The particular testing program upheld today is not reasonable; it is capricious, even perverse: Petitioners' policy targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects. I therefore dissent.

Vernonia cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them. Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student's blood or urine for drugs, the opinion in *Vernonia* could have saved many words.

Enrollment in a public school, and election to participate in school activities beyond the bare minimum that the curriculum requires, are indeed factors relevant to reasonableness, but they do not on their own justify intrusive, suspicionless searches. *Vernonia,* accordingly, did not rest upon these factors; instead, the Court performed what today's majority aptly describes as a "fact-specific balancing," Balancing of that order, applied to the facts now before the Court, should yield a result other than the one the Court announces today.

At the margins, of course, no policy of *random* drug testing is perfectly tailored to the harms it seeks to address. The School District cites the dangers faced by members of the band, who must "perform extremely precise routines with heavy equipment and instruments in close proximity to other students," and by Future Farmers of America, who "are required to individually control and restrain animals as large as 1500 pounds." Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree. There is a difference between imperfect tailoring and no tailoring at all.

The Vernonia district, in sum, had two good reasons for testing athletes: Sports team members faced special health risks and they "were the leaders of the drug culture." No similar reason, and no other tenable justification, explains Tecumseh's decision to target for testing all participants in every competitive extracurricular activity.

Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers. Even if students might be deterred from drug use in order to preserve their extracurricular

eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use. Tecumseh's policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.

Notes, Comments, and Questions

Since the Court decided *Vernonia* and *Earls*, public schools have continued to explore how much of the student population can be subjected to mandatory drug testing. Although courts have not yet approved a policy mandating the testing of all students at a public school, school districts have been largely successful in requiring testing of broad portions of the student population.

Consider these examples:

Some schools have required students to submit to drug testing if they wish to park on school grounds. *See, e.g.*, *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000). Lawful? Why or why not?

A public technical college adopted a policy requiring that all students at the college submit to drug tests. *See Kittle-Aikeley v. Strong*, 844 F.3d 727 (8th Cir. 2016) (en banc). Lawful? Why or why not? What if the policy applied only to students in certain academic programs?

In the case of the technical college, the Eighth Circuit upheld mandatory drug testing of students enrolled in "safety-sensitive programs." Dissenting judges would have allowed testing of all students because there was no reason "to assume that [the college's] students pursuing an education in its non-safety-sensitive programs are not likewise fully impacted by the same illicit drug-abuse crisis" that justified the testing of students in safety-sensitive programs. Other courts could reach different results in similar cases.

According to a national survey of school districts, many public schools operate drug testing programs that involve random testing of all students, seemingly in excess of what the Court has allowed. *See* Chris Ringwalt *et al.*, "Random Drug Testing in US Public School Districts," 98 Am. J. Pub. Health 826 (May 2008) ("28% randomly tested all students"). Further litigation on this issue seems likely.

Drug Testing of Public Hospital Patients

In *Ferguson v. City of Charleston*, the Court considered a public hospital's practice of testing patient urine for drugs to learn whether pregnant women were using cocaine. It applied the reasoning of the public employee and public school student drug test cases to the program.

Supreme Court of the United States

Crystal M. Ferguson v. City of Charleston

Decided March 21, 2001 – 532 U.S. 67

Justice STEVENS delivered the opinion of the Court.

In this case, we must decide whether a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. More narrowly, the question is whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.

I

In the fall of 1988, staff members at the public hospital operated in the city of Charleston by the Medical University of South Carolina (MUSC) became concerned about an apparent increase in the use of cocaine by patients who were receiving prenatal treatment.[1] In response to this perceived increase, as of April 1989, MUSC began to order drug screens to be performed on urine

samples from maternity patients who were suspected of using cocaine. If a patient tested positive, she was then referred by MUSC staff to the county substance abuse commission for counseling and treatment. However, despite the referrals, the incidence of cocaine use among the patients at MUSC did not appear to change.

Some four months later, Nurse Shirley Brown, the case manager for the MUSC obstetrics department, heard a news broadcast reporting that the police in Greenville, South Carolina, were arresting pregnant users of cocaine on the theory that such use harmed the fetus and was therefore child abuse. Nurse Brown discussed the story with MUSC's general counsel, Joseph C. Good, Jr., who then contacted Charleston Solicitor Charles Condon in order to offer MUSC's cooperation in prosecuting mothers whose children tested positive for drugs at birth.

After receiving Good's letter, Solicitor Condon took the first steps in developing the policy at issue in this case. He organized the initial meetings, decided who would participate, and issued the invitations, in which he described his plan to prosecute women who tested positive for cocaine while pregnant. The task force that Condon formed included representatives of MUSC, the police, the County Substance Abuse Commission and the Department of Social Services. Their deliberations led to MUSC's adoption of a 12-page document entitled "POLICY M-7," dealing with the subject of "Management of Drug Abuse During Pregnancy."

The first three pages of Policy M-7 set forth the procedure to be followed by the hospital staff to "identify/assist pregnant patients suspected of drug abuse." The first section, entitled the "Identification of Drug Abusers," provided that a patient should be tested for cocaine through a urine drug screen if she met one or more of nine criteria.[2] It also stated that a chain of custody should be followed when obtaining and testing urine samples, presumably to make sure that the results could be used in subsequent criminal proceedings. The policy also provided for education and referral to a substance abuse clinic for patients who tested positive. Most important, it added the threat of law enforcement intervention that "provided the necessary 'leverage' to make the [p]olicy effective." That threat was, as respondents candidly acknowledge, essential to the program's success in getting women into treatment and keeping them there.

The threat of law enforcement involvement was set forth in two protocols, the first dealing with the identification of drug use during pregnancy, and the second with identification of drug use after labor. Under the latter protocol, the police were to be notified without delay and the patient promptly arrested. Under the former, after the initial positive drug test, the police were to be notified (and the patient arrested) only if the patient tested positive for cocaine a second time or if she missed an appointment with a substance abuse counselor. In 1990, however, the policy was modified at the behest of the solicitor's office to give the patient who tested positive during labor, like the patient who tested positive during a prenatal care visit, an opportunity to avoid arrest by consenting to substance abuse treatment.

The last six pages of the policy contained forms for the patients to sign, as well as procedures for the police to follow when a patient was arrested. The policy also prescribed in detail the precise offenses with which a woman could be charged, depending on the stage of her pregnancy. If the pregnancy was 27 weeks or less, the patient was to be charged with simple possession. If it was 28 weeks or more, she was to be charged with possession and distribution to a person under the age of 18—in this case, the fetus. If she delivered "while testing positive for illegal drugs," she was also to be charged with unlawful neglect of a child. Under the policy, the police were instructed to interrogate the arrestee in order "to ascertain the identity of the subject who provided illegal drugs to the suspect." Other than the provisions describing the substance abuse treatment to be offered to women who tested positive, the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns.

II

Petitioners are 10 women who received obstetrical care at MUSC and who were arrested after testing positive for cocaine. Four of them were arrested during the initial implementation of the policy; they were not offered the opportunity to receive drug treatment as an alternative to arrest. The others were arrested after the policy was modified in 1990; they either failed to comply with the terms of the drug treatment program or tested positive for a second time. Respondents include the city of Charleston, law enforcement officials who helped develop and enforce the policy, and representatives of MUSC.

Petitioners' complaint challenged the validity of the policy. The jury found for respondents. Petitioners appealed [and] [t]he Court of Appeals for the Fourth Circuit affirmed. We granted certiorari to review the appellate court's holding on the "special needs" issue.[3] We conclude that the judgment should be reversed and the case remanded for a decision on the consent issue.

III

Because MUSC is a state hospital, the members of its staff are government actors, subject to the strictures of the Fourth

Amendment. Moreover, the urine tests conducted by those staff members were indisputably searches within the meaning of the Fourth Amendment. Neither the District Court nor the Court of Appeals concluded that any of the nine criteria used to identify the women to be searched provided either probable cause to believe that they were using cocaine, or even the basis for a reasonable suspicion of such use. Furthermore, given the posture in which the case comes to us, we must assume for purposes of our decision that the tests were performed without the informed consent of the patients.

Because the hospital seeks to justify its authority to conduct drug tests and to turn the results over to law enforcement agents without the knowledge or consent of the patients, this case differs from the four previous cases in which we have considered whether comparable drug tests "fit within the closely guarded category of constitutionally permissible suspicionless searches."

In each of those cases, we employed a balancing test that weighed the intrusion on the individual's interest in privacy against the "special needs" that supported the program. As an initial matter, we note that the invasion of privacy in this case is far more substantial than in those cases. In the previous four cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties. The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties. The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent. In none of our prior cases was there any intrusion upon that kind of expectation.

The critical difference between those four drug-testing cases and this one, however, lies in the nature of the "special need" asserted as justification for the warrantless searches. In each of those earlier cases, the "special need" that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement. In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment. This fact distinguishes this case from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements, which no one has challenged here.

Respondents argue in essence that their ultimate purpose—namely, protecting the health of both mother and child—is a beneficent one. [A] review of the M-7 policy plainly reveals that the purpose actually served by the MUSC searches "is ultimately indistinguishable from the general interest in crime control."

In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose. In this case, as Judge Blake put it in her dissent below, "it ... is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers...." Tellingly, the document codifying the policy incorporates the police's operational guidelines. It devotes its attention to the chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests. Nowhere, however, does the document discuss different courses of medical treatment for either mother or infant, aside from treatment for the mother's addiction. Moreover, throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy.

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of MUSC's policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment. Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs."

The fact that positive test results were turned over to the police does not merely provide a basis for distinguishing our prior cases applying the "special needs" balancing approach to the determination of drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment. While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients,* they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.

As respondents have repeatedly insisted, their motive was benign rather than punitive. Such a motive, however, cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement with the development and application of the MUSC policy. The stark and unique fact that characterizes this case is that Policy M-7 was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions. While respondents are correct that drug abuse both was and is a serious problem, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." The Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

[In a dissent joined by Chief Justice Roberts and Justice Thomas, Justice Scalia attacked the majority opinion on multiple fronts. First, he disputed whether any Fourth Amendment "search" had occurred, arguing that eliminated urine is abandoned and should be treated like the garbage at issue in *California v. Greenwood* (Chapter 3). Second, he argued that patients consented to the collection of urine by hospital officials. Finally he argued that even if somehow the hospital's collection of urine were a search to which patients did not consent, the "special-needs doctrine" would easily justify the drug testing to "protect both mother and unborn child."]

Notes, Comments, and Questions

Although no one today would recommend use of crack cocaine by pregnant women, it turns out that much of the science behind the so-called "crack baby" epidemic has been debunked. Predictions like that of "a bio-underclass, a generation of physically damaged cocaine babies whose biological inferiority is stamped at birth"—from a 1989 column in the *Washington Post*—or a flood of 4 million kids whose "neurological, emotional and learning problems will severely test teachers and schools"—from a 1990 article in the *New York Times*—appear alarmist in hindsight. *See* Vann R. Newkirk II, "What the 'Crack Baby' Panic Reveals about the Opioid Epidemic," Atlantic (July 16, 2017) (noting the greater empathy extended to pregnant women using opiates than was shown to crack-addicted mothers). Legal scholars noted that in the late 1980s, a trend emerged wherein prosecutors used laws previously used to punish abuse of children after birth—such as involuntary manslaughter and delivery of drugs to a minor—to prosecute pregnant drug users. *See, e.g.*, Doretta Massardo McGinnis, Comment, "Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory," 139 U. Pa. L. Rev. 505 (1990).

Had *Ferguson v. City of Charleston* been decided in 1991 instead of 2001, the Court might well have reached a different result. The concerns raised by Justice Scalia in his dissent—the need to "protect both mother and unborn child"—echo comments of pundits and of policy makers from the height of the crack-baby scare.

In our next chapter, we consider our final selection of exceptions to the warrant requirement.

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2.17: Chapter 18 The Warrant Requirement - Exceptions

In this chapter, we conclude our review of exceptions to the warrant requirement. In particular, we will examine: (1) searches of persons in jails, (2) searches of persons on probation and parole, (3) inventory searches, (4) administrative searches, and (5) DNA tests of arrested persons.

Warrant Exception: Searches of Persons in Jails and Prisons

To maintain order and safety in jails and prisons, correctional officers must conduct searches of inmates and their effects. The next case explores the limits of this authority, as well as whether the offense for which someone is jailed affects what searches are reasonable.

Supreme Court of the United States

Albert W. Florence v. Board of Chosen Freeholders of the County of Burlington

Decided April 2, 2012—566 U.S. 318

Justice KENNEDY delivered the opinion of the Court, except as to Part IV.[1]

I

In 1998, seven years before the incidents at issue, petitioner Albert Florence was arrested after fleeing from police officers in Essex County, New Jersey. He was charged with obstruction of justice and use of a deadly weapon. Petitioner entered a plea of guilty to two lesser offenses and was sentenced to pay a fine in monthly installments. In 2003, after he fell behind on his payments and failed to appear at an enforcement hearing, a bench warrant was issued for his arrest. He paid the outstanding balance less than a week later; but, for some unexplained reason, the warrant remained in a statewide computer database.

Two years later, in Burlington County, New Jersey, petitioner and his wife were stopped in their automobile by a state trooper. Based on the outstanding warrant in the computer system, the officer arrested petitioner and took him to the Burlington County Detention Center. He was held there for six days and then was transferred to the Essex County Correctional Facility. It is not the arrest or confinement but the search process at each jail that gives rise to the claims before the Court.

Burlington County jail procedures required every arrestee to shower with a delousing agent. Officers would check arrestees for scars, marks, gang tattoos, and contraband as they disrobed. Petitioner claims he was also instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. (It is not clear whether this last step was part of the normal practice.) Petitioner shared a cell with at least one other person and interacted with other inmates following his admission to the jail.

When petitioner was transferred [to the Essex County facility], all arriving detainees passed through a metal detector and waited in a group holding cell for a more thorough search. When they left the holding cell, they were instructed to remove their clothing while an officer looked for body markings, wounds, and contraband. Apparently without touching the detainees, an officer looked at their ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. This policy applied regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history. Petitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position as part of the process. After a mandatory shower, during which his clothes were inspected, petitioner was admitted to the facility. He was released the next day, when the charges against him were dismissed.

Petitioner sued the governmental entities that operated the jails, one of the wardens, and certain other defendants. Seeking relief under 42 U.S.C. § 1983 for violations of his Fourth and Fourteenth Amendment rights, petitioner maintained that persons arrested for a minor offense could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process. The District Court certified a class of individuals who were charged with a nonindictable offense under New Jersey law, processed at either the Burlington County or Essex County jail, and directed to strip naked even though an officer had not articulated any reasonable suspicion they were concealing contraband.

After discovery, the court granted petitioner's motion for summary judgment on the unlawful search claim. A divided panel of the United States Court of Appeals for the Third Circuit reversed. This Court granted certiorari.

II

The difficulties of operating a detention center must not be underestimated by the courts. Jails (in the stricter sense of the term, excluding prison facilities) admit more than 13 million inmates a year. The largest facilities process hundreds of people every day; smaller jails may be crowded on weekend nights, after a large police operation, or because of detainees arriving from other jurisdictions. Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face. The Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld "if it is reasonably related to legitimate penological interests."

The Court has [] recognized that deterring the possession of contraband depends in part on the ability to conduct searches without predictable exceptions. [C]orrectional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities. The task of determining whether a policy is reasonably related to legitimate security interests is "peculiarly within the province and professional expertise of corrections officials."

In many jails officials seek to improve security by requiring some kind of strip search of everyone who is to be detained. Persons arrested for minor offenses may be among the detainees processed at these facilities.

III

The question here is whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband. The Court has held that deference must be given to the officials in charge of the jail unless there is "substantial evidence" demonstrating their response to the situation is exaggerated. Petitioner has not met this standard, and the record provides full justifications for the procedures used.

A

Correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process. The admission of inmates creates numerous risks for facility staff, for the existing detainee population, and for a new detainee himself or herself. The danger of introducing lice or contagious infections, for example, is well documented. The Federal Bureau of Prisons recommends that staff screen new detainees for these conditions. Persons just arrested may have wounds or other injuries requiring immediate medical attention. It may be difficult to identify and treat these problems until detainees remove their clothes for a visual inspection.

Jails and prisons also face grave threats posed by the increasing number of gang members who go through the intake process. "Gang rivalries spawn a climate of tension, violence, and coercion." The groups recruit new members by force, engage in assaults against staff, and give other inmates a reason to arm themselves. Fights among feuding gangs can be deadly, and the officers who must maintain order are put in harm's way. These considerations provide a reasonable basis to justify a visual inspection for certain tattoos and other signs of gang affiliation as part of the intake process. The identification and isolation of gang members before they are admitted protects everyone in the facility.

Detecting contraband concealed by new detainees, furthermore, is a most serious responsibility. Weapons, drugs, and alcohol all disrupt the safe operation of a jail. Correctional officers have had to confront arrestees concealing knives, scissors, razor blades, glass shards, and other prohibited items on their person, including in their body cavities. They have also found crack, heroin, and marijuana. The use of drugs can embolden inmates in aggression toward officers or each other; and, even apart from their use, the trade in these substances can lead to violent confrontations.

Contraband creates additional problems because scarce items, including currency, have value in a jail's culture and underground economy. Correctional officials inform us "[t]he competition ... for such goods begets violence, extortion, and disorder." They "orchestrate thefts, commit assaults, and approach inmates in packs to take the contraband from the weak." This puts the entire facility, including detainees being held for a brief term for a minor offense, at risk. Gangs do coerce inmates who have access to the outside world, such as people serving their time on the weekends, to sneak things into the jail. These inmates, who might be thought to pose the least risk, have been caught smuggling prohibited items into jail.

It is not surprising that correctional officials have sought to perform thorough searches at intake for disease, gang affiliation, and contraband. Jails are often crowded, unsanitary, and dangerous places. There is a substantial interest in preventing any new inmate, either of his own will or as a result of coercion, from putting all who live or work at these institutions at even greater risk when he is admitted to the general population.

B

Petitioner acknowledges that correctional officials must be allowed to conduct an effective search during the intake process and that this will require at least some detainees to lift their genitals or cough in a squatting position. These procedures [] are designed to uncover contraband that can go undetected by a patdown, metal detector, and other less invasive searches. Petitioner maintains there is little benefit to conducting these more invasive steps on a new detainee who has not been arrested for a serious crime or for any offense involving a weapon or drugs. In his view these detainees should be exempt from this process unless they give officers a particular reason to suspect them of hiding contraband. It is reasonable, however, for correctional officials to conclude this standard would be unworkable.

Experience shows that people arrested for minor offenses have tried to smuggle prohibited items into jail, sometimes by using their rectal cavities or genitals for the concealment. They may have some of the same incentives as a serious criminal to hide contraband. A detainee might risk carrying cash, cigarettes, or a penknife to survive in jail. Others may make a quick decision to hide unlawful substances to avoid getting in more trouble at the time of their arrest.

Even if people arrested for a minor offense do not themselves wish to introduce contraband into a jail, they may be coerced into doing so by others. This could happen any time detainees are held in the same area, including in a van on the way to the station or in the holding cell of the jail. If, for example, a person arrested and detained for unpaid traffic citations is not subject to the same search as others, this will be well known to other detainees with jail experience. A hardened criminal or gang member can, in just a few minutes, approach the person and coerce him into hiding the fruits of a crime, a weapon, or some other contraband. As an expert in this case explained, "the interaction and mingling between misdemeanants and felons will only increase the amount of contraband in the facility if the jail can only conduct admission searches on felons." Exempting people arrested for minor offenses from a standard search protocol thus may put them at greater risk and result in more contraband being brought into the detention facility. This is a substantial reason not to mandate the exception petitioner seeks as a matter of constitutional law.

It also may be difficult, as a practical matter, to classify inmates by their current and prior offenses before the intake search. Jails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset. An arrestee may be carrying a false ID or lie about his identity. The officers who conduct an initial search often do not have access to criminal history records.

IV

This case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees. Petitioner's *amici* raise concerns about instances of officers engaging in intentional humiliation and other abusive practices. There also may be legitimate concerns about the invasiveness of searches that involve the touching of detainees. These issues are not implicated on the facts of this case, however, and it is unnecessary to consider them here.

V

Even assuming all the facts in favor of petitioner, the search procedures at the Burlington County Detention Center and the Essex County Correctional Facility struck a reasonable balance between inmate privacy and the needs of the institutions. The Fourth and Fourteenth Amendments do not require adoption of the framework of rules petitioner proposes.

The judgment of the Court of Appeals for the Third Circuit is affirmed.

Justice ALITO, concurring.

I join the opinion of the Court but emphasize the limits of today's holding. It is important to note [] that the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. Most of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate. In some cases, the charges are dropped. In others, arrestees are released either on their own recognizance or on minimal bail. In

the end, few are sentenced to incarceration. For these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible. For example, the Federal Bureau of Prisons (BOP) and possibly even some local jails appear to segregate temporary detainees who are minor offenders from the general population.

The Court does not address whether it is always reasonable, without regard to the offense or the reason for detention, to strip search an arrestee before the arrestee's detention has been reviewed by a judicial officer. The lead opinion explicitly reserves judgment on that question. In light of that limitation, I join the opinion of the Court in full.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The petition for certiorari asks us to decide "[w]hether the Fourth Amendment permits a ... suspicionless strip search of every individual arrested for any minor offense...." This question is phrased more broadly than what is at issue. The case is limited to strip searches of those arrestees entering a jail's general population. And the kind of strip search in question involves more than undressing and taking a shower (even if guards monitor the shower area for threatened disorder). Rather, the searches here involve close observation of the private areas of a person's body and for that reason constitute a far more serious invasion of that person's privacy.

In my view, such a search of an individual arrested for a minor offense that does not involve drugs or violence—say a traffic offense, a regulatory offense, an essentially civil matter, or any other such misdemeanor—is an "unreasonable searc[h]" forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband. And I dissent from the Court's contrary determination.

A strip search that involves a stranger peering without consent at a naked individual, and in particular at the most private portions of that person's body, is a serious invasion of privacy. Even when carried out in a respectful manner, and even absent any physical touching, such searches are inherently harmful, humiliating, and degrading. And the harm to privacy interests would seem particularly acute where the person searched may well have no expectation of being subject to such a search, say, because she had simply received a traffic ticket for failing to buckle a seatbelt, because he had not previously paid a civil fine, or because she had been arrested for a minor trespass.

I doubt that we seriously disagree about the nature of the strip search or about the serious affront to human dignity and to individual privacy that it presents. The basic question before us is whether such a search is nonetheless justified when an individual arrested for a minor offense is involuntarily placed in the general jail or prison population.

The majority, like the respondents, argues that strip searches are needed (1) to detect injuries or diseases, such as lice, that might spread in confinement, (2) to identify gang tattoos, which might reflect a need for special housing to avoid violence, and (3) to detect contraband, including drugs, guns, knives, and even pens or chewing gum, which might prove harmful or dangerous in prison.

Nonetheless, the "particular" invasion of interests must be "'reasonably related'" to the justifying "penological interest" and the need must not be "'exaggerated.'" It is at this point that I must part company with the majority. I have found no convincing reason indicating that, in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary in order to further the penal interests mentioned. And there are strong reasons to believe they are not justified.

The lack of justification is fairly obvious with respect to the first two penological interests advanced. The searches already employed at Essex and Burlington include: (a) pat-frisking all inmates; (b) making inmates go through metal detectors (including the Body Orifice Screening System (BOSS) chair used at Essex County Correctional Facility that identifies metal hidden within the body); (c) making inmates shower and use particular delousing agents or bathing supplies; and (d) searching inmates' clothing. In addition, petitioner concedes that detainees could be lawfully subject to being viewed in their undergarments by jail officers or during showering (for security purposes). No one here has offered any reason, example, or empirical evidence suggesting the inadequacy of such practices for detecting injuries, diseases, or tattoos. In particular, there is no connection between the genital lift and the "squat and cough" that Florence was allegedly subjected to and health or gang concerns.

The lack of justification for such a strip search is less obvious but no less real in respect to the third interest, namely that of detecting contraband. The information demonstrating the lack of justification is of three kinds. First, there are empirically based conclusions reached in specific cases. The New York Federal District Court [] conducted a study of 23,000 persons admitted to the Orange County correctional facility between 1999 and 2003. These 23,000 persons underwent a strip search of the kind described. Of these 23,000 persons, the court wrote, "the County encountered three incidents of drugs recovered from an inmate's anal cavity and two incidents of drugs falling from an inmate's underwear during the course of a strip search." The court

added that in four of these five instances there may have been "reasonable suspicion" to search, leaving only one instance in 23,000 in which the strip search policy "arguably" detected additional contraband.

Second, there is the plethora of recommendations of professional bodies, such as correctional associations, that have studied and thoughtfully considered the matter. The American Correctional Association (ACA)—an association that informs our view of "what is obtainable and what is acceptable in corrections philosophy"—has promulgated a standard that forbids suspicionless strip searches. And it has done so after consultation with the American Jail Association, National Sheriff's Association, National Institute of Corrections of the Department of Justice, and Federal Bureau of Prisons. Moreover, many correctional facilities apply a reasonable suspicion standard before strip searching inmates entering the general jail population, including the U.S. Marshals Service, the Immigration and Customs Service, and the Bureau of Indian Affairs.

Third, there is general experience in areas where the law has forbidden here-relevant suspicionless searches. Laws in at least 10 States prohibit suspicionless strip searches. At the same time at least seven Courts of Appeals have considered the question and have required reasonable suspicion that an arrestee is concealing weapons or contraband before a strip search of one arrested for a minor offense can take place. Respondents have not presented convincing grounds to believe that administration of these legal standards has increased the smuggling of contraband into prison. The majority is left with the word of prison officials in support of its contrary proposition. And though that word is important, it cannot be sufficient.

For the reasons set forth, I cannot find justification for the strip search policy at issue here—a policy that would subject those arrested for minor offenses to serious invasions of their personal privacy. I consequently dissent.

Notes, Comments, and Questions

The Court in *Florence* did not conclude that the challenged jail policy was in keeping with best correctional practices. Indeed, organizations of officials who run jails and prisons recommend against the kind of strip searches at issue in the case, and the Court was fully aware of this opposition. Why then did the Court find against Florence?

The dissenting Justices mention the Body Orifice Screening System (BOSS) chair, which allows jail officials to search inmates for hidden contraband without the sort of invasive physical contact complained of by Florence. More information about these scanners is available at the XECU Corporation website: bodyorificescanner.com.

Compare how the Court treats searches in jail with those of public school students. Unsurprisingly, the Court is more receptive to privacy claims from school children than from jail inmates. Yet in both contexts, the Court tends to defer to public officials.

Warrant Exception: Searches of Probationers and Parolees

Although persons on probation and parole are not subjected to the sort of control and scrutiny experienced by jail and prison inmates, probationers and parolees must submit to searches that would be "unreasonable" if required of other persons.

Because probationers and parolees by definition have been convicted of crimes, they are often known to police and may be suspected of ongoing criminal activity. In *United States v. Knights*, 534 U.S. 112 (2001), the Court considered the search of a probationer's house. When Mark Knights was convicted of a drug crime, his probation order included what is sometimes described as a "search condition." The order stated that he would: "[s]ubmit his ... person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer."

Soon afterward, police investigating a series of arsons suspected Knights and a partner of involvement in the crimes, and an officer searched Knights's apartment. Evidence found during the search would have helped prosecutors convict him of federal crimes, and he challenged the searches as unreasonable under the Fourth Amendment. The trial court suppressed the evidence "on the ground that the search was for 'investigatory' rather than 'probationary' purposes," and the Ninth Circuit affirmed. The Supreme Court reversed, holding that the searches were reasonable. The Court noted that "nothing in the condition of probation suggests that it was confined to searches bearing upon probationary status and nothing more."

Previously, in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), the Court had upheld the search of a probationer under a state law allowing "any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are 'reasonable grounds' to believe the presence of contraband." Knights argued that searches of probationers are allowed only if, as in *Griffin*, they are "special needs" searches conducted to verify whether the probationer is obeying conditions of probation, such as abstaining from drug use. The *Knights* Court disagreed, holding that the search condition reduced Knights's

reasonable expectation of privacy. That reduction, combined with the reasonable suspicion police had of his involvement in the arsons under investigation, justified the search of his residence. The Court explicitly declined to decide whether his acceptance of the search condition was a form of "consent" that would have made the search lawful under the holdings of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (Chapter 11), and similar cases.

Then, in *Samson v. California*, 547 U.S. 843 (2006), the Court approved the suspicionless search of a parolee on the street. The case concerned a "California law provid[ing] that every prisoner eligible for release on state parole 'shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.'" Upon seeing Donald Samson on the street, an officer searched him "based solely on petitioner's status as a parolee," and the search revealed methamphetamine. Samson challenged the search as unreasonable, and the Court disagreed. Relying on *Knights*, the Court again declined to consider whether the "consent" exception to the warrant requirement applied. The Court held instead that the search of parolees is reasonable because (1) awareness of the state law authorizing such searches lowers a parolee's reasonable expectation of privacy, and (2) the state has substantial interest in monitoring convicted criminals released on parole because they "are more likely to commit future criminal offenses" than the general population.

In a dissent joined by Justices Souter and Breyer, Justice Stevens argued that "neither *Knights* nor *Griffin* supports a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safeguards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer."

Although the Court has not formally relied upon the "consent" exception when approving searches of probationers (with reasonable suspicion) and parolees (with no individualized suspicion at all), it is hard to ignore the Court's reliance on the searched person's knowledge of and acceptance of the search conditions. Probation and parole are alternatives to imprisonment, and convicted defendants generally prefer probation to incarceration, just as inmates generally prefer parole to continued confinement. The Court's opinions in *Knights* and *Samson* seem based, in part, on the idea that someone who is unhappy with the state's parole or probation system can choose not to participate. The dissenters in *Samson* attacked this theory and rejected the state's argument that participation is a form of consent. They wrote that a convict "has no 'choice' concerning the search condition" and argued that equating acquiescence with consent "is sophistry."

For a handful of lower court cases examining searches of parolees and probationers, see: [casetext.com].

Note that there is a circuit split about whether an officer may (consistent with the Fourth Amendment) search a probationer's home without a warrant *even without a search condition*. See [UChicago].

Warrant Exception: Inventory Searches

When police impound an illegally parked car, they may tow it to a government parking lot. Similarly, police may tow the car of a driver who is arrested for a traffic violation. These are just two of the many ways in which government agents can lawfully take possession of property. Another common scenario arises when police store the effects of a person who is jailed, keeping them until the person is released. The Court has held that government officials may search property that comes into their possession in circumstances such as these, as long as they follow proper procedures.

Supreme Court of the United States

South Dakota v. Donald Opperman

Decided July 6, 1976 – 428 U.S. 364

Mr. Chief Justice BURGER delivered the opinion of the Court.

We review the judgment of the Supreme Court of South Dakota, holding that local police violated the Fourth Amendment to the Federal Constitution, as applicable to the States under the Fourteenth Amendment, when they conducted a routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances.

(1)

Local ordinances prohibit parking in certain areas of downtown Vermillion, S.D., between the hours of 2 a.m. and 6 a.m. During the

early morning hours of December 10, 1973, a Vermillion police officer observed respondent's unoccupied vehicle illegally parked in the restricted zone. At approximately 3 a.m., the officer issued an overtime parking ticket and placed it on the car's windshield. The citation warned: "Vehicles in violation of any parking ordinance may be towed from the area."

At approximately 10 o'clock on the same morning, another officer issued a second ticket for an overtime parking violation. These circumstances were routinely reported to police headquarters, and after the vehicle was inspected, the car was towed to the city impound lot.

From outside the car at the impound lot, a police officer observed a watch on the dashboard and other items of personal property located on the back seat and back floorboard. At the officer's direction, the car door was then unlocked and, using a standard inventory form pursuant to standard police procedures, the officer inventoried the contents of the car, including the contents of the glove compartment which was unlocked. There he found marihuana contained in a plastic bag. All items, including the contraband, were removed to the police department for safekeeping. During the late afternoon of December 10, respondent appeared at the police department to claim his property. The marihuana was retained by police.

Respondent was subsequently arrested on charges of possession of marihuana. His motion to suppress the evidence yielded by the inventory search was denied; he was convicted after a jury trial and sentenced to a fine of $100 and 14 days' incarceration in the county jail. On appeal, the Supreme Court of South Dakota reversed the conviction. We granted certiorari and we reverse.

(2)

This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are "effects" and thus within the reach of the Fourth Amendment, warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.

[T]he expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

In the interests of public safety and as part of what the Court has called "community caretaking functions," automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger. The practice has been viewed as essential to respond to incidents of theft or vandalism. In addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned.

(3)

In applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents. [Our prior holdings] point the way to the correct resolution of this case.

The Vermillion police were indisputably engaged in a caretaking search of a lawfully impounded automobile. The inventory was conducted only after the car had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of valuables inside the car. [T]here is no suggestion [] that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an

investigatory police motive.

On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not "unreasonable" under the Fourth Amendment.

The judgment of the South Dakota Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Notes, Comments, and Questions

In *Illinois v. Lafayette*, 462 U.S. 640 (1983), the Court applied *Opperman* to a police search of the "purse-type shoulder bag" of "an arrested person [who] arrive[d] at a police station." Because the search could not be deemed "incident" to the arrest, the Court considered "whether, consistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police stationhouse incident to booking and jailing the suspect." The Court found the question fairly straightforward and resolved it as follows:

"At the stationhouse, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests support an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the stationhouse. A standardized procedure for making a list or inventory as soon as reasonable after reaching the stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons have also been known to injure themselves—or others—with belts, knives, drugs or other items on their person while being detained. Dangerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital of these mundane realities justifies reasonable measures by police to limit these risks—either while the items are in police possession or at the time they are returned to the arrestee upon his release."

Because the Court found such searches to be reasonable regardless of whether officials feared any particular bag possessed by an arrestee, the Court held that neither probable cause or any other form of individualized suspicion was needed for inventory searches of an arrestee's belongings prior to incarceration, "in accordance with established inventory procedures."

By contrast, in *Florida v. Wells*, 495 U.S. 1 (1990), the Court found that because the highway patrol lacked "standardized criteria" or an "established routine" with respect to opening closed containers while inventorying a car, officers violated the Fourth Amendment when opening a locked suitcase found in the trunk of an impounded car. The Court said such criteria were needed because of "the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." In sum, departments have wide latitude to set inventory policies and to search cars, bags, and other items pursuant to such policies. But without a preexisting policy, searches lose the presumption of reasonableness.

A former student of your authors once told a story about *Gant* drawn from the student's experience as a police officer.[2] He began by describing how police reacted to the Court's decision in *Gant*.

"Post-*Gant*, law enforcement agencies scurried to train officers on search of automobiles incident to lawful arrest. A tool once frequently and heavily relied on, [SILA] was no longer an option for officers looking to get into vehicles without the availability of the automobile exception outlined in *Carroll*. This was particularly frustrating on pretext stops where officers would arrest local drug dealers and criminals for driver's license violations or other mundane crimes to get into vehicles where evidence of the more serious, and sometimes violent, crimes were concealed."

Police adjusted their tactics: "The response was shoring up vehicle tow, impound, and inventory policies." In other words, because police could not search nearly as many cars incident to arrest, police increased the number of cars they decided to tow after arrests.

Here is where the story gets exciting: "In 2010, Officers ... stopped a vehicle after complaints of careless and imprudent driving. The driver, 20, did not have a driver's license. Officer attempts to contact the vehicle owner to remove it from the side of the road were unsuccessful. Pursuant to department policy, officers contacted a tow truck and conducted an inventory search where they located the owner of the vehicle, mother of the driver, dead in the trunk."

As the student summed up, "Sometimes there IS a body in the trunk."

Warrant Exception: Administrative Searches

Our next warrant exception concerns "administrative searches," which involve government functions largely (if not entirely) unknown when the Fourth Amendment was ratified. For example, fire code and housing code inspections are important to the safety of densely populated cities. On the other hand, some might question whether inspectors should be allowed to search their homes without a warrant, perhaps even without probable cause.

Supreme Court of the United States

Roland Camara v. Municipal Court of the City and County of San Francisco

Decided June 5, 1967 – 387 U.S. 523

Mr. Justice WHITE delivered the opinion of the Court.

Appellant brought this action in a California Superior Court alleging that he was awaiting trial on a criminal charge of violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence, and that a writ of prohibition should issue to the criminal court because the ordinance authorizing such inspections is unconstitutional on its face. The Superior Court denied the writ, the District Court of Appeal affirmed, and the Supreme Court of California denied a petition for hearing. Appellant properly raised and had considered by the California courts the federal constitutional questions he now presents to this Court.

Though there were no judicial findings of fact in this prohibition proceeding, we shall set forth the parties' factual allegations. On November 6, 1963, an inspector of the Division of Housing Inspection of the San Francisco Department of Public Health entered an apartment building to make a routine annual inspection for possible violations of the city's Housing Code. The building's manager informed the inspector that appellant, lessee of the ground floor, was using the rear of his leasehold as a personal residence. Claiming that the building's occupancy permit did not allow residential use of the ground floor, the inspector confronted appellant and demanded that he permit an inspection of the premises. Appellant refused to allow the inspection because the inspector lacked a search warrant.

The inspector returned on November 8, again without a warrant, and appellant again refused to allow an inspection. A citation was then mailed ordering appellant to appear at the district attorney's office. When appellant failed to appear, two inspectors returned to his apartment on November 22. They informed appellant that he was required by law to permit an inspection under § 503 of the Housing Code.

Appellant nevertheless refused the inspectors access to his apartment without a search warrant. Thereafter, a complaint was filed charging him with refusing to permit a lawful inspection in violation of § 507 of the Code. Appellant was arrested on December 2 and released on bail. When his demurrer to the criminal complaint was denied, appellant filed this petition for a writ of prohibition.

Appellant has argued throughout this litigation that § 503 is contrary to the Fourth and Fourteenth Amendments in that it authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein. Consequently, appellant contends, he may not be prosecuted under § 507 for refusing to permit an inspection unconstitutionally authorized by § 503. [T]he District Court of Appeal held that § 503 does not violate Fourth Amendment rights because it "is part of a regulatory scheme which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions." [W]e reverse.

I

Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.

In *Frank v. State of Maryland*, [359 U.S. 360 (1959),] this Court upheld the conviction of one who refused to permit a warrantless inspection of private premises for the purposes of locating and abating a suspected public nuisance. Although *Frank* can arguably be distinguished from this case on its facts, the *Frank* opinion has generally been interpreted as carving out an additional exception to the rule that warrantless searches are unreasonable under the Fourth Amendment. The District Court of Appeal

so interpreted *Frank* in this case, and that ruling is the core of appellant's challenge here. We proceed to a re-examination of the factors which persuaded the *Frank* majority to adopt this construction of the Fourth Amendment's prohibition against unreasonable searches.

We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, *Frank* differed from the great bulk of Fourth Amendment cases which have been considered by this Court. But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. [A]s this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence.

[W]e hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. State of Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections. Because of the nature of the municipal programs under consideration, however, these conclusions must be the beginning, not the end, of our inquiry. The *Frank* majority gave recognition to the unique character of these inspection programs by refusing to require search warrants; to reject that disposition does not justify ignoring the question whether some other accommodation between public need and individual rights is essential.

II

The Fourth Amendment provides that, "no Warrants shall issue, but upon probable cause." Borrowing from more typical Fourth Amendment cases, appellant argues not only that code enforcement inspection programs must be circumscribed by a warrant procedure, but also that warrants should issue only when the inspector possesses probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced. We disagree.

In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.

There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures. It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building.

"Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of warrant. The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought."

III

Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations.

IV

In this case, appellant has been charged with a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. There was no emergency demanding immediate access; in fact, the inspectors made three trips to the building in an attempt to obtain appellant's consent to search. Yet no warrant was obtained and thus appellant was unable to verify either the need for or the appropriate limits of the inspection. Assuming the facts to be as the parties have alleged, we therefore conclude

that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection. It appears from the opinion of the District Court of Appeal that under these circumstances a writ of prohibition will issue to the criminal court under California law.

The judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Notes, Comments, and Questions

What are the differences between the general warrant proposed in *Camera* and the disfavored general warrant? What other types of searches might fall under the "inspection" umbrella?

Consider a city zoning law that restricts who may live in a certain residence on the basis of family status. For example, the city code might state that no more than three unrelated persons may live in a house zoned for "single-family" occupancy.[3] In such a house, an adult could live with her four children, but four unrelated roommates could not share the house (even though the four roomates would constitute one fewer total person than the alternative group of occupants). In a neighborhood near a university campus, students might occasionally rent houses (with two or three names on a lease) and use them in a way that violates the code (for example, six students living together). If a neighborhood busybody—concerned with a perceived threat to property values or simply interested in policing how neighbors behave—calls city officials with vague reports of overoccupancy, may a judge issue a warrant allowing city officials to inspect every house in the neighborhood to see who lives there and whether they are related to one another? May such warrants issue every year—allowing searches of houses in "single-family" neighborhoods near campus—even if no one complains?

In *See v. City of Seattle*, 387 U.S. 541 (1967), decided the same day as *Camara*, the Court held that the rule of *Camara* applied to commercial warehouses. "As we explained in *Camara,* a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."

Two decades later, however, the Court was less protective of a business owner's right to avoid warrantless administrative searches. In *New York v. Burger*, 482 U.S. 691 (1987), the Court considered a different kind of business premises—a junkyard. After stating (somewhat implausibly) that the junkyard was a "closely regulated industry," the Court held that proprietors of such businesses have lowered expectations of privacy. That finding, combined with the state interest in supervising such industries (in this case, to combat car theft by preventing stolen parts from being bought and sold at junkyards), made the warrantless search reasonable. Students should note that the *Burger* Court went even further than the Court's decision in *Camara*. In *Camara*, the Court required inspectors to obtain a warrant, which if suspiciously similar to the detested "general warrants" of old was at least issued by a judge. In *Burger*, the Court held that New York's statute allowing for the inspection of junkyards was a "constitutionally adequate substitute for a warrant."

In a dissent joined in full by Justice Marshall and in part by Justice O'Connor, Justice Brennan argued that "Burger's vehicle-dismantling business is not closely regulated (unless most New York City businesses are)." Objecting to the Court's acceptance of the New York statute in lieu of a warrant, he argued that "the Court also perceives careful guidance and control of police discretion in a statute that is patently insufficient to eliminate the need for a warrant." Accordingly, he concluded that the decision "renders virtually meaningless the general rule that a warrant is required for administrative searches of commercial property."

The Court revisited administrative searches in *City of Los Angeles v. Patel,* 135 S. Ct. 2443 (2015), deciding by a 5-4 vote that certain regulations of Los Angeles hotels violated the Fourth Amendment. In particular, the city required "hotel operators to record and keep specific information about their guests on the premises for a 90-day period" and to make the records "available to any officer of the Los Angeles Police Department for inspection … at a time and in a manner that minimizes any interference with the operation of the business." Refusal to make the records available was a crime. Hotel operators brought a facial challenge to the regulation and prevailed.

The majority noted that it did not strike down the provisions of the regulation requiring that the records be kept, nor did it prevent officers from viewing the records by consent or by obtaining a proper administrative warrant (or with some other exception to the warrant requirement). Instead, the Court struck down only the provision forcing hotel owners to show the records on demand to any officer without a warrant, on pain of criminal prosecution—without even the opportunity for a precompliance judicial review. The Court rejected the city's argument that the regulation was valid under prior precedents related to "closely regulated industries." Perhaps retreating a bit from the broad definition of such industries in *Burger*, the *Patel* Court stated, "Over the past 45 years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy … could exist for a proprietor over the stock of such an enterprise.'" Those industries are "liquor sales,"

"firearms dealing," "mining," and—of course—"running an automobile junkyard."

In a dissent joined by Chief Justice Roberts and Justice Thomas, Justice Scalia wrote: "[T]he Court today concludes that Los Angeles's ordinance is 'unreasonable' inasmuch as it permits police to flip through a guest register to ensure it is being filled out without first providing an opportunity for the motel operator to seek judicial review. Because I believe that such a limited inspection of a guest register is eminently reasonable under the circumstances presented, I dissent." He noted "that the motel operators who conspire with drug dealers and procurers may demand precompliance judicial review simply as a pretext to buy time for making fraudulent entries in their guest registers."

Justice Alito dissented as well, joined by Justice Thomas. Objecting in particular to the Court's finding that the regulation was *facially* invalid—as opposed to invalid in limited cases—he presented five examples of circumstances in which he believed it would be reasonable for the city to enforce the law as written. Here is one:

"Example Two. A murderer has kidnapped a woman with the intent to rape and kill her and there is reason to believe he is holed up in a certain motel. The Fourth Amendment's reasonableness standard accounts for exigent circumstances. When the police arrive, the motel operator folds her arms and says the register is locked in a safe. Invoking [the challenged regulation], the police order the operator to turn over the register. She refuses. The Fourth Amendment does not protect her from arrest."

* * *

DNA Tests of Arrestees

We conclude with a case challenging a Maryland policy under which police collected DNA from arrestees as part of "routine booking procedure."

Supreme Court of the United States

Maryland v. Alonzo Jay King

Decided June 3, 2013 – 569 U.S. 435

Justice KENNEDY delivered the opinion of the Court.

In 2003 a man concealing his face and armed with a gun broke into a woman's home in Salisbury, Maryland. He raped her. The police were unable to identify or apprehend the assailant based on any detailed description or other evidence they then had, but they did obtain from the victim a sample of the perpetrator's DNA.

In 2009 Alonzo King was arrested in Wicomico County, Maryland, and charged with first- and second-degree assault for menacing a group of people with a shotgun. As part of a routine booking procedure for serious offenses, his DNA sample was taken by applying a cotton swab or filter paper—known as a buccal swab—to the inside of his cheeks. The DNA was found to match the DNA taken from the Salisbury rape victim. King was tried and convicted for the rape. Additional DNA samples were taken from him and used in the rape trial, but there seems to be no doubt that it was the DNA from the cheek sample taken at the time he was booked in 2009 that led to his first having been linked to the rape and charged with its commission.

On July 13, 2009, King's DNA record was uploaded to the Maryland DNA database, and three weeks later, on August 4, 2009, his DNA profile was matched to the DNA sample collected in the unsolved 2003 rape case. Once the DNA was matched to King, detectives presented the forensic evidence to a grand jury, which indicted him for the rape. Detectives obtained a search warrant and took a second sample of DNA from King, which again matched the evidence from the rape. He moved to suppress the DNA match on the grounds that Maryland's DNA collection law violated the Fourth Amendment. The Circuit Court Judge upheld the statute as constitutional. King pleaded not guilty to the rape charges but was convicted and sentenced to life in prison without the possibility of parole. The Court of Appeals of Maryland, on review of King's rape conviction, ruled that the DNA taken when King was booked for the 2009 charge was an unlawful seizure because obtaining and using the cheek swab was an unreasonable search of the person. It set the rape conviction aside. This Court granted certiorari and now reverses the judgment of the Maryland court.

II

A

The Act authorizes Maryland law enforcement authorities to collect DNA samples from "an individual who is charged with ... a crime of violence or an attempt to commit a crime of violence; or ... burglary or an attempt to commit burglary." Maryland law defines a crime of violence to include murder, rape, first-degree assault, kidnaping, arson, sexual assault, and a variety of other serious crimes. Once taken, a DNA sample may not be processed or placed in a database before the individual is arraigned (unless the individual consents). It is at this point that a judicial officer ensures that there is probable cause to detain the arrestee on a qualifying serious offense. If "all qualifying criminal charges are determined to be unsupported by probable cause ... the DNA sample shall be immediately destroyed." DNA samples are also destroyed if "a criminal action begun against the individual ... does not result in a conviction," "the conviction is finally reversed or vacated and no new trial is permitted," or "the individual is granted an unconditional pardon."

The Act also limits the information added to a DNA database and how it may be used. Specifically, "[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored." No purpose other than identification is permissible: "A person may not willfully test a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle." Tests for familial matches are also prohibited. The officers involved in taking and analyzing respondent's DNA sample complied with the Act in all respects.

Respondent's DNA was collected in this case using a common procedure known as a "buccal swab." "Buccal cell collection involves wiping a small piece of filter paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells." The procedure is quick and painless. The swab touches inside an arrestee's mouth, but it requires no "surgical intrusio[n] beneath the skin," and it poses no "threa[t] to the health or safety" of arrestees.

B

Respondent's identification as the rapist resulted in part through the operation of a national project to standardize collection and storage of DNA profiles. Authorized by Congress and supervised by the Federal Bureau of Investigation, the Combined DNA Index System (CODIS) connects DNA laboratories at the local, state, and national level. All 50 States require the collection of DNA from felony convicts, and respondent does not dispute the validity of that practice. Twenty-eight States and the Federal Government have adopted laws similar to the Maryland Act authorizing the collection of DNA from some or all arrestees. At issue is a standard, expanding technology already in widespread use throughout the Nation.

III

It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. Virtually any "intrusio[n] into the human body" will work an invasion of "'cherished personal security' that is subject to constitutional scrutiny." The fact than an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.

To say that the Fourth Amendment applies here is the beginning point, not the end of the analysis. "[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred "some quantum of individualized suspicion ... [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion."

The Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal swab applied, as noted, to the inside of the cheeks. The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of officers whose perspective might be "colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.'" "[T]here are virtually no facts for a neutral magistrate to evaluate." Here, the search effected by the buccal swab of respondent falls within the category of cases this Court has analyzed by reference to the proposition that the "touchstone of the Fourth Amendment is reasonableness, not individualized suspicion."

Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. Urgent government interests are not a license for indiscriminate police behavior. To say that no warrant is

required is merely to acknowledge that "rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." This application of "traditional standards of reasonableness" requires a court to weigh "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." An assessment of reasonableness to determine the lawfulness of requiring this class of arrestees to provide a DNA sample is central to the instant case.

IV

A

The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. It is beyond dispute that "probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." Also uncontested is the "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested." When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests.

First, "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." An individual's identity is more than just his name or Social Security number, and the government's interest in identification goes beyond ensuring that the proper name is typed on the indictment. Identity has never been considered limited to the name on the arrestee's birth certificate. An "arrestee may be carrying a false ID or lie about his identity," and "criminal history records ... can be inaccurate or incomplete."

A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention. Police already seek this crucial identifying information. They use routine and accepted means as varied as comparing the suspect's booking photograph to sketch artists' depictions of persons of interest, showing his mugshot to potential witnesses, and of course making a computerized comparison of the arrestee's fingerprints against electronic databases of known criminals and unsolved crimes. In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.

The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. In this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene. Finding occurrences of the arrestee's CODIS profile in outstanding cases is consistent with this common practice. It uses a different form of identification than a name or fingerprint, but its function is the same.

Second, law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate "risks for facility staff, for the existing detainee population, and for a new detainee." DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon. For these purposes officers must know the type of person whom they are detaining, and DNA allows them to make critical choices about how to proceed.

Third, looking forward to future stages of criminal prosecution, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials." Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. Knowing that the defendant is wanted for a previous violent crime based on DNA identification is especially probative of the court's consideration of "the danger of the defendant to the alleged victim, another person, or the community."

Present capabilities make it possible to complete a DNA identification that provides information essential to determining whether a detained suspect can be released pending trial. The facts of this case are illustrative. Though the record is not clear, if some thought were being given to releasing the respondent on bail on the gun charge, a release that would take weeks or months in any event, when the DNA report linked him to the prior rape, it would be relevant to the conditions of his release. The same would be true with a supplemental fingerprint report.

Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense. "[P]rompt [DNA] testing ... would speed up apprehension

of criminals before they commit additional crimes, and prevent the grotesque detention of ... innocent people."

Because proper processing of arrestees is so important and has consequences for every stage of the criminal process, the Court has recognized that the "governmental interests underlying a station-house search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest."

B

DNA identification represents an important advance in the techniques used by law enforcement to serve legitimate police concerns for as long as there have been arrests. Law enforcement agencies routinely have used scientific advancements in their standard procedures for the identification of arrestees. "Police had been using photography to capture the faces of criminals almost since its invention." By the time that it had become "the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals," the courts likewise had come to the conclusion that "it would be [a] matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege."

Beginning in 1887, some police adopted more exacting means to identify arrestees, using the system of precise physical measurements pioneered by the French anthropologist Alphonse Bertillon. Bertillon identification consisted of 10 measurements of the arrestee's body, along with a "scientific analysis of the features of the face and an exact anatomical localization of the various scars, marks, &c., of the body." As in the present case, the point of taking this information about each arrestee was not limited to verifying that the proper name was on the indictment. These procedures were used to "facilitate the recapture of escaped prisoners," to aid "the investigation of their past records and personal history," and "to preserve the means of identification for ... future supervision after discharge."

Perhaps the most direct historical analogue to the DNA technology used to identify respondent is the familiar practice of fingerprinting arrestees. From the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of "the administrative steps incident to arrest." By the middle of the 20th century, it was considered "elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes."

DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, and DNA is a markedly more accurate form of identifying arrestees. A suspect who has changed his facial features to evade photographic identification or even one who has undertaken the more arduous task of altering his fingerprints cannot escape the revealing power of his DNA.

In sum, there can be little reason to question "the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." To that end, courts have confirmed that the Fourth Amendment allows police to take certain routine "administrative steps incident to arrest—*i.e.*, ... book[ing], photograph[ing], and fingerprint[ing]." DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is "no more than an extension of methods of identification long used in dealing with persons under arrest." In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest.

V

A

By comparison to this substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one.

The reasonableness of any search must be considered in the context of the person's legitimate expectations of privacy. The expectations of privacy of an individual taken into police custody "necessarily [are] of a diminished scope." A search of the detainee's person when he is booked into custody may "'involve a relatively extensive exploration,'" including "requir[ing] at least some detainees to lift their genitals or cough in a squatting position."

In this critical respect, the search here at issue differs from the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens that the Court has previously labeled as "'special needs'" searches. Once an individual has been arrested on probable cause for a dangerous offense that may require detention before

trial [] his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen.

The reasonableness inquiry here considers two other circumstances in which the Court has held that particularized suspicion is not categorically required: "diminished expectations of privacy [and] minimal intrusions." This is not to suggest that any search is acceptable solely because a person is in custody. Some searches, such as invasive surgery or a search of the arrestee's home, involve either greater intrusions or higher expectations of privacy than are present in this case. A brief intrusion of an arrestee's person is subject to the Fourth Amendment, but a swab of this nature does not increase the indignity already attendant to normal incidents of arrest.

B

In addition the processing of respondent's DNA sample's 13 CODIS loci did not intrude on respondent's privacy in a way that would make his DNA identification unconstitutional. In light of the scientific and statutory safeguards, once respondent's DNA was lawfully collected the STR analysis of respondent's DNA pursuant to CODIS procedures did not amount to a significant invasion of privacy that would render the DNA identification impermissible under the Fourth Amendment.

In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

The judgment of the Court of Appeals of Maryland is reversed.

Justice SCALIA, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment. Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.

It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous. [T]he Court elaborates at length the ways that the search here served the special purpose of "identifying" King. But that seems to me quite wrong—unless what one means by "identifying" someone is "searching for evidence that he has committed crimes unrelated to the crime of his arrest."

[I]f anything was "identified" at the moment that the DNA database returned a match, it was not King—his identity was already known. (The docket for the original criminal charges lists his full name, his race, his sex, his height, his weight, his date of birth, and his address.) Rather, what the August 4 match "identified" was *the previously-taken sample from the earlier crime*. That sample was genuinely mysterious to Maryland. King was not identified by his association with the sample; rather, the sample was identified by its association with King. The Court effectively destroys its own "identification" theory when it acknowledges that the object of this search was "to see what [was] already known about [King]." No minimally competent speaker of English would say, upon noticing a known arrestee's similarity "to a wanted poster of a previously unidentified suspect," that the *arrestee* had thereby been identified. It was the previously unidentified suspect who had been identified—just as, here, it was the previously unidentified rapist.

That taking DNA samples from arrestees has nothing to do with identifying them is confirmed not just by actual practice (which the Court ignores) but by the enabling statute itself (which the Court also ignores). The Maryland Act at issue has a section helpfully entitled "Purpose of collecting and testing DNA samples." (One would expect such a section to play a somewhat larger role in the Court's analysis of the Act's purpose—which is to say, at least *some* role.) That provision lists five purposes for which DNA samples may be tested. By this point, it will not surprise the reader to learn that the Court's imagined purpose is not among them.

So, to review: DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test. When they are tested, they are checked against the Unsolved Crimes

Collection—rather than the Convict and Arrestee Collection, which could be used to identify them. The Act forbids the Court's purpose (identification), but prescribes as its purpose what our suspicionless-search cases forbid ("official investigation into a crime"). Against all of that, it is safe to say that if the Court's identification theory is not wrong, there is no such thing as error.

I therefore dissent, and hope that today's incursion upon the Fourth Amendment [] will some day be repudiated.

Notes, Comments, and Questions

The dissent points out that the police did not really use the DNA to identify King; they used it to identify the source of sample obtained elsewhere; that is, they used the DNA test of King to match him to the pre-existing sample. In recent years, police have used DNA evidence to create profiles and search for family matches in ancestry DNA databases. What outcome under the Fourth Amendment?

Imagine a small community where two children are murdered. Police believe they have a serial killer and obtain a confession for one of the murders from a local boy with developmental disabilities. DNA evidence proves the two victims had the same killer, but the evidence also exonerates the boy. The police want to obtain DNA samples from every male resident in the small town to find the murderer. What outcome under the Fourth Amendment? What if the police convince the entire male population to consent to giving DNA evidence; one man has a friend give DNA evidence on his behalf. Then later the friend comes forward to confess the subterfuge. Analyze whether the police can require a DNA test from the man who sent the friend in his place. (Note: This question is based on a real case from England, in which Colin Pitchfork was eventually proven to have murdered two victims: Lynda Mann and Dawn Ashworth.)

This marks the end of our review of exceptions to the warrant requirement, as well as of searches more generally. While questions about unlawful searches will arise again during the semester—for example, when we consider what remedies are appropriate for different kinds of constitutional violations—we are now ready to shift our view to seizures and arrests, to which we will devote our next few chapters.

After that, the remainder of the course materials will focus on rights enumerated in the Fifth, Sixth, and Fourteenth Amendments, with the regulation of interrogations receiving particular attention.

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2.18: Chapter 19 - Seizures and Arrests

In this chapter, we consider the Court's definition of "seizure" for Fourth Amendment purposes. The common meaning of "seizure"—to take possession of a thing or person by force or by legal process—provides some insight to the term's meaning in constitutional law. But as is true for other terms of art, such as "search," the dictionary definition is not identical to the doctrinal meaning. We also consider when police may conduct arrests.

What Is a Seizure?

Just as something cannot be an "unreasonable search" without being a "search," something cannot be an "unreasonable seizure" without being a "seizure." Arrests are easily deemed "seizures" of the persons arrested. A variety of less invasive police tactics, however, have required more subtle analysis.

Supreme Court of the United States

United States v. Sylvia L. Mendenhall

Decided May 27, 1980 – 446 U.S. 544

Mr. Justice STEWART announced the judgment of the Court and delivered an opinion, in which Mr. Justice REHNQUIST joined.[1]

The respondent was brought to trial in the United States District Court for the Eastern District of Michigan on a charge of possessing heroin with intent to distribute it. She moved to suppress the introduction at trial of the heroin as evidence against her on the ground that it had been acquired from her through an unconstitutional search and seizure by agents of the Drug Enforcement Administration (DEA). The District Court denied the respondent's motion, and she was convicted after a trial upon stipulated facts. The Court of Appeals reversed. We granted certiorari.

I

At the hearing in the trial court on the respondent's motion to suppress, it was established how the heroin she was charged with possessing had been obtained from her. The respondent arrived at the Detroit Metropolitan Airport on a commercial airline flight from Los Angeles early in the morning on February 10, 1976. As she disembarked from the airplane, she was observed by two agents of the DEA, who were present at the airport for the purpose of detecting unlawful traffic in narcotics. After observing the respondent's conduct, which appeared to the agents to be characteristic of persons unlawfully carrying narcotics, the agents approached her as she was walking through the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket. The respondent produced her driver's license, which was in the name of Sylvia Mendenhall, and, in answer to a question of one of the agents, stated that she resided at the address appearing on the license. The airline ticket was issued in the name of "Annette Ford." When asked why the ticket bore a name different from her own, the respondent stated that she "just felt like using that name." In response to a further question, the respondent indicated that she had been in California only two days. Agent Anderson then specifically identified himself as a federal narcotics agent and, according to his testimony, the respondent "became quite shaken, extremely nervous. She had a hard time speaking."

After returning the airline ticket and driver's license to her, Agent Anderson asked the respondent if she would accompany him to the airport DEA office for further questions. She did so, although the record does not indicate a verbal response to the request. The office, which was located up one flight of stairs about 50 feet from where the respondent had first been approached, consisted of a reception area adjoined by three other rooms. At the office the agent asked the respondent if she would allow a search of her person and handbag and told her that she had the right to decline the search if she desired. She responded: "Go ahead." She then handed Agent Anderson her purse, which contained a receipt for an airline ticket that had been issued to "F. Bush" three days earlier for a flight from Pittsburgh through Chicago to Los Angeles. The agent asked whether this was the ticket that she had used for her flight to California, and the respondent stated that it was.

A female police officer then arrived to conduct the search of the respondent's person. She asked the agents if the respondent had consented to be searched. The agents said that she had, and the respondent followed the policewoman into a private room. There the policewoman again asked the respondent if she consented to the search, and the respondent replied that she did. The

policewoman explained that the search would require that the respondent remove her clothing. The respondent stated that she had a plane to catch and was assured by the policewoman that if she were carrying no narcotics, there would be no problem. The respondent then began to disrobe without further comment. As the respondent removed her clothing, she took from her undergarments two small packages, one of which appeared to contain heroin, and handed both to the policewoman. The agents then arrested the respondent for possessing heroin.

II

Here the Government concedes that its agents had neither a warrant nor probable cause to believe that the respondent was carrying narcotics when the agents conducted a search of the respondent's person. It is the Government's position, however, that the search was conducted pursuant to the respondent's consent, and thus was excepted from the requirements of both a warrant and probable cause. Evidently, the Court of Appeals concluded that the respondent's apparent consent to the search was in fact not voluntarily given and was in any event the product of earlier official conduct violative of the Fourth Amendment. We must first consider, therefore, whether such conduct occurred, either on the concourse or in the DEA office at the airport.

A[2]

[I]f the respondent was "seized" when the DEA agents approached her on the concourse and asked questions of her, the agents' conduct in doing so was constitutional only if they reasonably suspected the respondent of wrongdoing. But "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

On the facts of this case, no "seizure" of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed. We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions. It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

B

Although we have concluded that the initial encounter between the DEA agents and the respondent on the concourse at the Detroit Airport did not constitute an unlawful seizure, it is still arguable that the respondent's Fourth Amendment protections were violated when she went from the concourse to the DEA office. Such a violation might in turn infect the subsequent search of the respondent's person.

The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances and is a matter which the Government has the burden of proving. The respondent herself did not testify at the hearing. The Government's evidence showed that the

respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers.

On the other hand, it is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and [Black], may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, neither were they decisive, and the totality of the evidence in this case was plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers to the DEA office.

III

We conclude that the District Court's determination that the respondent consented to the search of her person "freely and voluntarily" was sustained by the evidence and that the Court of Appeals was, therefore, in error in setting it aside. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings.

[In a concurrence joined by Chief Justice Burger and Justice Blackmun, Justice Powell wrote that the Court should not decide whether the agents "seized" Mendenhall because the courts below had not considered it. Further, he argued that if the encounter did constitute a seizure, it was justified because the circumstances provided "reasonable suspicion."]

Mr. Justice WHITE, with whom Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice STEVENS join, dissenting.

The Court today concludes that agents of the Drug Enforcement Administration (DEA) acted lawfully in stopping a traveler changing planes in an airport terminal and escorting her to a DEA office for a strip-search of her person. This result is particularly curious because a majority of the Members of the Court refuse to reject the conclusion that Ms. Mendenhall was "seized," while a separate majority decline to hold that there were reasonable grounds to justify a seizure. Mr. Justice STEWART concludes that the DEA agents acted lawfully, regardless of whether there were any reasonable grounds for suspecting Ms. Mendenhall of criminal activity, because he finds that Ms. Mendenhall was not "seized" by the DEA agents, even though throughout the proceedings below the Government never questioned the fact that a seizure had occurred necessitating a showing of antecedent reasonable suspicion. Mr. Justice POWELL's opinion concludes that even though Ms. Mendenhall may have been "seized," the seizure was lawful because her behavior while changing planes in the airport provided reasonable suspicion that she was engaging in criminal activity. The Court then concludes, based on the absence of evidence that Ms. Mendenhall resisted her detention, that she voluntarily consented to being taken to the DEA office, even though she in fact had no choice in the matter. This conclusion is inconsistent with our recognition that consent cannot be presumed from a showing of acquiescence to authority.

Whatever doubt there may be concerning whether Ms. Mendenhall's Fourth Amendment interests were implicated during the initial stages of her confrontation with the DEA agents, she undoubtedly was "seized" within the meaning of the Fourth Amendment when the agents escorted her from the public area of the terminal to the DEA office for questioning and a strip-search of her person. [T]he nature of the intrusion to which Ms. Mendenhall was subjected when she was escorted by DEA agents to their office and detained there for questioning and a strip-search was so great that it "was in important respects indistinguishable from a traditional arrest." Although Ms. Mendenhall was not told that she was under arrest, she in fact was not free to refuse to go to the DEA office and was not told that she was. Furthermore, once inside the office, Ms. Mendenhall would not have been permitted to leave without submitting to a strip-search.[3]

The Court recognizes that the Government has the burden of proving that Ms. Mendenhall consented to accompany the officers, but it nevertheless holds that the "totality of evidence was plainly adequate" to support a finding of consent. On the record before us, the Court's conclusion can only be based on the notion that consent can be assumed from the absence of proof that a suspect resisted police authority.

Since the defendant was not present to testify at the suppression hearing, we can only speculate about her state of mind as her encounter with the DEA agents progressed from surveillance, to detention, to questioning, to seclusion in a private office, to the female officer's command to remove her clothing. Nevertheless, it is unbelievable that this sequence of events involved no invasion of a citizen's constitutionally protected interest in privacy. The rule of law requires a different conclusion.

Notes, Comments, and Questions

The Court in *Mendenhall* stated that a person is seized if "a reasonable person [in his situation] would have believed that he was not free to leave." As a result, lawyers and others have recommended that if someone is approached by police and wishes either

to avoid or to end the encounter, a useful tactic is to ask, “Am I free to leave?” If the answer is “yes,” then the person may leave without further discussion. If the answer is “no,” then the person should stay—a reasonable person in the situation would not feel free to go. A person told “no” can later challenge the interaction as an unlawful seizure. At a minimum the encounter should be considered a “seizure;” the debate will be about its legality. (An equivalent tactic is to ask, “Am I being detained?” An answer of “no” indicates permission to leave. “Yes” indicates a seizure.)

Consider the following scenario:

Police approach a suspect (who had recently parked his car) and ask to speak to him. The suspect agrees. The officer asks for identification, and the suspect produces a driver’s license. Before returning the license, the officer asks for and receives permission to search the suspect’s vehicle. Is that search the product of valid consent given by a suspect who had not been “seized” during the encounter? Or, instead, did the officer detain the suspect by retaining his driver’s license, thereby creating a situation in which a reasonable person would not feel free to leave? *See United States v. De La Rosa*, 922 F.2d 675, 678 (11th Cir. 1991); *id.* at 680-81 (Clark, J., dissenting on this question).[4]

Now imagine a slightly different scenario: Police lawfully stop a car and ask the driver for his license, which is provided. Before returning the license, officers ask for permission to search the car. Is this scenario different from the prior one in any material way? *See United States v. Thompson*, 712 F.2d 1356, 1360-61 (11th Cir. 1983).

The next case concerns a young suspect especially interested in avoiding an encounter with police. The question is whether police efforts to stop him qualified as a “seizure.”

Supreme Court of the United States

California v. Hodari D.

Decided April 23, 1991 – 499 U.S. 621

Justice SCALIA delivered the opinion of the Court.

Late one evening in April 1988, Officers Brian McColgin and Jerry Pertoso were on patrol in a high-crime area of Oakland, California. They were dressed in street clothes but wearing jackets with “Police” embossed on both front and back. Their unmarked car proceeded west on Foothill Boulevard, and turned south onto 63rd Avenue. As they rounded the corner, they saw four or five youths huddled around a small red car parked at the curb. When the youths saw the officers’ car approaching they apparently panicked, and took flight. The respondent here, Hodari D., and one companion ran west through an alley; the others fled south. The red car also headed south, at a high rate of speed.

The officers were suspicious and gave chase. McColgin remained in the car and continued south on 63rd Avenue; Pertoso left the car, ran back north along 63rd, then west on Foothill Boulevard, and turned south on 62nd Avenue. Hodari, meanwhile, emerged from the alley onto 62nd and ran north. Looking behind as he ran, he did not turn and see Pertoso until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, Pertoso tackled Hodari, handcuffed him, and radioed for assistance. Hodari was found to be carrying $130 in cash and a pager; and the rock he had discarded was found to be crack cocaine.

In the juvenile proceeding brought against him, Hodari moved to suppress the evidence relating to the cocaine. The court denied the motion without opinion. The California Court of Appeal reversed. The California Supreme Court denied the State’s application for review. We granted certiorari.

As this case comes to us, the only issue presented is whether, at the time he dropped the drugs, Hodari had been “seized” within the meaning of the Fourth Amendment.[5] If so, respondent argues, the drugs were the fruit of that seizure and the evidence concerning them was properly excluded. If not, the drugs were abandoned by Hodari and lawfully recovered by the police, and the evidence should have been admitted.

We have long understood that the Fourth Amendment’s protection against “unreasonable ... seizures” includes seizure of the person. From the time of the founding to the present, the word “seizure” has meant a “taking possession.” For most purposes at common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control. A ship still fleeing, even though under attack, would not be considered to have been seized as a war prize. To constitute an arrest, however—the quintessential “seizure of the person” under our Fourth Amendment

jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient.[6]

To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity. If, for example, Pertoso had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest. The present case, however, is even one step further removed. It does not involve the application of any physical force; Hodari was untouched by Officer Pertoso at the time he discarded the cocaine. His defense relies instead upon the proposition that a seizure occurs "when the officer, by means of physical force *or show of authority,* has in some way restrained the liberty of a citizen." Hodari contends (and we accept as true for purposes of this decision) that Pertoso's pursuit qualified as a "show of authority" calling upon Hodari to halt. The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.

The language of the Fourth Amendment, of course, cannot sustain respondent's contention. The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure. Nor can the result respondent wishes to achieve be produced—indirectly, as it were—by suggesting that Pertoso's uncomplied-with show of authority was a common-law arrest, and then appealing to the principle that all common-law arrests are seizures. An arrest requires *either* physical force *or,* where that is absent, s*ubmission* to the assertion of authority.

We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent urges. Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command "Stop!" expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.

In sum, assuming that Pertoso's pursuit in the present case constituted a "show of authority" enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied. We reverse the decision of the California Court of Appeal, and remand for further proceedings not inconsistent with this opinion.

Justice STEVENS, with whom Justice MARSHALL joins, dissenting.

The Court's narrow construction of the word "seizure" represents a significant, and in my view, unfortunate, departure from prior case law construing the Fourth Amendment. [T]he Court now adopts a definition of "seizure" that is unfaithful to a long line of Fourth Amendment cases. Even if the Court were defining seizure for the first time, which it is not, the definition that it chooses today is profoundly unwise. In its decision, the Court assumes, without acknowledging, that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as he misses his target.

Because the facts of this case are somewhat unusual, it is appropriate to note that the same issue would arise if the show of force took the form of a command to "freeze," a warning shot, or the sound of sirens accompanied by a patrol car's flashing lights. In any of these situations, there may be a significant time interval between the initiation of the officer's show of force and the complete submission by the citizen. At least on the facts of this case, the Court concludes that the timing of the seizure is governed by the citizen's reaction, rather than by the officer's conduct. One consequence of this conclusion is that the point at which the interaction between citizen and police officer becomes a seizure occurs, not when a reasonable citizen believes he or she is no longer free to go, but, rather, only after the officer exercises control over the citizen.

It is too early to know the consequences of the Court's holding. If carried to its logical conclusion, it will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have.

I respectfully dissent.

Notes, Comments, and Questions

Justice Scalia noted in a footnote that "California conceded below" that police did not have reasonable suspicion to seize Hodari and, citing Scripture, stated that the Court would not decide whether a stop would have been lawful. The dissent found the majority's musings on the question annoying:

"The Court's gratuitous quotation from Proverbs 28:1 mistakenly assumes that innocent residents have no reason to fear the sudden approach of strangers. We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority. *See generally* Johnson, *Race and the Decision To Detain a Suspect*, 93 Yale L.J. 214 (1983). It has long been 'a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' *Alberty v. United States*, 162 U.S. 499 (1896)."

We will reconsider the legal significance of flight from police when reading cases in which the Court confronted the merits.

The Court in *Hodari D.* decided that an attempted seizure by police—ordering "stop" at a suspect who ignores the command and runs—is not a "seizure" for purposes of the Fourth Amendment to the Constitution of the United States. The Court did not, however, decide how state law might regulate such police action. In New York, state courts have rejected the reasoning of *Hodari D.* when interpreting the state constitution. *See People v. Martinez,* 606 N.E.2d 951 (N.Y. 1992); *People v. Hill*, 150 A.D.3d 627, 634 & n.4 (N.Y. App. Div. 1st Dep't 2017) ("In contrast [to New York law], the United States Supreme Court rejected mere police pursuit as constituting a seizure in *California v. Hodari D.*"). Students need not investigate the idiosyncrasies of New York search and seizure law, much less of all the states. Instead, New York's rejection of *Hodari D.* is noted as an example of a larger principle: Under our federal system, states may not offer less protection than the Court declares to be provided by the federal constitution. But states may, if they wish, offer more protection. The Court's decisions about federal constitutional law thereby provide a floor—not a ceiling—for the protection of individual liberties. Would-be reformers of the law may find greater success in the state courts and state legislatures than in the filing of petitions for certiorari.

Arrests

In previous chapters, we have seen that police are often allowed to conduct warrantless arrests as long as they have probable cause to believe the arrestee has committed a crime. The leading Supreme Court case affirming this principle is *United States v. Watson*, 423 U.S. 411 (1976).

The *Watson* Court summarized the facts as follows:

"The relevant events began on August 17, 1972, when an informant, one Khoury, telephoned a postal inspector informing him that respondent Watson was in possession of a stolen credit card and had asked Khoury to cooperate in using the card to their mutual advantage. On five to 10 previous occasions Khoury had provided the inspector with reliable information on postal inspection matters, some involving Watson. Later that day Khoury delivered the card to the inspector. On learning that Watson had agreed to furnish additional cards, the inspector asked Khoury to arrange to meet with Watson. Khoury did so, a meeting being scheduled for August 22. Watson canceled that engagement, but at noon on August 23, Khoury met with Watson at a restaurant designated by the latter. Khoury had been instructed that if Watson had additional stolen credit cards, Khoury was to give a designated signal. The signal was given, the officers closed in, and Watson was forthwith arrested."

After his arrest, Watson consented to a search of his car that revealed incriminating evidence. He later moved to suppress the evidence on the ground that his consent was obtained after an unlawful arrest. The Court considered the arrest as follows:

"Contrary to the Court of Appeals' view, Watson's arrest was not invalid because executed without a warrant. Title 18 U.S.C. § 3061(a)(3) expressly empowers the Board of Governors of the Postal Service to authorize Postal Service officers and employees 'performing duties related to the inspection of postal matters' to 'make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.' [T]he inspector and his subordinates, in arresting Watson, were acting strictly in accordance with the governing statute and regulations. The effect of the judgment of the Court of Appeals was to invalidate the statute as applied in this case and as applied to all the situations where a court fails to find exigent circumstances justifying a warrantless arrest. We reverse that judgment."

"Section 3061 represents a judgment by Congress that it is not unreasonable under the Fourth Amendment for postal inspectors

to arrest without a warrant provided they have probable cause to do so. This was not an isolated or quixotic judgment of the legislative branch. Other federal law enforcement officers have been expressly authorized by statute for many years to make felony arrests on probable cause but without a warrant. This is true of United States marshals, and of agents of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Secret Service, and the Customs Service."

"[T]here is nothing in the Court's prior cases indicating that under the Fourth Amendment a warrant is required to make a valid arrest for a felony. Indeed, the relevant prior decisions are uniformly to the contrary."

"The cases construing the Fourth Amendment [] reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest."

In a concurrence, Justice Powell noted the "anomaly" created by decisions requiring warrants for searches absent exceptional circumstances—even when police have probable cause—and the decision in *Watson* allowing warrantless arrests based upon probable cause. He wrote, "Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches." But he nonetheless joined the majority because of "history and experience." He explained as follows:

"The Court's opinion emphasizes the historical sanction accorded warrantless felony arrests. In the early days of the common law most felony arrests were made upon personal knowledge and without warrants. So established were such arrests as the usual practice that Lord Coke seriously questioned whether a justice of the peace, receiving his information secondhand instead of from personal knowledge, even could authorize an arrest by warrant. By the late 18th century it had been firmly established by Blackstone, with an intervening assist from Sir Matthew Hale, that magistrates could issue arrest warrants upon information supplied by others. But recognition of the warrant power cast no doubt upon the validity of warrantless felony arrests, which continued to be practiced and upheld as before. There is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers."

"The historical momentum for acceptance of warrantless arrests, already strong at the adoption of the Fourth Amendment, has gained strength during the ensuing two centuries. Both the judiciary and the legislative bodies of this Nation repeatedly have placed their imprimaturs upon the practice and, as the Government emphasizes, law enforcement agencies have developed their investigative and arrest procedures upon an assumption that warrantless arrests were valid so long as based upon probable cause."

Note that Justice Powell's concurrence in *Watson* referred to "warrantless felony arrests," and the majority referred to "the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence." What about warrantless arrests for misdemeanors not committed in the officer's presence, about which the officer has probable cause to believe suspects have committed? For example, if a shopkeeper describes a suspect in detail and reports seeing him steal a candy bar, police would likely have probable cause to arrest the suspect for larceny, and in many jurisdictions such minor theft would be a misdemeanor. May the officer arrest the suspect without a warrant? Common law generally did not allow such arrests, but states now have statutes allowing them (some for all misdemeanors, others only for certain misdemeanors). Although the Supreme Court has not decided the question, the answer appears to be that if states wish to, they may authorize their police to conduct such arrests. *See, e.g.*, William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment,* 58 Mo. L. Rev. 771, 811–17 (1993); *State v. Walker*, 138 P.3d 113, 120 (Wash. 2006) ("every federal circuit court that has addressed the issue has found the Fourth Amendment does not require the misdemeanor to occur in the officer's presence in order for a warrantless arrest to be valid").

In the next case, the Court considered an officer who used the authority granted under *United States v. Watson*—which allows warrantless arrests—in an arguably unreasonable manner. The question was not whether the Justices approved of the challenged police behavior; they did not. Instead, the Court decided whether warrantless arrests for certain minor criminal offenses are "unreasonable" under the Fourth Amendment.

Supreme Court of the United States

Gail Atwater v. City of Lago Vista

Decided April 24, 2001 – 532 U.S. 318

Justice SOUTER delivered the opinion of the Court.

The question is whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. We hold that it does not.

I

A

In Texas, if a car is equipped with safety belts, a front-seat passenger must wear one, and the driver must secure any small child riding in front. Violation of either provision is "a misdemeanor punishable by a fine not less than $25 or more than $50." Texas law expressly authorizes "[a]ny peace officer [to] arrest without warrant a person found committing a violation" of these seatbelt laws, although it permits police to issue citations in lieu of arrest.

In March 1997, petitioner Gail Atwater was driving her pickup truck in Lago Vista, Texas, with her 3-year-old son and 5-year-old daughter in the front seat. None of them was wearing a seatbelt. Respondent Bart Turek, a Lago Vista police officer at the time, observed the seatbelt violations and pulled Atwater over. According to Atwater's complaint (the allegations of which we assume to be true for present purposes), Turek approached the truck and "yell[ed]" something to the effect of "[w]e've met before" and "[y]ou're going to jail." He then called for backup and asked to see Atwater's driver's license and insurance documentation, which state law required her to carry. When Atwater told Turek that she did not have the papers because her purse had been stolen the day before, Turek said that he had "heard that story two-hundred times."

Atwater asked to take her "frightened, upset, and crying" children to a friend's house nearby, but Turek told her, "[y]ou're not going anywhere." As it turned out, Atwater's friend learned what was going on and soon arrived to take charge of the children. Turek then handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took Atwater's "mug shot" and placed her, alone, in a jail cell for about one hour, after which she was taken before a magistrate and released on $310 bond.

Atwater was charged with driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance. She ultimately pleaded no contest to the misdemeanor seatbelt offenses and paid a $50 fine; the other charges were dismissed.

B

Atwater and her husband, petitioner Michael Haas, filed suit in a Texas state court against Turek and respondents City of Lago Vista and Chief of Police Frank Miller. So far as concerns us, petitioners (whom we will simply call Atwater) alleged that respondents (for simplicity, the City) had violated Atwater's Fourth Amendment "right to be free from unreasonable seizure" and sought compensatory and punitive damages.

The City removed the suit to the United States District Court for the Western District of Texas. [T]he District Court ruled the Fourth Amendment claim "meritless" and granted the City's summary judgment motion. A panel of the United States Court of Appeals for the Fifth Circuit reversed. Sitting en banc, the Court of Appeals vacated the panel's decision and affirmed the District Court's summary judgment for the City. We granted certiorari to consider whether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without warrant for minor criminal offenses. We now affirm.

II

Atwater's specific contention is that "founding-era common-law rules" forbade peace officers to make warrantless misdemeanor arrests except in cases of "breach of the peace," a category she claims was then understood narrowly as covering only those nonfelony offenses "involving or tending toward violence." Although her historical argument is by no means insubstantial, it ultimately fails.

A

[The Court engaged in a lengthy analysis of English legal history.] Having reviewed the relevant English decisions, as well as English and colonial American legal treatises, legal dictionaries, and procedure manuals, we simply are not convinced that Atwater's is the correct, or even necessarily the better, reading of the common-law history.

B

An examination of specifically American evidence is to the same effect. Neither the history of the framing era nor subsequent legal development indicates that the Fourth Amendment was originally understood, or has traditionally been read, to embrace Atwater's position.

What we have here, then, is just the opposite of what we had in *Wilson* v. *Arkansas* [514 U.S. 927 (1995) (Chapter 7)]. There, we emphasized that during the founding era a number of States had "enacted statutes specifically embracing" the common-law knock-and-announce rule; here, by contrast, those very same States passed laws extending warrantless arrest authority to a host of nonviolent misdemeanors, and in so doing acted very much inconsistently with Atwater's claims about the Fourth Amendment's object. We simply cannot conclude that the Fourth Amendment, as originally understood, forbade peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace.

Nor does Atwater's argument from tradition pick up any steam from the historical record as it has unfolded since the framing, there being no indication that her claimed rule has ever become "woven … into the fabric" of American law. The story, on the contrary, is of two centuries of uninterrupted (and largely unchallenged) state and federal practice permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace.

Small wonder, then, that today statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace, as do a host of congressional enactments. The American Law Institute has long endorsed the validity of such legislation, and the consensus, as stated in the current literature, is that statutes "remov[ing] the breach of the peace limitation and thereby permit[ting] arrest without warrant for *any* misdemeanor committed in the arresting officer's presence" have "'never been successfully challenged and stan[d] as the law of the land.'"

III

While it is true here that history, if not unequivocal, has expressed a decided, majority view that the police need not obtain an arrest warrant merely because a misdemeanor stopped short of violence or a threat of it, Atwater does not wager all on history. Instead, she asks us to mint a new rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness. Atwater accordingly argues for a modern arrest rule, one not necessarily requiring violent breach of the peace, but nonetheless forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention.

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.

But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

[C]omplications arise the moment we begin to think about the possible applications of the several criteria Atwater proposes for drawing a line between minor crimes with limited arrest authority and others not so restricted.

One line, she suggests, might be between "jailable" and "fine-only" offenses, between those for which conviction could result in commitment and those for which it could not. The trouble with this distinction, of course, is that an officer on the street might not be able to tell. It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes, but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest. Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge? And so on.

But Atwater's refinements would not end there. She represents that if the line were drawn at nonjailable traffic offenses, her proposed limitation should be qualified by a proviso authorizing warrantless arrests where "necessary for enforcement of the traffic laws or when [an] offense would otherwise continue and pose a danger to others on the road." The proviso only compounds the difficulties. Would, for instance, either exception apply to speeding? At oral argument, Atwater's counsel said that "it would not be reasonable to arrest a driver for speeding unless the speeding rose to the level of reckless driving." But is it not fair to expect that the chronic speeder will speed again despite a citation in his pocket, and should that not qualify as showing that the "offense would ... continue" under Atwater's rule? And why, as a constitutional matter, should we assume that only reckless driving will "pose a danger to others on the road" while speeding will not?

There is no need for more examples to show that Atwater's general rule and limiting proviso promise very little in the way of administrability. It is no answer that the police routinely make judgments on grounds like risk of immediate repetition; they surely do and should. But there is a world of difference between making that judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest, and making the same judgment when the question is the lawfulness of the warrantless arrest itself. It is the difference between no basis for legal action challenging the discretionary judgment, on the one hand, and the prospect of evidentiary exclusion or (as here) personal § 1983 liability for the misapplication of a constitutional standard, on the other. Atwater's rule therefore would not only place police in an almost impossible spot but would guarantee increased litigation over many of the arrests that would occur. For all these reasons, Atwater's various distinctions between permissible and impermissible arrests for minor crimes strike us as "very unsatisfactory line[s]" to require police officers to draw on a moment's notice.

Just how easily the costs could outweigh the benefits may be shown by asking, as one Member of this Court did at oral argument, "how bad the problem is out there." The very fact that the law has never jelled the way Atwater would have it leads one to wonder whether warrantless misdemeanor arrests need constitutional attention, and there is cause to think the answer is no. So far as such arrests might be thought to pose a threat to the probable-cause requirement, anyone arrested for a crime without formal process, whether for felony or misdemeanor, is entitled to a magistrate's review of probable cause within 48 hours, and there is no reason to think the procedure in this case atypical in giving the suspect a prompt opportunity to request release. Many jurisdictions, moreover, have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses. It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle. It is, in fact, only natural that States should resort to this sort of legislative regulation, for it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason. Finally, and significantly, under current doctrine the preference for categorical treatment of Fourth Amendment claims gives way to individualized review when a defendant makes a colorable argument that an arrest, with or without a warrant, was "conducted in an extraordinary manner, unusually harmful to [his] privacy or even physical interests."

The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials, is a dearth of horribles demanding redress. Indeed, when Atwater's counsel was asked at oral argument for any indications of comparably foolish, warrantless misdemeanor arrests, he could offer only one. We are sure that there are others, but just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests. That fact caps the reasons for rejecting Atwater's request for the development of a new and distinct body of constitutional law.

Accordingly, we confirm today what our prior cases have intimated: the standard of probable cause "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.

IV

Atwater's arrest satisfied constitutional requirements. There is no dispute that Officer Turek had probable cause to believe that Atwater had committed a crime in his presence. She admits that neither she nor her children were wearing seatbelts. Turek was accordingly authorized (not required, but authorized) to make a custodial arrest without balancing costs and benefits or determining whether or not Atwater's arrest was in some sense necessary.

Nor was the arrest made in an "extraordinary manner, unusually harmful to [her] privacy or ... physical interests." Atwater's arrest was surely "humiliating," as she says in her brief, but it was no more "harmful to ... privacy or ... physical interests" than the normal custodial arrest. She was handcuffed, placed in a squad car, and taken to the local police station, where officers asked her to remove her shoes, jewelry, and glasses, and to empty her pockets. They then took her photograph and placed her in a cell, alone,

for about an hour, after which she was taken before a magistrate, and released on $310 bond. The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment.

The Court of Appeals's en banc judgment is affirmed.

Justice O'CONNOR, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court recognizes that the arrest of Gail Atwater was a "pointless indignity" that served no discernible state interest and yet holds that her arrest was constitutionally permissible. Because the Court's position is inconsistent with the explicit guarantee of the Fourth Amendment, I dissent.

A full custodial arrest, such as the one to which Ms. Atwater was subjected, is the quintessential seizure. When a full custodial arrest is effected without a warrant, the plain language of the Fourth Amendment requires that the arrest be reasonable.

A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. If the arrestee is the occupant of a car, the entire passenger compartment of the car, including packages therein, is subject to search as well.[7] The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record.

We have said that "the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." If the State has decided that a fine, and not imprisonment, is the appropriate punishment for an offense, the State's interest in taking a person suspected of committing that offense into custody is surely limited, at best. This is not to say that the State will never have such an interest. A full custodial arrest may on occasion vindicate legitimate state interests, even if the crime is punishable only by fine. Arrest is the surest way to abate criminal conduct. It may also allow the police to verify the offender's identity and, if the offender poses a flight risk, to ensure her appearance at trial. But when such considerations are not present, a citation or summons may serve the State's remaining law enforcement interests every bit as effectively as an arrest.

Because a full custodial arrest is such a severe intrusion on an individual's liberty, its reasonableness hinges on "the degree to which it is needed for the promotion of legitimate governmental interests." In light of the availability of citations to promote a State's interests when a fine-only offense has been committed, I cannot concur in a rule which deems a full custodial arrest to be reasonable in every circumstance. Giving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable. Instead, I would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion" of a full custodial arrest.

The record in this case makes it abundantly clear that Ms. Atwater's arrest was constitutionally unreasonable. Atwater readily admits—as she did when Officer Turek pulled her over—that she violated Texas' seatbelt law. While Turek was justified in stopping Atwater, neither law nor reason supports his decision to arrest her instead of simply giving her a citation. The officer's actions cannot sensibly be viewed as a permissible means of balancing Atwater's Fourth Amendment interests with the State's own legitimate interests.

The Court's error [] does not merely affect the disposition of this case. The *per se* rule that the Court creates has potentially serious consequences for the everyday lives of Americans. A broad range of conduct falls into the category of fine-only misdemeanors.

To be sure, such laws are valid and wise exercises of the States' power to protect the public health and welfare. My concern lies not with the decision to enact or enforce these laws, but rather with the manner in which they may be enforced. Under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let the person continue on her way. Or, if a traffic violation, the officer may stop the car, arrest the driver, search the driver, search the entire passenger compartment of the car including any purse or package inside, and impound the car and inventory all of its contents. Although the Fourth Amendment expressly requires that the latter course be a reasonable and proportional response to the circumstances of the offense, the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate.

Such unbounded discretion carries with it grave potential for abuse. The majority takes comfort in the lack of evidence of "an epidemic of unnecessary minor-offense arrests." But the relatively small number of published cases dealing with such arrests proves little and should provide little solace. Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness.

The Court neglects the Fourth Amendment's express command in the name of administrative ease. In so doing, it cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness. I respectfully dissent.

Notes, Comments, and Questions

The result in *Atwater* may exemplify a maxim popularized by Justice Antonin Scalia, who once observed during a speech, "A lot of stuff that's stupid is not unconstitutional." Justice Scalia added that during a prior speech, he had proposed that all federal judges should receive a stamp with the words "STUPID BUT CONSTITUTIONAL" that could be used on complaints; then someone sent him one. Scalia, like others expressing similar sentiments, was known to argue that if you wish to prohibit stupid (but constitutional) conduct, you should contact your legislature, not federal judges.

If students encounter examples in this book of disagreeable police (or prosecutorial) conduct that the Court has deemed constitutional, they may wish to ask themselves two questions: (1) Is it plausible that a legislature can solve the problem that the Court has declined to solve, and (2) what specific suggestions might I have for my legislator? Most students are far more likely to become legislators than Supreme Court Justices.

After deciding in *Atwater* that the Fourth Amendment allows warrantless arrests even for minor crimes, the Court faced an odd set of facts in *Virginia v. Moore*. There, the Court considered a warrantless arrest conducted in violation of a state law. The issue was whether violating state law made the arrest "unreasonable" under the Fourth Amendment.

Supreme Court of the United States

Virginia v. David Lee Moore

Decided April 23, 2008 – 553 U.S. 164

Justice SCALIA delivered the opinion of the Court.

We consider whether a police officer violates the Fourth Amendment by making an arrest based on probable cause but prohibited by state law.

I

On February 20, 2003, two city of Portsmouth police officers stopped a car driven by David Lee Moore. They had heard over the police radio that a person known as "Chubs" was driving with a suspended license, and one of the officers knew Moore by that nickname. The officers determined that Moore's license was in fact suspended, and arrested him for the misdemeanor of driving on a suspended license, which is punishable under Virginia law by a year in jail and a $2,500 fine. The officers subsequently searched Moore and found that he was carrying 16 grams of crack cocaine and $516 in cash.

Under state law, the officers should have issued Moore a summons instead of arresting him. Driving on a suspended license, like some other misdemeanors, is not an arrestable offense except as to those who "fail or refuse to discontinue" the violation, and those whom the officer reasonably believes to be likely to disregard a summons, or likely to harm themselves or others. The intermediate appellate court found none of these circumstances applicable, and Virginia did not appeal that determination.

Moore was charged with possessing cocaine with the intent to distribute it in violation of Virginia law. He filed a pretrial motion to suppress the evidence from the arrest search. Virginia law does not, as a general matter, require suppression of evidence obtained in violation of state law. Moore argued, however, that suppression was required by the Fourth Amendment. The trial court denied the motion, and after a bench trial found Moore guilty of the drug charge and sentenced him to a 5-year prison term, with one year and six months of the sentence suspended. The conviction was reversed by a panel of Virginia's intermediate court

on Fourth Amendment grounds, reinstated by the intermediate court sitting en banc, and finally reversed again by the Virginia Supreme Court. We granted certiorari.

III

A

When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." That methodology provides no support for Moore's Fourth Amendment claim. In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.

Our decisions counsel against changing this calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires. We have treated additional protections exclusively as matters of state law. We have applied the same principle in the seizure context. We thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices—even practices set by rule. While those practices "vary from place to place and from time to time," Fourth Amendment protections are not "so variable" and cannot "be made to turn upon such trivialities."

Some earlier [decisions] excluded evidence obtained in violation of state law, but those decisions rested on our supervisory power over the federal courts, rather than the Constitution.

B

We are convinced that the approach of our prior cases is correct, because an arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure. Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation.

Moore argues that a State has no interest in arrest when it has a policy against arresting for certain crimes. That is not so, because arrest will still ensure a suspect's appearance at trial, prevent him from continuing his offense, and enable officers to investigate the incident more thoroughly. State arrest restrictions are more accurately characterized as showing that the State values its interests in forgoing arrests more highly than its interests in making them; or as showing that the State places a higher premium on privacy than the Fourth Amendment requires. A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.

If we concluded otherwise, we would often frustrate rather than further state policy. Virginia chooses to protect individual privacy and dignity more than the Fourth Amendment requires, but it also chooses not to attach to violations of its arrest rules the potent remedies that federal courts have applied to Fourth Amendment violations. Virginia does not, for example, ordinarily exclude from criminal trials evidence obtained in violation of its statutes. Moore would allow Virginia to accord enhanced protection against arrest only on pain of accompanying that protection with federal remedies for Fourth Amendment violations, which often include the exclusionary rule. States unwilling to lose control over the remedy would have to abandon restrictions on arrest altogether. This is an odd consequence of a provision designed to protect against searches and seizures.

Incorporating state-law arrest limitations into the Constitution would produce a constitutional regime no less vague and unpredictable than the one we rejected in *Atwater*. The constitutional standard would be only as easy to apply as the underlying state law, and state law can be complicated indeed. The Virginia statute in this case, for example, calls on law enforcement officers to weigh just the sort of case-specific factors that *Atwater* said would deter legitimate arrests if made part of the constitutional inquiry. It would authorize arrest if a misdemeanor suspect fails or refuses to discontinue the unlawful act, or if the officer believes the suspect to be likely to disregard a summons. *Atwater* specifically noted the "extremely poor judgment" displayed in arresting a local resident who would "almost certainly" have discontinued the offense and who had "no place to hide and no incentive to flee." It nonetheless declined to make those considerations part of the constitutional calculus. *Atwater* differs from this case in only one significant respect: It considered (and rejected) federal constitutional remedies for *all* minor-misdemeanor arrests; Moore seeks them in only that *subset* of minor-misdemeanor arrests in which there is the least to be gained—that is, where the State has already acted to constrain officers' discretion and prevent abuse. Here we confront fewer horribles than in *Atwater,* and less of a need for redress.

Finally, linking Fourth Amendment protections to state law would cause them to "vary from place to place and from time to time." Even at the same place and time, the Fourth Amendment's protections might vary if federal officers were not subject to the same statutory constraints as state officers.

We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections.

IV

Moore argues that even if the Constitution allowed his arrest, it did not allow the arresting officers to search him. We have recognized, however, that officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence. We have described this rule as covering any "lawful arrest" with constitutional law as the reference point. That is to say, we have equated a lawful arrest with an arrest based on probable cause: "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; *that intrusion being lawful,* a search incident to the arrest requires no additional justification." Moore correctly notes that several important state-court decisions have defined the lawfulness of arrest in terms of compliance with state law. But it is not surprising that States have used "lawful" as shorthand for compliance with state law, while our constitutional decision in *Robinson* [, 414 U.S. 218 (1973),] used "lawful" as shorthand for compliance with constitutional constraints.

The Virginia Supreme Court may have concluded that *Knowles [v. Iowa*, 525 U.S. 113 (1998)] required the exclusion of evidence seized from Moore because, under state law, the officers who arrested Moore should have issued him a citation instead. This argument might have force if the Constitution forbade Moore's arrest, because we have sometimes excluded evidence obtained through unconstitutional methods in order to deter constitutional violations. But the arrest rules that the officers violated were those of state law alone, and as we have just concluded, it is not the province of the Fourth Amendment to enforce state law. That Amendment does not require the exclusion of evidence obtained from a constitutionally permissible arrest.

We reaffirm against a novel challenge what we have signaled for more than half a century. When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety. The judgment of the Supreme Court of Virginia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice GINSBURG, concurring in the judgment.

The Fourth Amendment, today's decision holds, does not put States to an all-or-nothing choice in this regard. A State may accord protection against arrest beyond what the Fourth Amendment requires, yet restrict the remedies available when police deny to persons they apprehend the extra protection state law orders. Because I agree that the arrest and search Moore challenges violated Virginia law, but did not violate the Fourth Amendment, I join the Court's judgment.

* * *

In our next chapter, we consider a form of seizure less robust than an arrest—a "stop and frisk."

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2.19: Chapter 20 - Stop and Frisk

This chapter concerns the law enforcement tactic known as “stop and frisk.” Although such conduct is less invasive than an arrest, the “stop” is nonetheless a seizure that must be “reasonable” to be lawful under the Fourth Amendment. The “frisk” is a search that also must be reasonable to be lawful.

Our reading will review (1) the basic definition of “stop and frisk” and the Court’s justification for allowing it absent probable cause, (2) the difference between a stop and frisk and a full arrest (which requires probable cause), and (3) what police may do during a “*Terry* stop,” as these stops and frisks have come to be known.

We begin with *Terry v. Ohio*, which sets forth the doctrine permitting “stop and frisk” in some circumstances and which has given its name to the practice.

Supreme Court of the United States

John W. Terry v. State of Ohio

Decided June 10, 1968 – 392 U.S. 1

Mr. Chief Justice WARREN delivered the opinion of the Court.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary. Following the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton, by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would “stand and watch people or walk and watch people at many intervals of the day.” He added: “Now, in this case when I looked over they didn’t look right to me at the time.”

His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men. “I get more purpose to watch them when I seen their movements,” he testified. He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of “casing a job, a stick-up,” and that he considered it his duty as a police officer to investigate further. He added that he feared “they may have a gun.” Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker’s store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men “mumbled something” in response to his inquiries, Officer McFadden

grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38-caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe ... that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed. The Supreme Court of Ohio dismissed their appeal. We granted certiorari. We affirm the conviction.

I

The question is whether in all the circumstances of this on-the-street encounter, [Terry's] right to personal security was violated by an unreasonable search and seizure.

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"—as it is sometimes euphemistically termed—suspicious persons.

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search."

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search. It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest.

In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.

II

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

The danger in the logic which proceeds upon distinctions between a "stop" and an "arrest," or "seizure" of the person, and between a "frisk" and a "search" is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And ... it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation. This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.

The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did. And in determining whether the seizure and search were "unreasonable" our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

III

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. [W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails." And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. [I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? And simple "'good faith on the part of the arresting officer is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police."

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious

behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

IV

We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a "stick-up." We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his patdown which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

V

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Mr. Justice DOUGLAS, dissenting.

The opinion of the Court disclaims the existence of "probable cause." If loitering were in issue and that was the offense charged, there would be "probable cause" shown. But the crime here is carrying concealed weapons; and there is no basis for concluding that the officer had "probable cause" for believing that that crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again.

[P]olice officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their "seizure" without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion."

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

* * *

Selections from opinions in the next case, *United States v. Place*, were included in the assignment for Chapter 5. In that chapter, the case was presented to illustrate that dog sniffs in public places—in and of themselves—do not constitute searches. In this chapter, we return to the case to study what constitutes a permissible seizure of "effects."

Supreme Court of the United States

United States v. Raymond J. Place

Decided June 20, 1983 – 462 U.S. 696

Justice O'CONNOR delivered the opinion of the Court.

This case presents the issue whether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics. Given the enforcement problems associated with the detection of narcotics trafficking and the minimal intrusion that a properly limited detention would entail, we conclude that the Fourth Amendment does not prohibit such a detention. On the facts of this case, however, we hold that the police conduct exceeded the bounds of a permissible investigative detention of the

luggage.

I

Respondent Raymond J. Place's behavior aroused the suspicions of law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to New York's LaGuardia Airport. As Place proceeded to the gate for his flight, the agents approached him and requested his airline ticket and some identification. Place complied with the request and consented to a search of the two suitcases he had checked. Because his flight was about to depart, however, the agents decided not to search the luggage.

Prompted by Place's parting remark that he had recognized that they were police, the agents inspected the address tags on the checked luggage and noted discrepancies in the two street addresses. Further investigation revealed that neither address existed and that the telephone number Place had given the airline belonged to a third address on the same street. On the basis of their encounter with Place and this information, the Miami agents called Drug Enforcement Administration (DEA) authorities in New York to relay their information about Place.

Two DEA agents waited for Place at the arrival gate at LaGuardia Airport in New York. There again, his behavior aroused the suspicion of the agents. After he had claimed his two bags and called a limousine, the agents decided to approach him. They identified themselves as federal narcotics agents, to which Place responded that he knew they were "cops" and had spotted them as soon as he had deplaned. One of the agents informed Place that, based on their own observations and information obtained from the Miami authorities, they believed that he might be carrying narcotics. After identifying the bags as belonging to him, Place stated that a number of police at the Miami Airport had surrounded him and searched his baggage. The agents responded that their information was to the contrary. The agents requested and received identification from Place—a New Jersey driver's license, on which the agents later ran a computer check that disclosed no offenses, and his airline ticket receipt. When Place refused to consent to a search of his luggage, one of the agents told him that they were going to take the luggage to a federal judge to try to obtain a search warrant and that Place was free to accompany them. Place declined, but obtained from one of the agents telephone numbers at which the agents could be reached.

The agents then took the bags to Kennedy Airport,[1] where they subjected the bags to a "sniff test" by a trained narcotics detection dog. The dog reacted positively to the smaller of the two bags but ambiguously to the larger bag. Approximately 90 minutes had elapsed since the seizure of respondent's luggage. Because it was late on a Friday afternoon, the agents retained the luggage until Monday morning, when they secured a search warrant from a magistrate for the smaller bag. Upon opening that bag, the agents discovered 1,125 grams of cocaine.

Place was indicted for possession of cocaine with intent to distribute. In the District Court, Place moved to suppress the contents of the luggage seized from him at LaGuardia Airport. The District Court denied the motion. Place pleaded guilty to the possession charge, reserving the right to appeal the denial of his motion to suppress. On appeal of the conviction, the United States Court of Appeals for the Second Circuit reversed. We granted certiorari and now affirm.

II

In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

In this case, the Government asks us to recognize the reasonableness under the Fourth Amendment of warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion. Specifically, we are asked to apply the principles of *Terry v. Ohio* to permit such seizures on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime. In our view, such application is appropriate.

The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general proscription against unreasonable searches and seizures." We must balance the nature and quality

of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.

We examine first the governmental interest offered as a justification for a brief seizure of luggage from the suspect's custody for the purpose of pursuing a limited course of investigation. The Government contends that, where the authorities possess specific and articulable facts warranting a reasonable belief that a traveler's luggage contains narcotics, the governmental interest in seizing the luggage briefly to pursue further investigation is substantial. We agree.

Against this strong governmental interest, we must weigh the nature and extent of the intrusion upon the individual's Fourth Amendment rights when the police briefly detain luggage for limited investigative purposes. On this point, respondent Place urges that the rationale for a *Terry* stop of the person is wholly inapplicable to investigative detentions of personality. Specifically, the *Terry* exception to the probable-cause requirement is premised on the notion that a *Terry*-type stop of the person is substantially less intrusive of a person's liberty interests than a formal arrest. In the property context, however, Place urges, there are no degrees of intrusion. Once the owner's property is seized, the dispossession is absolute.

We disagree. The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or, as here, from the immediate custody and control of the owner. Moreover, the police may confine their investigation to an on-the-spot inquiry—for example, immediate exposure of the luggage to a trained narcotics detection dog—or transport the property to another location. Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime.

In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

The purpose for which respondent's luggage was seized, of course, was to arrange its exposure to a narcotics detection dog. Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test—no matter how brief—could not be justified on less than probable cause.

[The Court then held that "exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment."]

III

We [next] examine whether the agents' conduct in this case was such as to place the seizure within the general rule requiring probable cause for a seizure or within *Terry*'s exception to that rule.

The precise type of detention we confront here is seizure of personal luggage from the immediate possession of the suspect for the purpose of arranging exposure to a narcotics detection dog. Particularly in the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary. The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of a custodial confinement or to the public indignity of being personally detained. Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return. Therefore, when the police seize luggage from the suspect's custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause. Under this standard, it is clear that the police conduct here exceeded the permissible limits of a *Terry*-type investigative stop.

The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. [I]n assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation. We note that here the New York agents knew the time of Place's scheduled arrival at LaGuardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests. Thus, although we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case.

Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. In short, we hold that the detention of respondent's luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics.

IV

We conclude that, under all of the circumstances of this case, the seizure of respondent's luggage was unreasonable under the Fourth Amendment. Consequently, the evidence obtained from the subsequent search of his luggage was inadmissible, and Place's conviction must be reversed. The judgment of the Court of Appeals, accordingly, is affirmed.

* * *

The next case sheds further light on the permissible scope of investigatory stops based on reasonable suspicion. In particular, it helps to illustrate how long a person may be detained for a "*Terry* stop."

Supreme Court of the United States

United States v. William Harris Sharpe

Decided March 20, 1985 – 470 U.S. 675

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether an individual reasonably suspected of engaging in criminal activity may be detained for a period of 20 minutes, when the detention is necessary for law enforcement officers to conduct a limited investigation of the suspected criminal activity.

I

A

On the morning of June 9, 1978, Agent Cooke of the Drug Enforcement Administration (DEA) was on patrol in an unmarked vehicle on a coastal road near Sunset Beach, North Carolina, an area under surveillance for suspected drug trafficking. At approximately 6:30 a.m., Cooke noticed a blue pickup truck with an attached camper shell traveling on the highway in tandem with a blue Pontiac Bonneville. Respondent Savage was driving the pickup, and respondent Sharpe was driving the Pontiac. The Pontiac also carried a passenger, Davis, the charges against whom were later dropped. Observing that the truck was riding low in the rear and that the camper did not bounce or sway appreciably when the truck drove over bumps or around curves, Agent Cooke concluded that it was heavily loaded. A quilted material covered the rear and side windows of the camper.

Cooke's suspicions were sufficiently aroused to follow the two vehicles for approximately 20 miles as they proceeded south into South Carolina. He then decided to make an "investigative stop" and radioed the State Highway Patrol for assistance. Officer Thrasher, driving a marked patrol car, responded to the call. Almost immediately after Thrasher caught up with the procession, the Pontiac and the pickup turned off the highway and onto a campground road. Cooke and Thrasher followed the two vehicles as the latter drove along the road at 55 to 60 miles an hour, exceeding the speed limit of 35 miles an hour. The road eventually looped back to the highway, onto which Savage and Sharpe turned and continued to drive south.

At this point, all four vehicles were in the middle lane of the three right-hand lanes of the highway. Agent Cooke asked Officer Thrasher to signal both vehicles to stop. Thrasher pulled alongside the Pontiac, which was in the lead, turned on his flashing light, and motioned for the driver of the Pontiac to stop. As Sharpe moved the Pontiac into the right lane, the pickup truck cut between the Pontiac and Thrasher's patrol car, nearly hitting the patrol car, and continued down the highway. Thrasher pursued the truck while Cooke pulled up behind the Pontiac.

Cooke approached the Pontiac and identified himself. He requested identification, and Sharpe produced a Georgia driver's license bearing the name of Raymond J. Pavlovich. Cooke then attempted to radio Thrasher to determine whether he had been successful in stopping the pickup truck, but he was unable to make contact for several minutes, apparently because Thrasher was

not in his patrol car. Cooke radioed the local police for assistance, and two officers from the Myrtle Beach Police Department arrived about 10 minutes later. Asking the two officers to "maintain the situation," Cooke left to join Thrasher.

In the meantime, Thrasher had stopped the pickup truck about one-half mile down the road. After stopping the truck, Thrasher had approached it with his revolver drawn, ordered the driver, Savage, to get out and assume a "spread eagled" position against the side of the truck, and patted him down. Thrasher then holstered his gun and asked Savage for his driver's license and the truck's vehicle registration. Savage produced his own Florida driver's license and a bill of sale for the truck bearing the name of Pavlovich. In response to questions from Thrasher concerning the ownership of the truck, Savage said that the truck belonged to a friend and that he was taking it to have its shock absorbers repaired. When Thrasher told Savage that he would be held until the arrival of Cooke, whom Thrasher identified as a DEA agent, Savage became nervous, said that he wanted to leave, and requested the return of his driver's license. Thrasher replied that Savage was not free to leave at that time.

Agent Cooke arrived at the scene approximately 15 minutes after the truck had been stopped. Thrasher handed Cooke Savage's license and the bill of sale for the truck; Cooke noted that the bill of sale bore the same name as Sharpe's license. Cooke identified himself to Savage as a DEA agent and said that he thought the truck was loaded with marihuana. Cooke twice sought permission to search the camper, but Savage declined to give it, explaining that he was not the owner of the truck. Cooke then stepped on the rear of the truck and, observing that it did not sink any lower, confirmed his suspicion that it was probably overloaded. He put his nose against the rear window, which was covered from the inside, and reported that he could smell marihuana. Without seeking Savage's permission, Cooke removed the keys from the ignition, opened the rear of the camper, and observed a large number of burlap-wrapped bales resembling bales of marihuana that Cooke had seen in previous investigations. Agent Cooke then placed Savage under arrest and left him with Thrasher.

Cooke returned to the Pontiac and arrested Sharpe and Davis. Approximately 30 to 40 minutes had elapsed between the time Cooke stopped the Pontiac and the time he returned to arrest Sharpe and Davis. Cooke assembled the various parties and vehicles and led them to the Myrtle Beach police station. That evening, DEA agents took the truck to the Federal Building in Charleston, South Carolina. Several days later, Cooke supervised the unloading of the truck, which contained 43 bales weighing a total of 2,629 pounds. Acting without a search warrant, Cooke had eight randomly selected bales opened and sampled. Chemical tests showed that the samples were marihuana.

B

Sharpe and Savage were charged with possession of a controlled substance with intent to distribute it. The United States District Court for the District of South Carolina denied respondents' motion to suppress the contraband, and respondents were convicted. A divided panel of the Court of Appeals for the Fourth Circuit reversed the convictions. We granted the petition, vacated the judgment of the Court of Appeals, and remanded the case for further consideration. On remand, a divided panel of the Court of Appeals again reversed the convictions. We granted certiorari and we reverse.

II

The only issue in this case [] is whether it was reasonable under the circumstances facing Agent Cooke and Officer Thrasher to detain Savage, whose vehicle contained the challenged evidence, for approximately 20 minutes.[2] We conclude that the detention of Savage clearly meets the Fourth Amendment's standard of reasonableness.

Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on *Terry* stops. While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.

In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable." The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or

to pursue it.

We readily conclude that, given the circumstances facing him, Agent Cooke pursued his investigation in a diligent and reasonable manner. During most of Savage's 20-minute detention, Cooke was attempting to contact Thrasher and enlisting the help of the local police who remained with Sharpe while Cooke left to pursue Officer Thrasher and the pickup. Once Cooke reached Officer Thrasher and Savage, he proceeded expeditiously: within the space of a few minutes, he examined Savage's driver's license and the truck's bill of sale, requested (and was denied) permission to search the truck, stepped on the rear bumper and noted that the truck did not move, confirming his suspicion that it was probably overloaded. He then detected the odor of marihuana.

Clearly this case does not involve any delay unnecessary to the legitimate investigation of the law enforcement officers. Respondents presented no evidence that the officers were dilatory in their investigation. The delay in this case was attributable almost entirely to the evasive actions of Savage, who sought to elude the police as Sharpe moved his Pontiac to the side of the road. Except for Savage's maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place. The somewhat longer detention was simply the result of a "graduate[d] ... respons[e] to the demands of [the] particular situation."

We reject the contention that a 20-minute stop is unreasonable when the police have acted diligently and a suspect's actions contribute to the added delay about which he complains. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Notes, Comments, and Questions

The Court decided in *Illinois v. Caballes* (Chapter 5) that when a motorist is lawfully held for a traffic stop, police use of drug-sniffing dogs to investigate a vehicle is not a "search." In *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), the Court considered whether police may lengthen a traffic stop for the purpose of conducting such a dog sniff.

A police officer pulled over Dennys Rodriguez for driving on the shoulder of a Nebraska state highway, which is unlawful. During the stop, the officer asked Rodriguez why he had driven on the shoulder and, after receiving an answer, "gathered Rodriguez's license, registration, and proof of insurance." He then ran "a records check on Rodriguez" before returning to question Rodriguez and his passenger. Next, the officer returned to his car again, ran a records check on the passenger, and "began writing a warning ticket for Rodriguez for driving on the shoulder of the road." Rodriguez made no objection to any of this conduct.

After writing the warning ticket and presenting it to Rodriguez (along with other documents the officer had collected during the stop), the officer asked Rodriguez for permission to walk a drug dog around Rodriguez's vehicle. Rodriguez declined, and the officer ordered Rodriguez to stay put, which he did. The officer brought the dog, and when the dog "alerted to the presence of drugs," the officer searched the car and found "a large bag of methamphetamine." Rodriguez was eventually convicted of "possession with intent to distribute 50 grams or more of methamphetamine."

Rodriguez argued that the officer impermissibly extended the traffic stop—after it was essentially finished—so that he could conduct the dog sniff. Rodriguez argued further that the extension constituted an unlawful seizure. The Court agreed.

In an opinion by Justice Ginsburg, the Court wrote:

"A seizure for a traffic violation justifies a police investigation of that violation. '[A] relatively brief encounter,' a routine traffic stop is 'more analogous to a so-called "*Terry* stop" ... than to a formal arrest.' Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.' Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."

The Court wrote that while activities related to traffic enforcement—such as checking a driver's license and registration—are permissible parts of a traffic stop, "[a] dog sniff, by contrast, is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.' Candidly, the Government acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission."

The Court rejected the prosecution's argument that so long as the total length of the stop remains reasonable, an officer may extend it to conduct a dog sniff.

"The Government argues that an officer may 'incremental[ly]' prolong a stop to conduct a dog sniff so long as the officer is

reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. The Government's argument, in effect, is that by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. The reasonableness of a seizure, however, depends on what the police in fact do. In this regard, the Government acknowledges that 'an officer always has to be reasonably diligent.' How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.' [A] traffic stop 'prolonged beyond' that point is 'unlawful.' The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket but whether conducting the sniff 'prolongs'—*i.e.,* adds time to—'the stop.'"

In his dissent, Justice Alito first argued that the Court should have avoided the constitutional question decided in the case because "the police officer *did have* reasonable suspicion [of illegal drug activity], and, as a result, the officer was justified in detaining the occupants for the short period of time (seven or eight minutes) that is at issue."[3] Then, he argued that the Court's holding was baseless and impractical, suggesting that officers will delay completing the permitted activities of a traffic stop if they wish to conduct dog sniffs.

"The Court refuses to address the real Fourth Amendment question: whether the stop was unreasonably prolonged. Instead, the Court latches onto the fact that Officer Struble delivered the warning prior to the dog sniff and proclaims that the authority to detain based on a traffic stop ends when a citation or warning is handed over to the driver. The Court thus holds that the Fourth Amendment was violated, not because of the length of the stop, but simply because of the sequence in which Officer Struble chose to perform his tasks."

"The rule that the Court adopts will do little good going forward. It is unlikely to have any appreciable effect on the length of future traffic stops. Most officers will learn the prescribed sequence of events even if they cannot fathom the reason for that requirement."

The next case concerns whether during a *Terry* stop, police may demand that a suspect identify himself, under threat of prosecution if the suspect does not comply.

Supreme Court of the United States

Larry D. Hiibel v. Sixth Judicial District Court of Nevada

Decided June 21, 2004 – 542 U.S. 177

Justice KENNEDY delivered the opinion of the Court.

The petitioner was arrested and convicted for refusing to identify himself during a stop allowed by *Terry v. Ohio*. He challenges his conviction under the Fourth and Fifth Amendments to the United States Constitution, applicable to the States through the Fourteenth Amendment.

I

The sheriff's department in Humboldt County, Nevada, received an afternoon telephone call reporting an assault. The caller reported seeing a man assault a woman in a red and silver GMC truck on Grass Valley Road. Deputy Sheriff Lee Dove was dispatched to investigate. When the officer arrived at the scene, he found the truck parked on the side of the road. A man was standing by the truck, and a young woman was sitting inside it. The officer observed skid marks in the gravel behind the vehicle, leading him to believe it had come to a sudden stop.

The officer approached the man and explained that he was investigating a report of a fight. The man appeared to be intoxicated. The officer asked him if he had "any identification on [him]," which we understand as a request to produce a driver's license or some other form of written identification. The man refused and asked why the officer wanted to see identification. The officer responded that he was conducting an investigation and needed to see some identification. The unidentified man became agitated and insisted he had done nothing wrong. The officer explained that he wanted to find out who the man was and what he was doing there. After continued refusals to comply with the officer's request for identification, the man began to taunt the officer by placing his hands behind his back and telling the officer to arrest him and take him to jail. This routine kept up for several minutes: The officer asked for identification 11 times and was refused each time. After warning the man that he would be arrested if he continued to refuse to comply, the officer placed him under arrest.

We now know that the man arrested on Grass Valley Road is Larry Dudley Hiibel. Hiibel was charged with "willfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office." The government reasoned that Hiibel had obstructed the officer in carrying out his duties under § 171.123, a Nevada statute that defines the legal rights and duties of a police officer in the context of an investigative stop. Section 171.123 provides in relevant part:

"1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

....

"3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer."

Hiibel was tried in the Justice Court of Union Township. The court agreed that Hiibel's refusal to identify himself as required by [Nevada Law] "obstructed and delayed Dove as a public officer in attempting to discharge his duty." Hiibel was convicted and fined $250. The Sixth Judicial District Court affirmed. On review the Supreme Court of Nevada rejected the Fourth Amendment challenge in a divided opinion. We granted certiorari.

II

NRS § 171.123(3) is an enactment sometimes referred to as a "stop and identify" statute. Stop and identify statutes often combine elements of traditional vagrancy laws with provisions intended to regulate police behavior in the course of investigatory stops. The statutes vary from State to State, but all permit an officer to ask or require a suspect to disclose his identity.

Stop and identify statutes have their roots in early English vagrancy laws that required suspected vagrants to face arrest unless they gave "a good Account of themselves." The Court has recognized [] constitutional limitations on the scope and operation of stop and identify statutes. In *Brown v. Texas*, [443 U.S. 47 (1979)] the Court invalidated a conviction for violating a Texas stop and identify statute on Fourth Amendment grounds. The Court ruled that the initial stop was not based on specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity. Four Terms later, the Court invalidated a modified stop and identify statute on vagueness grounds. Th[at] law [] required a suspect to give an officer "'credible and reliable'" identification when asked to identify himself. The Court held that the statute was void because it provided no standard for determining what a suspect must do to comply with it, resulting in "'virtually unrestrained power to arrest and charge persons with a violation.'"

The present case begins where our prior cases left off. Here there is no question that the initial stop was based on reasonable suspicion, satisfying the Fourth Amendment requirements noted in *Brown*. As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means—a choice, we assume, that the suspect may make—the statute is satisfied and no violation occurs.

III

Hiibel argues that his conviction cannot stand because the officer's conduct violated his Fourth Amendment rights. We disagree.

Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment. "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." Beginning with *Terry v. Ohio*, the Court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be "'justified at its inception, and ... reasonably related in scope to the circumstances which justified the interference in the first place.'"

Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops. Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault. Officers

called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.

Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer. [T]he Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government. As a result, the Fourth Amendment itself cannot require a suspect to answer questions. This case concerns a different issue, however. Here, the source of the legal obligation arises from Nevada state law, not the Fourth Amendment. Further, the statutory obligation does not go beyond answering an officer's request to disclose a name.

The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop. The reasonableness of a seizure under the Fourth Amendment is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." The Nevada statute satisfies that standard. The request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity. On the other hand, the Nevada statute does not alter the nature of the stop itself: it does not change its duration or its location. A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures.

It is clear in this case that the request for identification was "reasonably related in scope to the circumstances which justified" the stop. The officer's request was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. The stop, the request, and the State's requirement of a response did not contravene the guarantees of the Fourth Amendment.

The judgment of the Nevada Supreme Court is [a]ffirmed.

Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

[T]his Court's Fourth Amendment precedents make clear that police may conduct a *Terry* stop only within circumscribed limits. And one of those limits invalidates laws that compel responses to police questioning.

In *Terry v. Ohio*, the Court considered whether police, in the absence of probable cause, can stop, question, or frisk an individual at all. The Court recognized that the Fourth Amendment protects the "'right of every individual to the possession and control of his own person.'" At the same time, it recognized that in certain circumstances, public safety might require a limited "seizure," or stop, of an individual against his will. The Court consequently set forth conditions circumscribing when and how the police might conduct a *Terry* stop. They include what has become known as the "reasonable suspicion" standard. Justice White, in a separate concurring opinion, set forth further conditions. Justice White wrote: "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation."

About 10 years later, the Court, in *Brown v. Texas,* held that police lacked "any reasonable suspicion" to detain the particular petitioner and require him to identify himself. Then, five years later, the Court wrote that an "officer may ask the [*Terry*] detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.*" *Berkemer v. McCarty,* [468 U.S. 420 (1984)].

This lengthy history—of concurring opinions, of references, and of clear explicit statements—means that the Court's statement in *Berkemer,* while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than 20 years. There is no good reason now to reject this generation-old statement of the law.

The majority presents no evidence that the rule enunciated by Justice White and then by the *Berkemer* Court, which for nearly a generation has set forth a settled *Terry* stop condition, has significantly interfered with law enforcement. Nor has the majority presented any other convincing justification for change. I would not begin to erode a clear rule with special exceptions.

I consequently dissent.

Notes, Comments, and Questions

Perceptions of Stop-and-Frisk

In *Terry v. Ohio*, the majority wrote, "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." The Court held that the "reasonable suspicion" standard struck a sensible compromise between individual liberty and law enforcement realities.

In dissent, Justice Douglas warned, "To give the police greater power than a magistrate is to take a long step down the totalitarian path." He argued that "if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country."

In the subsequent half century, the debate over stop-and-frisk tactics has remained heated. Opponents of the practice have argued that it visits humiliation on suspects for limited benefit and that police apply the tactic in a racially biased manner. For example, a federal court in New York found that the NYPD unconstitutionally focused disproportionately on Black and Hispanic suspects when stopping and frisking New Yorkers. *See Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). The Court of Appeals for the Second Circuit initially stayed the ruling of the district court pending appeal, but the city dropped the appeal after the election of a mayor who campaigned on a promise to comply with the district court. *See* J. David Goodman, "De Blasio Drops Challenge to Law on Police Profiling," N.Y. Times (March 5, 2014).

The case in favor of stop-and-frisk was articulated by Heidi Grossman, New York City's lead attorney in the *Floyd* trial. She said, "Our defense is that we go to where the crime is. And once we go to where the crime is, we have our police officers keep their eyes open, make observations; and only when they make observations, do they go and make reasonable suspicion stops." She added that when police conduct stop-and-frisk in areas with high minority populations, "the majority of victims are black and Hispanics in the area. They are begging for help, and they want to be able to walk to and from work in a safe way. And so it is incumbent upon us to have our officers go out there and do their job, and keep the city safe." *See* "The Argument for Stop-and-Frisk," NPR (May 22, 2013).

For the perspective of some New Yorkers who have been repeatedly stopped and frisked and find the experience intensely unpleasant, *see* Julie Dressner & Edwin Martinez, Op-Doc: Season 1, "The Scars of Stop-and-Frisk," N.Y. Times (June 12, 2012); Ross Tuttle & Erin Schneider, "Stopped-and-Frisked: 'For Being a F**king Mutt,'" The Nation (Oct. 8, 2012) *(*secret recording by teen of himself being stopped, along with interview of anonymous police officer about department practices).

What are the best (most convincing) arguments in favor of allowing police to stop and frisk suspects without probable cause?

In our next chapter, we will study how the Court has defined "reasonable suspicion." A more demanding definition—vaguely close to probable cause—would narrow the set of situations in which police may "stop and frisk" suspects. A less strict definition—something beyond a mere hunch but not much further—would give greater discretion to police.

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2.20: Chapter 21 - Reasonable Suspicion

In this chapter we review the Court's efforts to define "reasonable suspicion," which is required for stops and frisks under *Terry v. Ohio*. Critics of stop and frisk practices complain that the Court has set too low a standard, thereby allowing law enforcement to stop pretty much anyone, particularly in neighborhoods with high crime rates. Advocates for stop and frisk counter that a stricter standard would undermine effective policework.

Supreme Court of the United States

United States v. Ralph Arvizu

Decided Jan. 15, 2002 – 534 U.S. 266

Chief Justice REHNQUIST delivered the opinion of the [unanimous] Court.

Respondent Ralph Arvizu was stopped by a border patrol agent while driving on an unpaved road in a remote area of southeastern Arizona. A search of his vehicle turned up more than 100 pounds of marijuana.

On an afternoon in January 1998, Agent Clinton Stoddard was working at a border patrol checkpoint along U.S. Highway 191 approximately 30 miles north of Douglas, Arizona. Douglas has a population of about 13,000 and is situated on the United States-Mexico border in the southeastern part of the State. Only two highways lead north from Douglas. Highway 191 leads north to Interstate 10, which passes through Tucson and Phoenix. State Highway 80 heads northeast through less populated areas toward New Mexico, skirting south and east of the portion of the Coronado National Forest that lies approximately 20 miles northeast of Douglas.

The checkpoint is located at the intersection of 191 and Rucker Canyon Road, an unpaved east-west road that connects 191 and the Coronado National Forest. When the checkpoint is operational, border patrol agents stop the traffic on 191 as part of a coordinated effort to stem the flow of illegal immigration and smuggling across the international border. Agents use roving patrols to apprehend smugglers trying to circumvent the checkpoint by taking the backroads, including those roads through the sparsely populated area between Douglas and the national forest. Magnetic sensors, or "intrusion devices," facilitate agents' efforts in patrolling these areas. Directionally sensitive, the sensors signal the passage of traffic that would be consistent with smuggling activities.

Sensors are located along the only other northbound road from Douglas besides Highways 191 and 80: Leslie Canyon Road. Leslie Canyon Road runs roughly parallel to 191, about halfway between 191 and the border of the Coronado National Forest, and ends when it intersects Rucker Canyon Road. It is unpaved beyond the 10-mile stretch leading out of Douglas and is very rarely traveled except for use by local ranchers and forest service personnel. Smugglers commonly try to avoid the 191 checkpoint by heading west on Rucker Canyon Road from Leslie Canyon Road and thence to Kuykendall Cutoff Road, a primitive dirt road that leads north approximately 12 miles east of 191. From there, they can gain access to Tucson and Phoenix.

Around 2:15 p.m., Stoddard received a report via Douglas radio that a Leslie Canyon Road sensor had been triggered. This was significant to Stoddard for two reasons. First, it suggested to him that a vehicle might be trying to circumvent the checkpoint. Second, the timing coincided with the point when agents begin heading back to the checkpoint for a shift change, which leaves the area unpatrolled.

Stoddard drove eastbound on Rucker Canyon Road to investigate. As he did so, he received another radio report of sensor activity. It indicated that the vehicle that had triggered the first sensor was heading westbound on Rucker Canyon Road. He saw the dust trail of an approaching vehicle about a half mile away. Stoddard had not seen any other vehicles and, based on the timing, believed that this was the one that had tripped the sensors. He pulled off to the side of the road at a slight slant so he could get a good look at the oncoming vehicle as it passed by.

It was a minivan, a type of automobile that Stoddard knew smugglers used. As it approached, it slowed dramatically, from about 50-55 to 25-30 miles per hour. He saw five occupants inside. An adult man was driving, an adult woman sat in the front passenger seat, and three children were in the back. The driver appeared stiff and his posture very rigid. He did not look at Stoddard and seemed to be trying to pretend that Stoddard was not there. Stoddard thought this suspicious because in his experience on patrol most persons look over and see what is going on, and in that area most drivers give border patrol agents a friendly wave. Stoddard

noticed that the knees of the two children sitting in the very back seat were unusually high, as if their feet were propped up on some cargo on the floor.

At that point, Stoddard decided to get a closer look, so he began to follow the vehicle as it continued westbound. Shortly thereafter, all of the children, though still facing forward, put their hands up at the same time and began to wave at Stoddard in an abnormal pattern. It looked to Stoddard as if the children were being instructed. Their odd waving continued on and off for about four to five minutes.

Several hundred feet before the Kuykendall Cutoff Road intersection, the driver signaled that he would turn. At one point, the driver turned the signal off, but just as he approached the intersection he put it back on and abruptly turned north onto Kuykendall. The turn was significant to Stoddard because it was made at the last place that would have allowed the minivan to avoid the checkpoint. Also, Kuykendall, though passable by a sedan or van, is rougher than either Rucker Canyon or Leslie Canyon Roads, and the normal traffic is four-wheel-drive vehicles. Stoddard did not recognize the minivan as part of the local traffic agents encounter on patrol, and he did not think it likely that the minivan was going to or coming from a picnic outing. He was not aware of any picnic grounds on Turkey Creek, which could be reached by following Kuykendall Cutoff all the way up. He knew of picnic grounds and a Boy Scout camp east of the intersection of Rucker Canyon and Leslie Canyon Roads, but the minivan had turned west at that intersection. And he had never seen anyone picnicking or sightseeing near where the first sensor went off.

Stoddard radioed for a registration check and learned that the minivan was registered to an address in Douglas that was four blocks north of the border in an area notorious for alien and narcotics smuggling. After receiving the information, Stoddard decided to make a vehicle stop. He approached the driver and learned that his name was Ralph Arvizu. Stoddard asked if respondent would mind if he looked inside and searched the vehicle. Respondent agreed, and Stoddard discovered marijuana in a black duffel bag under the feet of the two children in the back seat. Another bag containing marijuana was behind the rear seat. In all, the van contained 128.85 pounds of marijuana, worth an estimated $99,080.

Respondent was charged with possession with intent to distribute marijuana. He moved to suppress the marijuana, arguing among other things that Stoddard did not have reasonable suspicion to stop the vehicle as required by the Fourth Amendment. After holding a hearing where Stoddard and respondent testified, the District Court for the District of Arizona ruled otherwise. The Court of Appeals for the Ninth Circuit reversed. We granted certiorari to review the decision of the Court of Appeals.

The Fourth Amendment prohibits “unreasonable searches and seizures” by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. Because the “balance between the public interest and the individual’s right to personal security” tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer’s action is supported by reasonable suspicion to believe that criminal activity “‘may be afoot.’”

When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the “totality of the circumstances” of each case to see whether the detaining officer has a “particularized and objective basis” for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that “might well elude an untrained person.” Although an officer’s reliance on a mere “‘hunch’” is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. But we have deliberately avoided reducing it to “‘a neat set of legal rules.’” We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. [It] does not take into account the “totality of the circumstances,” as our cases have understood that phrase. The court appeared to believe that each observation by Stoddard that was by itself readily susceptible to an innocent explanation was entitled to “no weight.” *Terry,* however, precludes this sort of divide-and-conquer analysis.

[T]he Court of Appeals’ approach would seriously undercut the “totality of the circumstances” principle which governs the existence *vel non* of “reasonable suspicion.” Take, for example, the court’s positions that respondent’s deceleration could not be considered because “slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity” and that his failure to acknowledge Stoddard’s presence provided no support because there were “no ‘special circumstances’ rendering ‘innocent avoidance … improbable.’” We think it quite reasonable that a driver’s slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area’s inhabitants. To the extent that a totality of the circumstances approach may render appellate review less

circumscribed by precedent than otherwise, it is the nature of the totality rule.

Having considered the totality of the circumstances and given due weight to the factual inferences drawn by the law enforcement officer and District Court Judge, we hold that Stoddard had reasonable suspicion to believe that respondent was engaged in illegal activity. It was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a border patrol agent that respondent had set out from Douglas along a little-traveled route used by smugglers to avoid the 191 checkpoint. Stoddard's knowledge further supported a commonsense inference that respondent intended to pass through the area at a time when officers would be leaving their backroads patrols to change shifts. The likelihood that respondent and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas. Corroborating this inference was the fact that recreational areas farther to the north would have been easier to reach by taking 191, as opposed to the 40-to-50–mile trip on unpaved and primitive roads. The children's elevated knees suggested the existence of concealed cargo in the passenger compartment. Finally, Stoddard's assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes, were entitled to some weight.

A determination that reasonable suspicion exists [] need not rule out the possibility of innocent conduct. Undoubtedly, each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard's stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment.

The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

* * *

In *California v. Hodari D.* (Chapter 19), the majority speculated in a footnote whether "it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police," and the dissent retorted that innocent persons might flee police for a variety of reasons. Because the question was not before the Court, the Justices did not decide whether flight from police was sufficiently suspicious to justify—by itself—a *Terry* stop. In the next case, the Court considered the merits of the question.

Supreme Court of the United States

Illinois v. William aka Sam Wardlow

Decided Jan. 12, 2000 – 528 U.S. 119

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent Wardlow fled upon seeing police officers patrolling an area known for heavy narcotics trafficking. Two of the officers caught up with him, stopped him and conducted a protective patdown search for weapons. Discovering a .38-caliber handgun, the officers arrested Wardlow. We hold that the officers' stop did not violate the Fourth Amendment to the United States Constitution.

On September 9, 1995, Officers Nolan and Harvey were working as uniformed officers in the special operations section of the Chicago Police Department. The officers were driving the last car of a four car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions. The officers were traveling together because they expected to find a crowd of people in the area, including lookouts and customers.

As the caravan passed 4035 West Van Buren, Officer Nolan observed respondent Wardlow standing next to the building holding an opaque bag. Respondent looked in the direction of the officers and fled. Nolan and Harvey turned their car southbound, watched him as he ran through the gangway and an alley, and eventually cornered him on the street. Nolan then exited his car and stopped respondent. He immediately conducted a protective patdown search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions. During the frisk, Officer Nolan squeezed the bag respondent was carrying and felt a heavy, hard object similar to the shape of a gun. The officer then opened the bag and discovered a .38-caliber handgun with five live rounds of ammunition. The officers arrested Wardlow.

The Illinois trial court denied respondent's motion to suppress, finding the gun was recovered during a lawful stop and frisk. The Illinois Appellate Court reversed Wardlow's conviction, concluding that the gun should have been suppressed. The Illinois Supreme Court held that the stop and subsequent arrest violated the Fourth Amendment. We granted certiorari and now reverse.

This case, involving a brief encounter between a citizen and a police officer on a public street, is governed by the analysis we first applied in *Terry*. In *Terry,* we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.

Nolan and Harvey were among eight officers in a four-car caravan that was converging on an area known for heavy narcotics trafficking, and the officers anticipated encountering a large number of people in the area, including drug customers and individuals serving as lookouts. It was in this context that Officer Nolan decided to investigate Wardlow after observing him flee. An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a "high crime area" among the relevant contextual considerations in a *Terry* analysis.

In this case, moreover, it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. We conclude Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.

Such a holding is entirely consistent with our decision in *Florida v. Royer*, [460 U.S. 491 (1983)] where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Terry accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way. But in this case the officers found respondent in possession of a handgun, and arrested him for violation of an Illinois firearms statute. No question of the propriety of the arrest itself is before us.

The judgment of the Supreme Court of Illinois is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, concurring in part and dissenting in part.

[The dissent agreed with the majority that flight from police could sometimes create cause for suspicion and thereby "by itself, be sufficient to justify a temporary investigative stop of the kind authorized by *Terry*." It agreed too that the Court was correct in not "authorizing the temporary detention of anyone who flees at the mere sight of a police officer." In other words, sometimes flight alone justifies a *Terry* stop, and sometimes it does not. "Given the diversity and frequency of possible motivations for flight, it would be profoundly unwise to endorse either *per se* rule." The dissent differed from the majority in its discussion of why innocent persons might flee from officers:]

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.

[The dissent quoted from *Alberty v. United States*, 162 U.S. 499, 511 (1896), as follows:]

"[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves."

[The dissent then concluded "that in this case the brief testimony of the officer who seized respondent does not justify the conclusion that he had reasonable suspicion to make the stop." The dissent argued that the officer's testimony was vague and could not even demonstrate that Wardlow's "flight was related to his expectation of police focus on him."]

Notes, Comments, and Questions

The Court in *Wardlow* announced that "unprovoked flight" in a "high crime area"—particularly "an area of heavy narcotics trafficking"—justifies a *Terry* stop. It is not certain what other factors, when combined with flight, are sufficient to constitute reasonable suspicion. It seems likely, however, that once flight is part of the analysis, not much additional ground for suspicion is needed to give officers discretion to stop a suspect.

What guidance does the Court give on what a "high-crime area" is? What comes to your mind as you think of high-crime areas? Would official statistics (for example, records of arrests organized by neighborhood) provide an accurate picture of which neighborhoods have the most crime? How do race and poverty play into our notions of high crime areas? Is a fraternity house (or a neighborhood of such houses, nicknamed "Greektown") a high-crime area? Why or why not?

Consider a college student fleeing a police officer who arrives at a fraternity party in response to a noise complaint. May the officer chase the student down and conduct a *Terry* stop? Why or why not?

Now imagine that same college student is walking in a high-poverty, primarily minority neighborhood in the middle of an afternoon. He sees two police officers walking toward him, and he runs in the other direction. Does this conduct justify *Terry* stop? Why or why not?

As students have likely already noticed, a great deal of Fourth Amendment cases result from enforcement of laws banning the possession, manufacture, and sale of certain drugs. Because police spend substantial time on drug enforcement, officers have come to recognize common characteristics and behaviors of persons involved in the drug trade. The next case concerns the relevance of such observations to a finding of reasonable suspicion.

Supreme Court of the United States

United States v. Andrew Sokolow

Decided April 3, 1989 – 490 U.S. 1

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent Andrew Sokolow was stopped by Drug Enforcement Administration (DEA) agents upon his arrival at Honolulu International Airport. The agents found 1,063 grams of cocaine in his carry-on luggage. When respondent was stopped, the agents knew, *inter alia,* that (1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage. A divided panel of the United States Court of Appeals for the Ninth Circuit held that the DEA agents did not have a reasonable suspicion to stop respondent, as required by the Fourth Amendment. We take the contrary view.

This case involves a typical attempt to smuggle drugs through one of the Nation's airports. On a Sunday in July 1984, respondent went to the United Airlines ticket counter at Honolulu Airport, where he purchased two round-trip tickets for a flight to Miami leaving later that day. The tickets were purchased in the names of "Andrew Kray" and "Janet Norian" and had open return dates. Respondent paid $2,100 for the tickets from a large roll of $20 bills, which appeared to contain a total of $4,000. He also gave

the ticket agent his home telephone number. The ticket agent noticed that respondent seemed nervous; he was about 25 years old; he was dressed in a black jumpsuit and wore gold jewelry; and he was accompanied by a woman, who turned out to be Janet Norian. Neither respondent nor his companion checked any of their four pieces of luggage.

After the couple left for their flight, the ticket agent informed Officer John McCarthy of the Honolulu Police Department of respondent's cash purchase of tickets to Miami. Officer McCarthy determined that the telephone number respondent gave to the ticket agent was subscribed to a "Karl Herman," who resided at 348-A Royal Hawaiian Avenue in Honolulu. Unbeknownst to McCarthy (and later to the DEA agents), respondent was Herman's roommate. The ticket agent identified respondent's voice on the answering machine at Herman's number. Officer McCarthy was unable to find any listing under the name "Andrew Kray" in Hawaii. McCarthy subsequently learned that return reservations from Miami to Honolulu had been made in the names of Kray and Norian, with their arrival scheduled for July 25, three days after respondent and his companion had left. He also learned that Kray and Norian were scheduled to make stopovers in Denver and Los Angeles.

On July 25, during the stopover in Los Angeles, DEA agents identified respondent. He "appeared to be very nervous and was looking all around the waiting area." Later that day, at 6:30 p.m., respondent and Norian arrived in Honolulu. As before, they had not checked their luggage. Respondent was still wearing a black jumpsuit and gold jewelry. The couple proceeded directly to the street and tried to hail a cab, where Agent Richard Kempshall and three other DEA agents approached them. Kempshall displayed his credentials, grabbed respondent by the arm, and moved him back onto the sidewalk. Kempshall asked respondent for his airline ticket and identification; respondent said that he had neither. He told the agents that his name was "Sokolow," but that he was traveling under his mother's maiden name, "Kray."

Respondent and Norian were escorted to the DEA office at the airport. There, the couple's luggage was examined by "Donker," a narcotics detector dog, which alerted on respondent's brown shoulder bag. The agents arrested respondent. He was advised of his constitutional rights and declined to make any statements. The agents obtained a warrant to search the shoulder bag. They found no illicit drugs, but the bag did contain several suspicious documents indicating respondent's involvement in drug trafficking. The agents had Donker reexamine the remaining luggage, and this time the dog alerted on a medium-sized Louis Vuitton bag. By now, it was 9:30 p.m., too late for the agents to obtain a second warrant. They allowed respondent to leave for the night, but kept his luggage. The next morning, after a second dog confirmed Donker's alert, the agents obtained a warrant and found 1,063 grams of cocaine inside the bag.

Respondent was indicted for possession with the intent to distribute cocaine. The United States District Court for Hawaii denied his motion to suppress the cocaine and other evidence seized from his luggage. Respondent then entered a conditional plea of guilty to the offense charged.

The United States Court of Appeals for the Ninth Circuit reversed respondent's conviction by a divided vote. We granted certiorari to review the decision of the Court of Appeals. We now reverse.

The Court of Appeals held that the DEA agents seized respondent when they grabbed him by the arm and moved him back onto the sidewalk. The Government does not challenge that conclusion, and we assume—without deciding—that a stop occurred here. Our decision, then, turns on whether the agents had a reasonable suspicion that respondent was engaged in wrongdoing when they encountered him on the sidewalk.

The concept of reasonable suspicion, like probable cause, is not "readily, or even usefully, reduced to a neat set of legal rules." We think the Court of Appeals' effort to refine and elaborate the requirements of "reasonable suspicion" in this case creates unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment. In evaluating the validity of a stop such as this, we must consider "the totality of the circumstances—the whole picture."

The rule enunciated by the Court of Appeals, in which evidence available to an officer is divided into evidence of "ongoing criminal behavior," on the one hand, and "probabilistic" evidence, on the other, is not in keeping with the [] statements from our decisions. It also seems to us to draw a sharp line between types of evidence, the probative value of which varies only in degree. The Court of Appeals classified evidence of traveling under an alias, or evidence that the suspect took an evasive or erratic path through an airport, as meeting the test for showing "ongoing criminal activity." But certainly instances are conceivable in which traveling under an alias would not reflect ongoing criminal activity: for example, a person who wished to travel to a hospital or clinic for an operation and wished to conceal that fact. One taking an evasive path through an airport might be seeking to avoid a confrontation with an angry acquaintance or with a creditor. This is not to say that each of these types of evidence is not highly probative, but they do not have the sort of ironclad significance attributed to them by the Court of Appeals.

On the other hand, the factors in this case that the Court of Appeals treated as merely "probabilistic" also have probative significance. Paying $2,100 in cash for two airplane tickets is out of the ordinary, and it is even more out of the ordinary to pay

that sum from a roll of $20 bills containing nearly twice that amount of cash. Most business travelers, we feel confident, purchase airline tickets by credit card or check so as to have a record for tax or business purposes, and few vacationers carry with them thousands of dollars in $20 bills. We also think the agents had a reasonable ground to believe that respondent was traveling under an alias; the evidence was by no means conclusive, but it was sufficient to warrant consideration. While a trip from Honolulu to Miami, standing alone, is not a cause for any sort of suspicion, here there was more: surely few residents of Honolulu travel from that city for 20 hours to spend 48 hours in Miami during the month of July. Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.

We do not agree with respondent that our analysis is somehow changed by the agents' belief that his behavior was consistent with one of the DEA's "drug courier profiles." A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent.

We hold that the agents had a reasonable basis to suspect that respondent was transporting illegal drugs on these facts. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with our decision.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

Because the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and the guilty alike. In the present case, the chain of events set in motion when respondent Andrew Sokolow was stopped by Drug Enforcement Administration (DEA) agents at Honolulu International Airport led to the discovery of cocaine and, ultimately, to Sokolow's conviction for drug trafficking. But in sustaining this conviction on the ground that the agents reasonably suspected Sokolow of ongoing criminal activity, the Court diminishes the rights of *all* citizens "to be secure in their persons," as they traverse the Nation's airports. Finding this result constitutionally impermissible, I dissent.

The Fourth Amendment cabins government's authority to intrude on personal privacy and security by requiring that searches and seizures usually be supported by a showing of probable cause. The reasonable-suspicion standard is a derivation of the probable-cause command, applicable only to those brief detentions which fall short of being full-scale searches and seizures and which are necessitated by law enforcement exigencies such as the need to stop ongoing crimes, to prevent imminent crimes, and to protect law enforcement officers in highly charged situations. By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to "overbearing or harassing" police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race.

To deter such egregious police behavior, we have held that a suspicion is not reasonable unless officers have based it on "specific and articulable facts." It is not enough to suspect that an individual has committed crimes in the past, harbors unconsummated criminal designs, or has the propensity to commit crimes. On the contrary, before detaining an individual, law enforcement officers must reasonably suspect that he is engaged in, or poised to commit, a criminal act *at that moment*.

In my view, a law enforcement officer's mechanistic application of a formula of personal and behavioral traits in deciding whom to detain can only dull the officer's ability and determination to make sensitive and fact-specific inferences "in light of his experience." Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's "chameleon-like way of adapting to any particular set of observations." In asserting that it is not "somehow" relevant that the agents who stopped Sokolow did so in reliance on a prefabricated profile of criminal characteristics, the majority thus ducks serious issues relating to a questionable law enforcement practice, to address the validity of which we granted certiorari in this case.

* * *

Reasonable Suspicion Based on Tips

Police rely on information volunteered by persons outside of law enforcement to conduct investigations. Witnesses to crimes, suspects themselves, and others willing to provide relevant information to help officers do their work. The Court has decided a handful of cases concerning how much a "tip" from an informant contributes to a finding of reasonable suspicion.

Supreme Court of the United States

Alabama v. Vanessa Rose White

Decided June 11, 1990 – 496 U.S. 325

Justice WHITE delivered the opinion of the Court.

Based on an anonymous telephone tip, police stopped respondent's vehicle. A consensual search of the car revealed drugs. The issue is whether the tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. We hold that it did.

On April 22, 1987, at approximately 3 p.m., Corporal B.H. Davis of the Montgomery Police Department received a telephone call from an anonymous person, stating that Vanessa White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine inside a brown attaché case. Corporal Davis and his partner, Corporal P. A. Reynolds, proceeded to the Lynwood Terrace Apartments. The officers saw a brown Plymouth station wagon with a broken right taillight in the parking lot in front of the 235 building. The officers observed respondent leave the 235 building, carrying nothing in her hands, and enter the station wagon. They followed the vehicle as it drove the most direct route to Dobey's Motel. When the vehicle reached the Mobile Highway, on which Dobey's Motel is located, Corporal Reynolds requested a patrol unit to stop the vehicle. The vehicle was stopped at approximately 4:18 p.m., just short of Dobey's Motel. Corporal Davis asked respondent to step to the rear of her car, where he informed her that she had been stopped because she was suspected of carrying cocaine in the vehicle. He asked if they could look for cocaine, and respondent said they could look. The officers found a locked brown attaché case in the car, and, upon request, respondent provided the combination to the lock. The officers found marijuana in the attaché case and placed respondent under arrest. During processing at the station, the officers found three milligrams of cocaine in respondent's purse.

Respondent was charged in Montgomery County Court with possession of marijuana and possession of cocaine. The trial court denied respondent's motion to suppress, and she pleaded guilty to the charges, reserving the right to appeal the denial of her suppression motion. The Court of Criminal Appeals of Alabama concluded that respondent's motion to dismiss should have been granted and reversed her conviction. The Supreme Court of Alabama denied the State's petition for writ of certiorari. [W]e granted the State's petition for certiorari. We now reverse.

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture" that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. The [*Illinois v.*] *Gates* Court applied its totality-of-the-circumstances approach in this manner, taking into account the facts known to the officers from personal observation, and giving the anonymous tip the weight it deserved in light of its indicia of reliability as established through independent police work. The same approach applies in the reasonable-suspicion context, the only difference being the level of suspicion that must be established. Contrary to the court below, we conclude that when the officers stopped respondent, the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity and that the investigative stop therefore did not violate the Fourth Amendment.

It is true that not every detail mentioned by the tipster was verified, such as the name of the woman leaving the building or the precise apartment from which she left; but the officers did corroborate that a woman left the 235 building and got into the particular vehicle that was described by the caller. With respect to the time of departure predicted by the informant, Corporal Davis testified that the caller gave a particular time when the woman would be leaving, but he did not state what that time was. He did testify that, after the call, he and his partner proceeded to the Lynwood Terrace Apartments to put the 235 building under surveillance. Given the fact that the officers proceeded to the indicated address immediately after the call and that respondent emerged not too long thereafter, it appears from the record before us that respondent's departure from the building was within the timeframe predicted by the caller. As for the caller's prediction of respondent's destination, it is true that the officers stopped her just short of Dobey's Motel and did not know whether she would have pulled in or continued past it. But given that the 4-mile route driven by respondent was the most direct route possible to Dobey's Motel but nevertheless involved several turns, we think respondent's destination was significantly corroborated.

The Court's opinion in *Gates* gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity.

Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller.

We think it also important that, as in *Gates,* "the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." The fact that the officers found a car precisely matching the caller's description in front of the 235 building is an example of the former. Anyone could have "predicted" that fact because it was a condition presumably existing at the time of the call. What was important was the caller's ability to predict respondent's *future behavior,* because it demonstrated inside information—a special familiarity with respondent's affairs. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Although it is a close case, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car. We therefore reverse the judgment of the Court of Criminal Appeals of Alabama and remand the case for further proceedings not inconsistent with this opinion.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

Millions of people leave their apartments at about the same time every day carrying an attaché case and heading for a destination known to their neighbors. Usually, however, the neighbors do not know what the briefcase contains. An anonymous neighbor's prediction about somebody's time of departure and probable destination is anything but a reliable basis for assuming that the commuter is in possession of an illegal substance—particularly when the person is not even carrying the attaché case described by the tipster.

The record in this case does not tell us how often respondent drove from the Lynwood Terrace Apartments to Dobey's Motel; for all we know, she may have been a room clerk or telephone operator working the evening shift. It does not tell us whether Officer Davis made any effort to ascertain the informer's identity, his reason for calling, or the basis of his prediction about respondent's destination. Indeed, for all that this record tells us, the tipster may well have been another police officer who had a "hunch" that respondent might have cocaine in her attaché case.

Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip about her like the one predicting Vanessa White's excursion. In addition, under the Court's holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed. Fortunately, the vast majority of those in our law enforcement community would not adopt such a practice. But the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection.

I respectfully dissent.

* * *

The stop in *White* was made upon reasonable suspicion; then the suspect consented to the automobile search. Without consent, could the officer search the car? Why or why not?

In the next case, the Court distinguished *Alabama v. White* and found that the information provided by a tipster did not justify a *Terry* stop.

Supreme Court of the United States

Florida v. J.L.

Decided March 28, 2000 – 529 U.S. 266

Justice GINSBURG delivered the opinion of the [unanimous] Court.

The question presented in this case is whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer's stop and frisk of that person. We hold that it is not.

I

On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip—the record does not say how long—two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]." One of the three, respondent J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket. The second officer frisked the other two individuals, against whom no allegations had been made, and found nothing.

J.L., who was at the time of the frisk "10 days shy of his 16th birth[day]," was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. He moved to suppress the gun as the fruit of an unlawful search, and the trial court granted his motion. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment. We granted certiorari and now affirm the judgment of the Florida Supreme Court.

II

Our "stop and frisk" decisions begin with *Terry v. Ohio*. In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." The question we here confront is whether the tip pointing to J.L. had those indicia of reliability.

The tip in the instant case lacked the moderate indicia of reliability present in [*Alabama v.*] *White* and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.

Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. The United States as *amicus curiae* makes a similar argument, proposing that a stop and frisk should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip...." These contentions misapprehend the reliability needed for a tip to justify a *Terry* stop.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

A second major argument advanced by Florida and the United States as *amicus* is, in essence, that the standard *Terry* analysis should be modified to license a "firearm exception." Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry*'s rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. But an

automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms. If police officers may properly conduct *Terry* frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain [] that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in *Adams [v. Williams,* 407 U.S.143 (1972),] and *White,* the Fourth Amendment is not so easily satisfied.

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and schools, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.

Finally, the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with *Terry,* to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue. In that context, we hold that an anonymous tip lacking indicia of reliability of the kind contemplated in *Adams* and *White* does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.

The judgment of the Florida Supreme Court is affirmed.

* * *

Look closely at the tips in *White* and *J.L.* Is there a good basis for distinguishing the two? Would you be able to predict when an officer should (and should not) form reasonable suspicion from a tip?

In 2014, the Court applied *White* and *J.L.* to a tip concerning a dangerous driver on a California highway. As the caustic dissent indicates, the Court's decision in *Navarette v. California* has been widely read as lowering the amount of evidence necessary to support a finding of reasonable suspicion.

Supreme Court of the United States

Lorenzo Prado Navarette v. California

Decided April 22, 2014 – 572 U.S. 393

Justice THOMAS delivered the opinion of the Court.

After a 911 caller reported that a vehicle had run her off the road, a police officer located the vehicle she identified during the call and executed a traffic stop. We hold that the stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated.

I

On August 23, 2008, a Mendocino County 911 dispatch team for the California Highway Patrol (CHP) received a call from another CHP dispatcher in neighboring Humboldt County. The Humboldt County dispatcher relayed a tip from a 911 caller, which the Mendocino County team recorded as follows: "'Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.'" The Mendocino County team then broadcast that information to CHP officers at 3:47 p.m.

A CHP officer heading northbound toward the reported vehicle responded to the broadcast. At 4:00 p.m., the officer passed the truck near mile marker 69. At about 4:05 p.m., after making a U-turn, he pulled the truck over. A second officer, who had separately responded to the broadcast, also arrived on the scene. As the two officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The officers arrested the driver, petitioner Lorenzo Prado Navarette, and the passenger, petitioner José Prado Navarette.

Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. Both the magistrate who presided over the suppression hearing and the Superior Court disagreed. Petitioners pleaded guilty to transporting marijuana and were sentenced to 90 days in jail plus three years of probation.

The California Court of Appeal affirmed. The California Supreme Court denied review. We granted certiorari and now affirm.

II

The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability." The standard takes into account "the totality of the circumstances—the whole picture." Although a mere "'hunch'" does not create reasonable suspicion, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause.

These principles apply with full force to investigative stops based on information from anonymous tips. We have firmly rejected the argument "that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person." Of course, "an anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity." That is because "ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations," and an anonymous tipster's veracity is "'by hypothesis largely unknown, and unknowable.'" But under appropriate circumstances, an anonymous tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop."

The initial question in this case is whether the 911 call was sufficiently reliable to credit the allegation that petitioners' truck "ran the [caller] off the roadway." Even assuming for present purposes that the 911 call was anonymous, we conclude that the call bore adequate indicia of reliability for the officer to credit the caller's account. The officer was therefore justified in proceeding from the premise that the truck had, in fact, caused the caller's car to be dangerously diverted from the highway.

By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability. A driver's claim that another vehicle ran her off the road [] necessarily implies that the informant knows the other car was driven dangerously.

There is also reason to think that the 911 caller in this case was telling the truth. Police confirmed the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call). That timeline of events suggests that the caller reported the incident soon after she was run off the road. That sort of contemporaneous report has long been treated as especially reliable.

Another indicator of veracity is the caller's use of the 911 emergency system. A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity. As this case illustrates, 911 calls can be recorded, which provides victims with an opportunity to identify the false tipster's voice and subject him to prosecution. The 911 system also permits law enforcement to verify important information about the caller. None of this is to suggest that tips in 911 calls are *per se* reliable. Given the foregoing technological and regulatory developments, however, a reasonable officer could conclude that a false tipster would think twice before using such a system. The caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call.

Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that "criminal activity may be afoot." We must therefore determine whether the 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness. We conclude that the behavior alleged by the 911 caller, "viewed from the standpoint of an objectively reasonable police officer, amount[s] to reasonable suspicion" of drunk driving. The stop was therefore proper.

Reasonable suspicion depends on "'"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."'" Under that commonsense approach, we can appropriately recognize certain driving behaviors as sound indicia of drunk driving. Indeed, the accumulated experience of thousands of officers suggests that these sorts of erratic behaviors are strongly correlated with drunk driving. Of course, not all traffic infractions imply intoxication. Unconfirmed reports of driving without a seatbelt or slightly over the speed limit, for example, are so tenuously connected to drunk driving that a stop

on those grounds alone would be constitutionally suspect. But a reliable tip alleging the dangerous behaviors discussed above generally would justify a traffic stop on suspicion of drunk driving.

The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues. And the experience of many officers suggests that a driver who almost strikes a vehicle or another object—the exact scenario that ordinarily causes "running [another vehicle] off the roadway"—is likely intoxicated. As a result, we cannot say that the officer acted unreasonably under these circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving.

III

Like *White,* this is a "close case." As in that case, the indicia of the 911 caller's reliability here are stronger than those in *J. L.*, where we held that a bare-bones tip was unreliable. Although the indicia present here are different from those we found sufficient in *White,* there is more than one way to demonstrate "a particularized and objective basis for suspecting the particular person stopped of criminal activity." Under the totality of the circumstances, we find the indicia of reliability in this case sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road. That made it reasonable under the circumstances for the officer to execute a traffic stop. We accordingly affirm.

Justice SCALIA, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures. I would reverse the judgment of the Court of Appeal of California.

The California Highway Patrol in this case knew nothing about the tipster on whose word—and that alone—they seized Lorenzo and José Prado Navarette. They did not know her name. They did not know her phone number or address. They did not even know where she called from (she may have dialed in from a neighboring county).

The Court says that "[b]y reporting that she had been run off the road by a specific vehicle ... the caller necessarily claimed eyewitness knowledge." So what? The issue is not how she claimed to know, but whether what she claimed to know was true. The claim to "eyewitness knowledge" of being run off the road supports *not at all* its veracity; nor does the amazing, mystifying prediction (so far short of what existed in *White*) that the petitioners' truck *would be heading south on Highway 1*.

All that has been said up to now assumes that the anonymous caller made, at least in effect, an accusation of drunken driving. But in fact she did not. She said that the petitioners' truck "'[r]an [me] off the roadway.'" That neither asserts that the driver was drunk nor even raises the *likelihood* that the driver was drunk. The most it conveys is that the truck did some apparently nontypical thing that forced the tipster off the roadway, whether partly or fully, temporarily or permanently. Who really knows what (if anything) happened? The truck might have swerved to avoid an animal, a pothole, or a jaywalking pedestrian.

But let us assume the worst of the many possibilities: that it was a careless, reckless, or even intentional maneuver that forced the tipster off the road. Lorenzo might have been distracted by his use of a hands-free cell phone or distracted by an intense sports argument with Jose. Or, indeed, he might have intentionally forced the tipster off the road because of some personal animus, or hostility to her "Make Love, Not War" bumper sticker. I fail to see how reasonable suspicion of a *discrete instance* of irregular or hazardous driving generates a reasonable suspicion of *ongoing intoxicated driving*. What proportion of the hundreds of thousands—perhaps millions—of careless, reckless, or intentional traffic violations committed each day is attributable to drunken drivers? I say 0.1 percent. I have no basis for that except my own guesswork. But unless the Court has some basis in reality to believe that the proportion is many orders of magnitude above that—say 1 in 10 or at least 1 in 20—it has no grounds for its unsupported assertion that the tipster's report in this case gave rise to a *reasonable suspicion* of drunken driving.

Bear in mind that that is the only basis for the stop that has been asserted in this litigation. The stop required suspicion of an ongoing crime, not merely suspicion of having run someone off the road earlier. And driving while being a careless or reckless person, unlike driving while being a drunk person, is not an ongoing crime. In other words, in order to stop the petitioners the officers here not only had to assume without basis the accuracy of the anonymous accusation but also had to posit an unlikely reason (drunkenness) for the accused behavior.

In sum, at the moment the police spotted the truck, it was more than merely "*possib[le]*" that the petitioners were not committing an ongoing traffic crime. It was overwhelmingly likely that they were not.

It gets worse. Not only, it turns out, did the police have no good reason *at first* to believe that Lorenzo was driving drunk, they had very good reason *at last* to know that he was not. The Court concludes that the tip, plus confirmation of the truck's location, produced reasonable suspicion that the truck not only had been *but still was* barreling dangerously and drunkenly down Highway 1. In fact, alas, it was not, and the officers knew it. They followed the truck for five minutes, presumably to see if it was being operated recklessly. And *that* was good police work. While the anonymous tip was not enough to support a stop for drunken driving, it was surely enough to counsel observation of the truck to see if it was driven by a drunken driver. But the pesky little detail left out of the Court's reasonable-suspicion equation is that, for the five minutes that the truck was being followed (five minutes is a *long* time), Lorenzo's driving was irreproachable. Had the officers witnessed the petitioners violate a single traffic law, they would have had cause to stop the truck, and this case would not be before us. And not only was the driving *irreproachable,* but the State offers no evidence to suggest that the petitioners even did anything *suspicious,* such as suddenly slowing down, pulling off to the side of the road, or turning somewhere to see whether they were being followed. Consequently, the tip's suggestion of ongoing drunken driving (if it could be deemed to suggest that) not only went uncorroborated; it was affirmatively undermined.

A hypothetical variation on the facts of this case illustrates the point. Suppose an anonymous tipster reports that, while following near mile marker 88 a silver Ford F-150, license plate 8D949925, traveling southbound on Highway 1, she saw in the truck's open cab several five-foot-tall stacks of what was unmistakably baled cannabis. Two minutes later, a highway patrolman spots the truck exactly where the tip suggested it would be, begins following it, but sees nothing in the truck's cab. It is not enough to say that the officer's observation merely failed to corroborate the tipster's accusation. It is more precise to say that the officer's observation *discredited* the informant's accusation: The crime was supposedly occurring (and would continue to occur) in plain view, but the police saw nothing. Similarly, here, the crime supposedly suggested by the tip was ongoing intoxicated driving, the hallmarks of which are many, readily identifiable, and difficult to conceal. That the officers witnessed nary a minor traffic violation nor any other "sound indici[um] of drunk driving," strongly suggests that the suspected crime was *not* occurring after all. The tip's implication of continuing criminality, already weak, grew even weaker.

Resisting this line of reasoning, the Court curiously asserts that, since drunk drivers who see marked squad cars in their rearview mirrors may evade detection simply by driving "more careful[ly]," the "absence of additional suspicious conduct" is "hardly surprising" and thus largely irrelevant. Whether a drunk driver drives drunkenly, the Court seems to think, is up to him. That is not how I understand the influence of alcohol. I subscribe to the more traditional view that the dangers of intoxicated driving are the intoxicant's impairing effects on the body—effects that no mere act of the will can resist. Consistent with this view, I take it as a fundamental premise of our intoxicated-driving laws that a driver soused enough to swerve once can be expected to swerve again—and soon. If he does not, and if the only evidence of his first episode of irregular driving is a mere inference from an uncorroborated, vague, and nameless tip, then the Fourth Amendment requires that he be left alone.

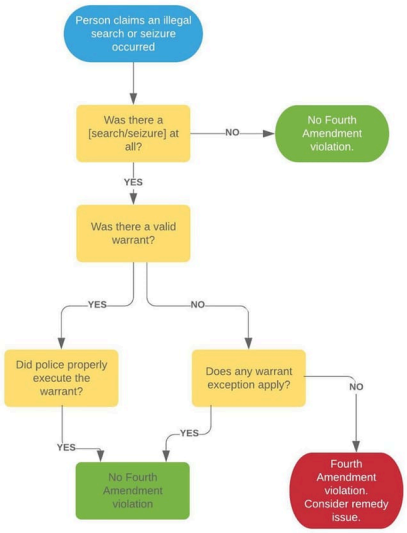
The Court's opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness. All the malevolent 911 caller need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police. If the driver turns out not to be drunk (which will almost always be the case), the caller need fear no consequences, even if 911 knows his identity. After all, he never alleged drunkenness, but merely called in a traffic violation—and on that point his word is as good as his victim's.

Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference. To prevent and detect murder we do not allow searches without probable cause or targeted *Terry* stops without reasonable suspicion. We should not do so for drunken driving either. After today's opinion all of us on the road, and not just drug dealers, are at risk of having our freedom of movement curtailed on suspicion of drunkenness, based upon a phone tip, true or false, of a single instance of careless driving. I respectfully dissent.

* * *

This concludes our review of the substantive search and seizure law that the Court has based upon the Fourth Amendment. We turn next to interrogations.

Fourth Amendment Flowchart Exercise



Flowcharts can help students visualize what they have learned. The goal is not to memorize the example chart presented here but instead to create a new chart that helps one to connect material from throughout the book. Your authors recommend that when students make their own charts, they add additional detail, such as case names or chapter numbers. For example, in the box asking whether there was a "search" or "seizure" at all, students might add information related to dog sniffs, aerial surveillance, the open fields doctrine, thermal imaging, garbage collection, and other items included in the early chapters of this book.

In the box asking if there was a valid warrant, students might add information related to the particularity requirement, as well as other sources of challenges to validity.

This chart focuses on the Fourth Amendment. Later in the book, a different sample chart focuses on the *Miranda* Rule.

These charts have two primary purposes. One is that when the charts are finished, they can serve as study aids. The other is that the creation of the charts—even if students never review them after finishing them—forces students to consider material more carefully than they otherwise might, which helps with learning and with retention of information. Also, fellow students can help spot misunderstandings that, were they not in a chart, would remain uncorrected. Study group members might wish to bring charts to share with classmates.

Note that the "Fourth Amendment violation" box asks students to consider what remedy might be available to the person whose rights were violated. A separate chart devoted to remedies (such as the exclusionary rule) would be worth creating after students cover that material.

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3: INTERROGATIONS

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3.1: Chapter 22 - Due Process and the Voluntariness Requirement

INTERROGATIONS

Chapter 22

Due Process and the Voluntariness Requirement

In this chapter we begin our study of how the Court has used the Constitution to regulate interrogations. Over the next several chapters, we will review three main lines of cases: (1) those decided under the Due Process Clauses of the Fourteenth Amendment and the Fifth Amendment, which the Court has used to require that only "voluntary" confessions be admitted as evidence, (2) those decided under the Self-Incrimination Clause of the Fifth Amendment, which the Court has used as the basis for the *Miranda* Rule, and (3) those decided under the Assistance of Counsel Clause of the Sixth Amendment, which the Court has used to prohibit certain questioning of defendants for whom the right to counsel has "attached."

We begin with cases enforcing the voluntariness requirement under the Due Process Clauses. Our first case, *Brown v. Mississippi*, appeared in the reading for our first chapter and students may wish to quickly reread the facts of the case if they do not remember them. In that chapter, *Brown* was presented to provide background on why the Supreme Court might feel the need to supervise the criminal justice systems of the states. Now, we consider it again to learn the substantive law governing interrogations.

Supreme Court of the United States.

Ed Brown v. Mississippi

Decided Feb. 17, 1936 – 297 U.S. 278

Mr. Chief Justice HUGHES delivered the opinion of the [unanimous] Court.

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934, and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants' counsel. Defendants then testified that the confessions were false and had been procured by physical torture.

[D]efendants filed in the Supreme Court a "suggestion of error" explicitly challenging the proceedings of the trial, in the use of the confessions and with respect to the alleged denial of representation by counsel, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. The state court entertained the suggestion of error, considered the federal question, and decided it against defendants' contentions.

The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law; and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitution right.

The state court said: "After the state closed its case on the merits, the appellants, for the first time, introduced evidence from

which it appears that the confessions were not made voluntarily but were coerced." There is no dispute as to the facts upon this point. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

[The Court then quoted portions of the state court dissent:]

"[T]he solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise."

"The defendants were brought to the courthouse ... and the so-called trial was opened, and was concluded on the next day, ... and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence, a peremptory instruction to find for the defendants would have been inescapable."

[T]he trial [] is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed, and the judgment must be reversed.

* * *

The Court has stated that "when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial ... the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *see also Bram v. United States*, 168 U.S. 532, 555 (1897) (recalling with approval English precedent to the effect "that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that, where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received").

Unfortunately, while the facts in *Brown v. Mississippi* are horrific, it was not the only case in which the Court found it necessary to reverse a conviction based upon an involuntary confession. Indeed, in reciting the facts of the next case, the Court referred to "the usual pattern" of testimony concerning the treatment of a suspect.

Supreme Court of the United States

E.E. Ashcraft v. Tennessee

Decided May 1, 1944 – 322 U.S. 143

Mr. Justice BLACK delivered the opinion of the Court.

[Petitioner E.E. Ashcraft's wife was found murdered. The state presented evidence that during interrogation, Ashcraft—a white man—suggested that John Ware—a Black man—was the killer and had acted alone. The state's evidence also included a subsequent confession by Ashcraft that he hired Ware to kill Mrs. Ashcraft.]

We proceed therefore to consider the evidence relating to the circumstances out of which the alleged confession[] came.

The officers first talked to Ashcraft about 6 P.M. on the day of his wife's murder as he was returning home from work. Informed by them of the tragedy, he was taken to an undertaking establishment to identify her body which previously had been identified only by a driver's license. From there he was taken to the county jail where he conferred with the officers until about 2 A.M. No clues of ultimate value came from this conference, though it did result in the officers' holding and interrogating the Ashcrafts' maid and several of her friends. During the following week the officers made extensive investigations in Ashcraft's neighborhood and elsewhere and further conferred with Ashcraft himself on several occasions, but none of these activities produced tangible evidence pointing to the identity of the murderer.

Then, early in the evening of Saturday, June 14, the officers came to Ashcraft's home and "took him into custody." In the words of the Tennessee Supreme Court, "They took him to an office or room on the northwest corner of the fifth Floor of the Shelby County jail. This office is equipped with all sorts of crime and detective devices such as a fingerprint outfit, cameras, high-powered lights, and such other devices as might be found in a homicide investigating office. ... It appears that the officers placed Ashcraft at a table in this room on the fifth floor of the county jail with a light over his head and began to quiz him. They questioned him in relays until the following Monday morning, June 16, 1941, around nine-thirty or ten o'clock. It appears that Ashcraft from Saturday evening at seven o'clock until Monday morning at approximately nine-thirty never left this homicide room of the fifth floor."

Testimony of the officers shows that the reason they questioned Ashcraft "in relays" was that they became so tired they were compelled to rest. But from 7:00 Saturday evening until 9:30 Monday morning Ashcraft had no rest. One officer did say that he gave the suspect a single five minutes respite, but except for this five minutes the procedure consisted of one continuous stream of questions.

As to what happened in the fifth-floor jail room during this thirty-six hour secret examination the testimony follows the usual pattern and is in hopeless conflict. Ashcraft swears that the first thing said to him when he was taken into custody was, "Why in hell did you kill your wife?"; that during the course of the examination he was threatened and abused in various ways; and that as the hours passed his eyes became blinded by a powerful electric light, his body became weary, and the strain on his nerves became unbearable. The officers, on the other hand, swear that throughout the questioning they were kind and considerate. They say that they did not accuse Ashcraft of the murder until four hours after he was brought to the jail building, though they freely admit that from that time on their barrage of questions was constantly directed at him on the assumption that he was the murderer. Together with other persons whom they brought in on Monday morning to witness the culmination of the thirty-six hour ordeal the officers declare that at that time Ashcraft was "cool", "calm", "collected," "normal"; that his vision was unimpaired and his eyes not bloodshot; and that he showed no outward signs of being tired or sleepy.

As to whether Ashcraft actually confessed there is a similar conflict of testimony. Ashcraft maintains that although the officers incessantly attempted by various tactics of intimidation to entrap him into a confession, not once did he admit knowledge concerning or participation in the crime. And he specifically denies the officers' statements that he accused Ware of the crime, insisting that in response to their questions he merely gave them the name of Ware as one of several men who occasionally had ridden with him to work. The officers' version of what happened, however, is that about 11 P.M. on Sunday night, after twenty-eight hours' constant questioning, Ashcraft made a statement that Ware had overpowered him at his home and abducted the deceased, and was probably the killer. About midnight the officers found Ware and took him into custody, and, according to their testimony, Ware made a self-incriminating statement as of early Monday morning, and at 5:40 A.M. signed by mark a written confession in which appeared the statement that Ashcraft had hired him to commit the murder. This alleged confession of Ware was read to Ashcraft about six o'clock Monday morning, whereupon Ashcraft is said substantially to have admitted its truth in a detailed statement taken down by a reporter. About 9:30 Monday morning a transcript of Ashcraft's purported statement was read to him. The State's position is that he affirmed its truth but refused to sign the transcript, saying that he first wanted to consult his lawyer. As to this latter 9:30 episode the officers' testimony is reinforced by testimony of the several persons whom they brought in to witness the end of the examination.

In reaching our conclusion as to the validity of Ashcraft's confession we do not resolve any of the disputed questions of fact relating to the details of what transpired within the confession chamber of the jail or whether Ashcraft actually did confess. Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime, or where, as in many other cases, his supposed offense bears relation to an unpopular economic, political, or religious cause.

Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all. Ashcraft, a citizen of excellent reputation, was taken into custody by police officers. Ten days' examination of the Ashcrafts' maid, and of several others, in jail where they were held, had revealed nothing whatever against Ashcraft. Inquiries among his neighbors and business associates likewise had failed to unearth one single tangible clue pointing to his guilt. For thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite. From the beginning of

the questioning at 7 o'clock on Saturday evening until 6 o'clock on Monday morning Ashcraft denied that he had anything to do with the murder of his wife. And at a hearing before a magistrate about 8:30 Monday morning Ashcraft pleaded not guilty to the charge of murder which the officers had sought to make him confess during the previous thirty-six hours.

We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a "voluntary" confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.

* * *

As was true of *Brown v. Mississippi* and *Tennessee v. Ashcraft*, our next case not only has unpleasant facts, but also required the Supreme Court to overrule a state court of last resort which had affirmed a conviction.

Supreme Court of the United States

Frank Andrew Payne v. Arkansas

Decided May 19, 1958 – 356 U.S. 560

Mr. Justice WHITTAKER delivered the opinion of the Court.

Near 6:30 p.m. on October 4, 1955, J. M. Robertson, an elderly retail lumber dealer in the City of Pine Bluff, Arkansas, was found in his office dead or dying from crushing blows inflicted upon his head. More than $450 was missing from the cash drawer. Petitioner, a 19-year-old [Black man] with a fifth-grade education,[1] who had been employed by Robertson for several weeks, was suspected of the crime. He was interrogated that night at his home by the police, but they did not then arrest him. Near 11 a.m. the next day, October 5, he was arrested.

Petitioner was held incommunicado without any charge against him from the time of his arrest at 11 a.m. on October 5 until after his confession on the afternoon of October 7, without counsel, advisor or friend being permitted to see him. Members of his family who sought to see him were turned away, because the police did not "make it a practice of letting anyone talk to [prisoners] while they are being questioned." Two of petitioner's brothers and three of his nephews were, to his knowledge, brought by the police to the city jail and questioned during the evening of petitioner's arrest, and one of his brothers was arrested and held in jail overnight. Petitioner asked permission to make a telephone call but his request was denied.

Petitioner was not given lunch after being lodged in the city jail on October 5, and missed the evening meal on that day because he was then being questioned in the office of the chief of police. Near 6:30 the next morning, October 6, he was taken by the police, without breakfast, and also without shoes or socks, on a trip to Little Rock, a distance of about 45 miles, for further questioning and a lie detector test, arriving there about 7:30 a.m. He was not given breakfast in that city, but was turned over to the state police who gave him a lie detector test and questioned him for an extended time not shown in the record. At about 1 p.m. that day he was given shoes and also two sandwiches—the first food he had received in more than 25 hours. He was returned to the city jail in Pine Bluff at about 6:30 that evening—too late for the evening meal—and placed in a cell on the second floor. The next morning, October 7, he was given breakfast—which, except for the two sandwiches he had been given at Little Rock at 1 p.m. the day before, was the only food he had received in more than 40 hours.

We come now to an even more vital matter. Petitioner testified, concerning the conduct that immediately induced his confession, as follows: "I was locked up upstairs and Chief Norman Young came up [about 1 p.m. on October 7] and told me that I had not told him all of the story—he said that there was 30 or 40 people outside that wanted to get me, and he said if I would come in and tell him the truth that he would probably keep them from coming in." When again asked what the chief of police had said to him on that occasion petitioner testified: "Chief Norman Young said thirty or forty people were outside wanting to get in to me and he asked me if I wanted to make a confession he would try to keep them out." The chief of police, on cross-examination, admitted that he had made the substance of that statement to petitioner, and had told him that he would be permitted to confess to the chief "in private." In this setting, petitioner immediately agreed to make a statement to the chief. The chief then took petitioner to his private office, and almost immediately after arriving at that place there was a knock on the door. The chief opened the door and stepped outside, leaving the door ajar, and petitioner heard him say "'He is fixing to confess now,' and he would like to have me alone." Petitioner did not know what persons or how many were outside the door. The chief re-entered his office and began

questioning petitioner who orally confessed that he had committed the crime. Thereupon Sergeant Halsell of the State Police and Sheriff Norton were admitted to the room, and under questioning by Sergeant Halsell petitioner gave more details concerning the crime. Soon afterward a court reporter was called in and several businessmen were also admitted to the room. Sergeant Halsell then requisitioned petitioner and the questions and answers were taken by the reporter in shorthand. After being transcribed by the reporter, the typed transcription was returned to the room about 3 p.m. and was read and signed to petitioner and witnessed by the officers and businessmen referred to. Thus the "confession" was obtained.

That petitioner was not physically tortured affords no answer to the question whether the confession was coerced, for "[t]here is torture of mind as well as body; the will is as much affected by fear as by force. ... A confession by which life becomes forfeit must be the expression of free choice." The undisputed evidence in this case shows that petitioner, a mentally dull 19-year-old youth, (1) was arrested without a warrant, (2) was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and of his right to counsel, as required by Arkansas statutes, (3) was not advised of his right to remain silent or of his right to counsel, (4) was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, (5) was denied food for long periods, and, finally, (6) was told by the chief of police "that there would be 30 or 40 people there in a few minutes that wanted to get him," which statement created such fear in petitioner as immediately produced the "confession." It seems obvious from the totality of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an "expression of free choice," and that its use before the jury, over petitioner's objection, deprived him of "that fundamental fairness essential to the very concept of justice," and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment.

* * *

The next case demonstrates that coercive interrogations were by no means limited to the American South. Further, to find that a confession was not voluntary, the Court does not require evidence of physical mistreatment of a suspect.

Supreme Court of the United States

Vincent Joseph Spano v. New York

Decided June 22, 1959 – 360 U.S. 315

Mr. Chief Justice WARREN delivered the opinion of the Court.

This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment. As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement. Because of the delicate nature of the constitutional determination which we must make, we cannot escape the responsibility of making our own examination of the record.

The State's evidence reveals the following: Petitioner Vincent Joseph Spano is a derivative citizen of this country, having been born in Messina, Italy. He was 25 years old at the time of the shooting in question and had graduated from junior high school. He had a record of regular employment. The shooting took place on January 22, 1957.

On that day, petitioner was drinking in a bar. The decedent, a former professional boxer weighing almost 200 pounds who had fought in Madison Square Garden, took some of petitioner's money from the bar. Petitioner followed him out of the bar to recover it. A fight ensued, with the decedent knocking petitioner down and then kicking him in the head three or four times. Shock from the force of these blows caused petitioner to vomit. After the bartender applied some ice to his head, petitioner left the bar, walked to his apartment, secured a gun, and walked eight or nine blocks to a candy store where the decedent was frequently to be found. He entered the store in which decedent, three friends of decedent, at least two of whom were ex-convicts, and a boy who was supervising the store were present. He fired five shots, two of which entered the decedent's body, causing his death. The boy was the only eyewitness; the three friends of decedent did not see the person who fired the shot. Petitioner then disappeared for the next week or so.

On February 1, 1957, the Bronx County Grand Jury returned an indictment for first-degree murder against petitioner. Accordingly, a bench warrant was issued for his arrest, commanding that he be forthwith brought before the court to answer the indictment, or, if the court had adjourned for the term, that he be delivered into the custody of the Sheriff of Bronx County.

On February 3, 1957, petitioner called one Gaspar Bruno, a close friend of 8 or 10 years' standing who had attended school with

him. Bruno was a fledgling police officer, having at that time not yet finished attending police academy. According to Bruno's testimony, petitioner told him "that he took a terrific beating, that the deceased hurt him real bad and he dropped him a couple of times and he was dazed; he didn't know what he was doing and that he went and shot at him." Petitioner told Bruno that he intended to get a lawyer and give himself up. Bruno relayed this information to his superiors.

The following day, February 4, at 7:10 p.m., petitioner, accompanied by counsel, surrendered himself to the authorities in front of the Bronx County Building, where both the office of the Assistant District Attorney who ultimately prosecuted his case and the court-room in which he was ultimately tried were located. His attorney had cautioned him to answer no questions, and left him in the custody of the officers. He was promptly taken to the office of the Assistant District Attorney and at 7:15 p.m. the questioning began, being conducted by Assistant District Attorney Goldsmith, Lt. Gannon, Detectives Farrell, Lehrer and Motta, and Sgt. Clarke. The record reveals that the questioning was both persistent and continuous. Petitioner, in accordance with his attorney's instructions, steadfastly refused to answer. Detective Motta testified: "He refused to talk to me." "He just looked up to the ceiling and refused to talk to me." Detective Farrell testified:

"Q. And you started to interrogate him? A. That is right.

"Q. What did he say? A. He said 'you would have to see my attorney. I tell you nothing but my name.'

"Q. Did you continue to examine him? A. Verbally, yes, sir."

He asked one officer, Detective Ciccone, if he could speak to his attorney, but that request was denied. Detective Ciccone testified that he could not find the attorney's name in the telephone book.[2] He was given two sandwiches, coffee and cake at 11 p.m.

At 12:15 a.m. on the morning of February 5, after five hours of questioning in which it became evident that petitioner was following his attorney's instructions, on the Assistant District Attorney's orders petitioner was transferred to the 46th Squad, Ryer Avenue Police Station. The Assistant District Attorney also went to the police station and to some extent continued to participate in the interrogation. Petitioner arrived at 12:30 and questioning was resumed at 12:40. The character of the questioning is revealed by the testimony of Detective Farrell:

"Q. Who did you leave him in the room with? A. With Detective Lehrer and Sergeant Clarke came in and Mr. Goldsmith came in or Inspector Halk came in. It was back and forth. People just came in, spoke a few words to the defendant or they listened a few minutes and they left."

But petitioner persisted in his refusal to answer, and again requested permission to see his attorney, this time from Detective Lehrer. His request was again denied.

It was then that those in charge of the investigation decided that petitioner's close friend, Bruno, could be of use. He had been called out on the case around 10 or 11 p.m., although he was not connected with the 46th Squad or Precinct in any way. Although, in fact, his job was in no way threatened, Bruno was told to tell petitioner that petitioner's telephone call had gotten him "in a lot of trouble," and that he should seek to extract sympathy from petitioner for Bruno's pregnant wife and three children. Bruno developed this theme with petitioner without success, and petitioner, also without success, again sought to see his attorney, a request which Bruno relayed unavailingly to his superiors. After this first session with petitioner, Bruno was again directed by Lt. Gannon to play on petitioner's sympathies, but again no confession was forthcoming. But the Lieutenant a third time ordered Bruno falsely to importune his friend to confess but again petitioner clung to his attorney's advice. Inevitably, in the fourth such session directed by the Lieutenant, lasting a full hour, petitioner succumbed to his friend's prevarications and agreed to make a statement. Accordingly, at 3:25 a.m. the Assistant District Attorney, a stenographer, and several other law enforcement officials entered the room where petitioner was being questioned, and took his statement in question and answer form with the Assistant District Attorney asking the questions. The statement was completed at 4:05 a.m.

But this was not the end. At 4:30 a.m. three detectives took petitioner to Police Headquarters in Manhattan. On the way they attempted to find the bridge from which petitioner said he had thrown the murder weapon. They crossed the Triborough Bridge into Manhattan, arriving at Police Headquarters at 5 a.m., and left Manhattan for the Bronx at 5:40 a.m. via the Willis Avenue Bridge. When petitioner recognized neither bridge as the one from which he had thrown the weapon, they re-entered Manhattan via the Third Avenue Bridge, which petitioner stated was the right one, and then returned to the Bronx well after 6 a.m. During that trip the officers also elicited a statement from petitioner that the deceased was always "on [his] back," "always pushing" him and that he was "not sorry" he had shot the deceased. All three detectives testified to that statement at the trial.

At the trial, the confession was introduced in evidence over appropriate objections. The jury was instructed that it could rely on it only if it was found to be voluntary. The jury returned a guilty verdict and petitioner was sentenced to death. The New York Court

of Appeals affirmed the conviction over three dissents, and we granted certiorari to resolve the serious problem presented under the Fourteenth Amendment.

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. [A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made. Our judgment here is that, on all the facts, this conviction cannot stand.

Petitioner was a foreign-born young man of 25 with no past history of law violation or of subjection to official interrogation, at least insofar as the record shows. He had progressed only one-half year into high school and the record indicates that he had a history of emotional instability. He did not make a narrative statement, but was subject to the leading questions of a skillful prosecutor in a question and answer confession. He was subjected to questioning not by a few men, but by many. They included Assistant District Attorney Goldsmith, one Hyland of the District Attorney's Office, Deputy Inspector Halks, Lieutenant Gannon, Detective Ciccone, Detective Motta, Detective Lehrer, Detective Marshal, Detective Farrell, Detective Leira, Detective Murphy, Detective Murtha, Sergeant Clarke, Patrolman Bruno and Stenographer Baldwin. All played some part, and the effect of such massive official interrogation must have been felt. Petitioner was questioned for virtually eight straight hours before he confessed, with his only respite being a transfer to an arena presumably considered more appropriate by the police for the task at hand. Nor was the questioning conducted during normal business hours, but began in early evening, continued into the night, and did not bear fruition until the not-too-early morning. The drama was not played out, with the final admissions obtained, until almost sunrise. In such circumstances slowly mounting fatigue does, and is calculated to, play its part. The questioners persisted in the face of his repeated refusals to answer on the advice of his attorney, and they ignored his reasonable requests to contact the local attorney whom he had already retained and who had personally delivered him into the custody of these officers in obedience to the bench warrant.

The use of Bruno, characterized in this Court by counsel for the State as a "childhood friend" of petitioner's, is another factor which deserves mention in the totality of the situation. Bruno's was the one face visible to petitioner in which he could put some trust. There was a bond of friendship between them going back a decade into adolescence. It was with this material that the officers felt that they could overcome petitioner's will. They instructed Bruno falsely to state that petitioner's telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child. And Bruno played this part of a worried father, harried by his superiors, in not one, but four different acts, the final one lasting an hour. Petitioner was apparently unaware of John Gay's famous couplet: "An open foe may prove a curse, But a pretended friend is worse," and he yielded to his false friend's entreaties.

We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting. Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these. Accordingly, we hold that petitioner's conviction cannot stand under the Fourteenth Amendment. The judgment must be reversed.

Notes, Comments, and Questions

For a case in which coercive conduct was alleged but the Court nonetheless affirmed a conviction, students should see *Lisbena v. California*, 314 U.S. 219 (1941). In a dissent joined by Justice Douglas, Justice Black wrote, "The testimony of the officers to whom the confession was given is enough, standing alone, to convince me that it could not have been free and voluntary." In particular, the dissent noted that "an investigator, 'slapped' the defendant whose left ear was thereafter red and swollen" and that squads of questioners took turns interviewing the defendant, in a manner similar to other cases we have seen. The majority, however, deferred to state court findings "as concerns the petitioner's claims of physical violence, threats or implied promises of leniency." Despite referring to "the violations of law involved in the treatment of the petitioner," the Court declined to find a Due Process violation. Instead, it called the case "close to the line" and held that the defendant "exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the

statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer."

These days, a promise of lenient treatment does not automatically render the ensuing confession involuntary. Instead, it is a factor to consider as part of the "totality-of-the-circumstances" test the Court applies to Due Process claims.

The next case also involved facts very close to the line that separates "voluntary" confessions from "involuntary" confessions. Note that while Justice White wrote for the Court, part of his opinion is a dissent because he could not obtain majority support.

Supreme Court of the United States

Arizona v. Oreste C. Fulminante

Decided March 26, 1991 – 499 U.S. 279

Justice WHITE delivered an opinion, Parts I, II, and IV of which are the opinion of the Court, and Part III of which is a dissenting opinion.[3]

The Arizona Supreme Court ruled in this case that respondent Oreste Fulminante's confession, received in evidence at his trial for murder, had been coerced and that its use against him was barred by the Fifth and Fourteenth Amendments to the United States Constitution. The court also held that the harmless-error rule could not be used to save the conviction. We affirm the judgment of the Arizona court, although for different reasons than those upon which that court relied.

I

Early in the morning of September 14, 1982, Fulminante called the Mesa, Arizona, Police Department to report that his 11-year-old stepdaughter, Jeneane Michelle Hunt, was missing. He had been caring for Jeneane while his wife, Jeneane's mother, was in the hospital. Two days later, Jeneane's body was found in the desert east of Mesa. She had been shot twice in the head at close range with a large caliber weapon, and a ligature was around her neck. Because of the decomposed condition of the body, it was impossible to tell whether she had been sexually assaulted.

Fulminante's statements to police concerning Jeneane's disappearance and his relationship with her contained a number of inconsistencies, and he became a suspect in her killing. When no charges were filed against him, Fulminante left Arizona for New Jersey. Fulminante was later convicted in New Jersey on federal charges of possession of a firearm by a felon.

Fulminante was incarcerated in the Ray Brook Federal Correctional Institution in New York. There he became friends with another inmate, Anthony Sarivola, then serving a 60-day sentence for extortion. The two men came to spend several hours a day together. Sarivola, a former police officer, had been involved in loansharking for organized crime but then became a paid informant for the Federal Bureau of Investigation. While at Ray Brook, he masqueraded as an organized crime figure. After becoming friends with Fulminante, Sarivola heard a rumor that Fulminante was suspected of killing a child in Arizona. Sarivola then raised the subject with Fulminante in several conversations, but Fulminante repeatedly denied any involvement in Jeneane's death. During one conversation, he told Sarivola that Jeneane had been killed by bikers looking for drugs; on another occasion, he said he did not know what had happened. Sarivola passed this information on to an agent of the Federal Bureau of Investigation, who instructed Sarivola to find out more.

Sarivola learned more one evening in October 1983, as he and Fulminante walked together around the prison track. Sarivola said that he knew Fulminante was "starting to get some tough treatment and whatnot" from other inmates because of the rumor. Sarivola offered to protect Fulminante from his fellow inmates, but told him, "'You have to tell me about it,' you know. I mean, in other words, 'For me to give you any help.'" Fulminante then admitted to Sarivola that he had driven Jeneane to the desert on his motorcycle, where he choked her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head.

Sarivola was released from prison in November 1983. Fulminante was released the following May, only to be arrested the next month for another weapons violation. On September 4, 1984, Fulminante was indicted in Arizona for the first-degree murder of Jeneane.

Prior to trial, Fulminante moved to suppress the statement he had given Sarivola in prison, as well as a second confession he had given to Donna Sarivola, then Anthony Sarivola's fiancée and later his wife, following his May 1984 release from prison. He asserted that the confession to Sarivola was coerced, and that the second confession was the "fruit" of the first. Following the hearing, the trial court denied the motion to suppress, specifically finding that, based on the stipulated facts, the confessions

were voluntary. The State introduced both confessions as evidence at trial, and on December 19, 1985, Fulminante was convicted of Jeneane's murder. He was subsequently sentenced to death.

Fulminante appealed, arguing, among other things, that his confession to Sarivola was the product of coercion and that its admission at trial violated his rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution. After considering the evidence at trial as well as the stipulated facts before the trial court on the motion to suppress, the Arizona Supreme Court held that the confession was coerced, but initially determined that the admission of the confession at trial was harmless error, because of the overwhelming nature of the evidence against Fulminante. Upon Fulminante's motion for reconsideration, however, the court ruled that this Court's precedent precluded the use of the harmless-error analysis in the case of a coerced confession. The court therefore reversed the conviction and ordered that Fulminante be retried without the use of the confession to Sarivola. Because of differing views in the state and federal courts over whether the admission at trial of a coerced confession is subject to a harmless-error analysis, we granted the State's petition for certiorari. Although a majority of this Court finds that such a confession is subject to a harmless-error analysis, for the reasons set forth below, we affirm the judgment of the Arizona court.

II

We deal first with the State's contention that the court below erred in holding Fulminante's confession to have been coerced. In applying the totality of the circumstances test to determine that the confession to Sarivola was coerced, the Arizona Supreme Court focused on a number of relevant facts. First, the court noted that "because [Fulminante] was an alleged child murderer, he was in danger of physical harm at the hands of other inmates." In addition, Sarivola was aware that Fulminante had been receiving "'rough treatment from the guys.'" Using his knowledge of these threats, Sarivola offered to protect Fulminante in exchange for a confession to Jeneane's murder, and "[i]n response to Sarivola's offer of protection, [Fulminante] confessed." Agreeing with Fulminante that "Sarivola's promise was 'extremely coercive,'" the Arizona court declared: "[T]he confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word."

We normally give great deference to the factual findings of the state court. Nevertheless, "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." Although the question is a close one, we agree with the Arizona Supreme Court's conclusion that Fulminante's confession was coerced. The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. Accepting the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion.

III[4]

Four of us, Justices MARSHALL, BLACKMUN, STEVENS, and myself, would affirm the judgment of the Arizona Supreme Court on the ground that the harmless-error rule is inapplicable to erroneously admitted coerced confessions. We thus disagree with the Justices who have a contrary view.

The majority today abandons what until now the Court has regarded as the "axiomatic [proposition] that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction." Today, a majority of the Court, without any justification, overrules [a] vast body of precedent without a word and in so doing dislodges one of the fundamental tenets of our criminal justice system.

The search for truth is indeed central to our system of justice, but "certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial." The right of a defendant not to have his coerced confession used against him is among those rights, for using a coerced confession "abort[s] the basic trial process" and "render[s] a trial fundamentally unfair."

For the foregoing reasons the four of us would adhere to the consistent line of authority that has recognized as a basic tenet of our criminal justice system the prohibition against using a defendant's coerced confession against him at his criminal trial. *Stare decisis* is "of fundamental importance to the rule of law;" the majority offers no convincing reason for overturning our long line of decisions requiring the exclusion of coerced confessions.

IV

Since five Justices have determined that harmless-error analysis applies to coerced confessions, it becomes necessary to evaluate under that ruling the admissibility of Fulminante's confession to Sarivola. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The Court has the power to review the record *de novo* in order to determine an error's harmlessness. In so doing, it must be determined whether the State has met its burden of demonstrating that the admission of the confession to Sarivola did not contribute to Fulminante's conviction. Five of us are of the view that the State has not carried its burden and accordingly affirm the judgment of the court below reversing respondent's conviction.

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. ... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession such as that given by Fulminante to Sarivola, the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.

Our review of the record leads us to conclude that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminante's confession to Anthony Sarivola was harmless error.

Because a majority of the Court has determined that Fulminante's confession to Anthony Sarivola was coerced and because a majority has determined that admitting this confession was not harmless beyond a reasonable doubt, we agree with the Arizona Supreme Court's conclusion that Fulminante is entitled to a new trial at which the confession is not admitted. Accordingly the judgment of the Arizona Supreme Court is [a]ffirmed.

Chief Justice REHNQUIST, with whom Justice O'CONNOR joins, Justice KENNEDY and Justice SOUTER join as to Parts I and II, and Justice SCALIA joins as to Parts II and III, delivered the opinion of the Court with respect to Part II, and a dissenting opinion with respect to Parts I and III.

The Court today properly concludes that the admission of an "involuntary" confession at trial is subject to harmless error analysis. Nonetheless, the independent review of the record which we are required to make shows that respondent Fulminante's confession was not in fact involuntary. And even if the confession were deemed to be involuntary, the evidence offered at trial, including a second, untainted confession by Fulminante, supports the conclusion that any error here was certainly harmless.

The admissibility of a confession such as that made by respondent Fulminante depends upon whether it was voluntarily made. "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

In this case the parties stipulated to the basic facts at the hearing in the Arizona trial court on respondent's motion to suppress the confession. Anthony Sarivola, an inmate at the Ray Brook Prison, was a paid confidential informant for the FBI. While at Ray Brook, various rumors reached Sarivola that Oreste Fulminante, a fellow inmate who had befriended Sarivola, had killed his stepdaughter in Arizona. Sarivola passed these rumors on to his FBI contact, who told him "to find out more about it." Sarivola, having already discussed the rumors with respondent on several occasions, asked him whether the rumors were true, adding that he might be in a position to protect Fulminante from physical recriminations in prison, but that "[he] must tell him the truth." Fulminante then confessed to Sarivola that he had in fact killed his stepdaughter in Arizona, and provided Sarivola with substantial details about the manner in which he killed the child. At the suppression hearing, Fulminante stipulated to the fact that "[a]t no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's 'protection.'" The trial court was also aware, through an excerpt from Sarivola's interview testimony which respondent appended to his reply memorandum, that Sarivola believed Fulminante's time was "running short" and that he would "have went out of the prison horizontally." The trial court found that respondent's confession was voluntary.

On the basis of the record before it, the Supreme Court stated:

"Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other

inmates. Sarivola was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover, the defendant maintains that Sarivola's promise was "extremely coercive' because the 'obvious' inference from the promise was that his life would be in jeopardy if he did not confess. We agree."

Exercising our responsibility to make the independent examination of the record necessary to decide this federal question, I am at a loss to see how the Supreme Court of Arizona reached the conclusion that it did. Fulminante offered no evidence that he believed that his life was in danger or that he in fact confessed to Sarivola in order to obtain the proffered protection. Indeed, he had stipulated that "[a]t no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's 'protection.'" Sarivola's testimony that he told Fulminante that "if [he] would tell the truth, he could be protected," adds little if anything to the substance of the parties' stipulation. The decision of the Supreme Court of Arizona rests on an assumption that is squarely contrary to this stipulation, and one that is not supported by any testimony of Fulminante.

The conversations between Sarivola and Fulminante were not lengthy, and the defendant was free at all times to leave Sarivola's company. Sarivola at no time threatened him or demanded that he confess; he simply requested that he speak the truth about the matter. Fulminante was an experienced habitue of prisons, and presumably able to fend for himself. In concluding on these facts that Fulminante's confession was involuntary, the Court today embraces a more expansive definition of that term than is warranted by any of our decided cases.

* * *

In *Colorado v. Connelly*, the Court considered whether a confession could be deemed "involuntary" without evidence of misconduct by any government official. In particular, the question was whether a suspect's mental illness could make his confession involuntary for purposes of the Due Process Clause of the Fourteenth Amendment.

Supreme Court of the United States

Colorado v. Francis Barry Connelly

Decided Dec. 10, 1986 – 479 U.S. 157

Chief Justice REHNQUIST delivered the opinion of the Court.

In this case, the Supreme Court of Colorado held that the United States Constitution requires a court to suppress a confession when the mental state of the defendant, at the time he made the confession, interfered with his "rational intellect" and his "free will." Because this decision seemed to conflict with prior holdings of this Court, we granted certiorari. We conclude that the admissibility of this kind of statement is governed by state rules of evidence. We therefore reverse.

I

On August 18, 1983, Officer Patrick Anderson of the Denver Police Department was in uniform, working in an off-duty capacity in downtown Denver. Respondent Francis Connelly approached Officer Anderson and, without any prompting, stated that he had murdered someone and wanted to talk about it. Anderson immediately advised respondent that he had the right to remain silent, that anything he said could be used against him in court, and that he had the right to an attorney prior to any police questioning. Respondent stated that he understood these rights but he still wanted to talk about the murder. Understandably bewildered by this confession, Officer Anderson asked respondent several questions. Connelly denied that he had been drinking, denied that he had been taking any drugs, and stated that, in the past, he had been a patient in several mental hospitals. Officer Anderson again told Connelly that he was under no obligation to say anything. Connelly replied that it was "all right," and that he would talk to Officer Anderson because his conscience had been bothering him. To Officer Anderson, respondent appeared to understand fully the nature of his acts.

Shortly thereafter, Homicide Detective Stephen Antuna arrived. Respondent was again advised of his rights, and Detective Antuna asked him "what he had on his mind." Respondent answered that he had come all the way from Boston to confess to the murder of Mary Ann Junta, a young girl whom he had killed in Denver sometime during November 1982. Respondent was taken to police headquarters, and a search of police records revealed that the body of an unidentified female had been found in April 1983. Respondent openly detailed his story to Detective Antuna and Sergeant Thomas Haney, and readily agreed to take the officers to the scene of the killing. Under Connelly's sole direction, the two officers and respondent proceeded in a police vehicle to the location of the crime. Respondent pointed out the exact location of the murder. Throughout this episode, Detective Antuna

perceived no indication whatsoever that respondent was suffering from any kind of mental illness.

Respondent was held overnight. During an interview with the public defender's office the following morning, he became visibly disoriented. He began giving confused answers to questions, and for the first time, stated that "voices" had told him to come to Denver and that he had followed the directions of these voices in confessing. Respondent was sent to a state hospital for evaluation. He was initially found incompetent to assist in his own defense. By March 1984, however, the doctors evaluating respondent determined that he was competent to proceed to trial.

At a preliminary hearing, respondent moved to suppress all of his statements. Dr. Jeffrey Metzner, a psychiatrist employed by the state hospital, testified that respondent was suffering from chronic schizophrenia and was in a psychotic state at least as of August 17, 1983, the day before he confessed. Metzner's interviews with respondent revealed that respondent was following the "voice of God." This voice instructed respondent to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver. When respondent arrived from Boston, God's voice became stronger and told respondent either to confess to the killing or to commit suicide. Reluctantly following the command of the voices, respondent approached Officer Anderson and confessed.

Dr. Metzner testified that, in his expert opinion, respondent was experiencing "command hallucinations." This condition interfered with respondent's "volitional abilities; that is, his ability to make free and rational choices." Dr. Metzner further testified that Connelly's illness did not significantly impair his cognitive abilities. Thus, respondent understood the rights he had when Officer Anderson and Detective Antuna advised him that he need not speak. Dr. Metzner admitted that the "voices" could in reality be Connelly's interpretation of his own guilt, but explained that in his opinion, Connelly's psychosis motivated his confession.

On the basis of this evidence the Colorado trial court decided that respondent's statements must be suppressed because they were "involuntary." The trial court also found that Connelly's mental state vitiated his attempted waiver of the right to counsel and the privilege against compulsory self-incrimination. Accordingly, respondent's initial statements and his custodial confession were suppressed. The Colorado Supreme Court affirmed.

II

[W]e [have] held that by virtue of the Due Process Clause "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned."

Indeed, coercive government misconduct was the catalyst for this Court's seminal confession case, *Brown v. Mississippi*. In that case, police officers extracted confessions from the accused through brutal torture. The Court had little difficulty concluding that even though the Fifth Amendment did not at that time apply to the States, the actions of the police were "revolting to the sense of justice."

Thus the cases considered by this Court over the 50 years since *Brown v. Mississippi* have focused upon the crucial element of police overreaching. While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

Our "involuntary confession" jurisprudence is entirely consistent with the settled law requiring some sort of "state action" to support a claim of violation of the Due Process Clause of the Fourteenth Amendment. The Colorado trial court, of course, found that the police committed no wrongful acts, and that finding has been neither challenged by respondent nor disturbed by the Supreme Court of Colorado. The latter court, however, concluded that sufficient state action was present by virtue of the admission of the confession into evidence in a court of the State.

The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other. The flaw in respondent's constitutional argument is that it would expand our previous line of "voluntariness" cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision.

The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. Moreover, suppressing respondent's statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained.

We have previously cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries...." We abide by that counsel now. We hold that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. We also conclude that the taking of respondent's statements, and their admission into evidence, constitute no violation of that Clause.

The judgment of the Supreme Court of Colorado is accordingly reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Today the Court denies Mr. Connelly his fundamental right to make a vital choice with a sane mind, involving a determination that could allow the State to deprive him of liberty or even life. This holding is unprecedented: "Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane...." Because I believe that the use of a mentally ill person's involuntary confession is antithetical to the notion of fundamental fairness embodied in the Due Process Clause, I dissent.

The respondent's seriously impaired mental condition is clear on the record of this case. At the time of his confession, Mr. Connelly suffered from a "longstanding severe mental disorder," diagnosed as chronic paranoid schizophrenia. He had been hospitalized for psychiatric reasons five times prior to his confession; his longest hospitalization lasted for seven months. Mr. Connelly heard imaginary voices and saw nonexistent objects. He believed that his father was God, and that he was a reincarnation of Jesus.

At the time of his confession, Mr. Connelly's mental problems included "grandiose and delusional thinking." He had a known history of "thought withdrawal and insertion." Although physicians had treated Mr. Connelly "with a wide variety of medications in the past including antipsychotic medications," he had not taken any antipsychotic medications for at least six months prior to his confession. Following his arrest, Mr. Connelly initially was found incompetent to stand trial because the court-appointed psychiatrist, Dr. Metzner, "wasn't very confident that he could consistently relate accurate information." Dr. Metzner testified that Mr. Connelly was unable "to make free and rational choices" due to auditory hallucinations. He achieved competency to stand trial only after six months of hospitalization and treatment with antipsychotic and sedative medications.

The state trial court found that the "overwhelming evidence presented by the Defense" indicated that the prosecution did not meet its burden of demonstrating by a preponderance of the evidence that the initial statement to Officer Anderson was voluntary. The Supreme Court of Colorado affirmed after evaluating "the totality of circumstances" surrounding the unsolicited confession.

The absence of police wrongdoing should not, by itself, determine the voluntariness of a confession by a mentally ill person. The requirement that a confession be voluntary reflects a recognition of the importance of free will and of reliability in determining the admissibility of a confession, and thus demands an inquiry into the totality of the circumstances surrounding the confession.

Today's decision restricts the application of the term "involuntary" to those confessions obtained by police coercion. Confessions by mentally ill individuals or by persons coerced by parties other than police officers are now considered "voluntary." The Court's failure to recognize all forms of involuntariness or coercion as antithetical to due process reflects a refusal to acknowledge free will as a value of constitutional consequence. This right requires vigilant protection if we are to safeguard the values of private conscience and human dignity.

Since the Court redefines voluntary confessions to include confessions by mentally ill individuals, the reliability of these confessions becomes a central concern. The instant case starkly highlights the danger of admitting a confession by a person with a severe mental illness. The trial court made no findings concerning the reliability of Mr. Connelly's involuntary confession, since it believed that the confession was excludable on the basis of involuntariness. However, the overwhelming evidence in the record points to the unreliability of Mr. Connelly's delusional mind. Mr. Connelly was found incompetent to stand trial because he was unable to relate accurate information, and the court-appointed psychiatrist indicated that Mr. Connelly was actively hallucinating and exhibited delusional thinking at the time of his confession. The Court, in fact, concedes that "[a] statement rendered by one

in the condition of respondent might be proved to be quite unreliable....”

Moreover, the record is barren of any corroboration of the mentally ill defendant’s confession. No physical evidence links the defendant to the alleged crime. Police did not identify the alleged victim’s body as the woman named by the defendant. Mr. Connelly identified the alleged scene of the crime, but it has not been verified that the unidentified body was found there or that a crime actually occurred there. There is not a shred of competent evidence in this record linking the defendant to the charged homicide. There is only Mr. Connelly’s confession.

Minimum standards of due process should require that the trial court find substantial indicia of reliability, on the basis of evidence extrinsic to the confession itself, before admitting the confession of a mentally ill person into evidence. I would require the trial court to make such a finding on remand. To hold otherwise allows the State to imprison and possibly to execute a mentally ill defendant based solely upon an inherently unreliable confession.

I dissent.

* * *

In part because the Court found it difficult to regulate interrogations effectively using only the Due Process Clauses, the Justices were inspired to create the *Miranda* Rule, which imposes additional requirements on police. We turn to *Miranda* in our next chapter.

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3.2: Chapter 23 - The Miranda Rule

INTERROGATIONS

Chapter 23

The *Miranda* Rule

In *Miranda v. Arizona*, the Court created an entirely new method of regulating police interrogations of suspects. Rather than search the records of each case for evidence of voluntariness, the Court set forth a procedure under which law enforcement officers must—at least sometimes—inform suspects of certain constitutional rights and the potential consequences of waiving those rights. Under the new rule, the Court would presume confessions were obtained involuntarily if officers failed to follow the new procedure, and such a presumption would lead to exclusion of confessions from evidence at trial. Over the next several chapters, we will explore (1) the basics of the *Miranda* Rule, (2) how the Court has defined important terms like "custody" and "interrogation," (3) what constitutes an effective "waiver" of rights under *Miranda*, and (4) what exceptions apply to the rule that evidence obtained in violation of *Miranda* is excluded from evidence.

Even more than *Terry v. Ohio*—which all lawyers should be able to summarize—*Miranda v. Arizona* is a case that friends and acquaintances will expect lawyers to understand. It is probably the most famous criminal procedure case ever decided, and students should form their own opinions about the doctrine it created.

Supreme Court of the United States

Ernesto A. Miranda v. State of Arizona

Decided June 13, 1966 – 384 U.S. 436

Mr. Chief Justice WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in *Escobedo v. State of Illinois*, 378 U.S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible. This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago.

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person ... shall be compelled in any criminal case to be a witness against himself," and that "the accused shall ... have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and ... designed to approach immortality as nearly as human

institutions can approach it."

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time. In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. The Commission on Civil Rights in 1961 found much evidence to indicate that 'some policemen still resort to physical force to obtain confessions." The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future.

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. These texts are used by law enforcement agencies themselves as guides. It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation." To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire

for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged. The texts thus stress that the major qualities an interrogator should possess are patience and perseverance. The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt.

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "Mutt and Jeff" act:

"... In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room."

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party." Then the questioning resumes "as though there were now no doubt about the guilt of the subject."

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator." After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

"Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.

In these cases [before us], we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly

be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.

The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

III

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences

of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel.

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel. While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Douglas v. California*, 372 U.S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual

must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a “station house lawyer” present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person’s Fifth Amendment privilege so long as they do not question him during that time.

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. This Court has always set high standards of proof for the waiver of constitutional rights, and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

IV

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.

V

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

Mr. Justice HARLAN, whom Mr. Justice STEWART and Mr. Justice WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a fourfold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light "[t]o speak of any confessions of

crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser." Until today, the role of the Constitution has been only to sift out undue pressure, not to assure spontaneous confessions.

The Court's new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all.

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it. There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

Mr. Justice WHITE, with whom Mr. Justice HARLAN and Mr. Justice STEWART join, dissenting.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment.

Only a tiny minority of our judges who have dealt with the question, including today's majority, have considered in-custody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as every member knows, has left standing literally thousands of criminal convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against compelled self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a "need for counsel to protect the Fifth Amendment privilege ...."

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent. Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

The rule announced today will measurably weaken the ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials. Criminal trials, no matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants who otherwise

would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Much of the trouble with the Court's new rule is that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved. It applies to every defendant, whether the professional criminal or one committing a crime of momentary passion who is not part and parcel of organized crime. It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnapping and some of those involving organized crime.

Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

Notes, Comments, and Questions

Most students are familiar with the *Miranda* warnings, even before reading the case. Prior to a custodial interrogation, officers must inform suspects of the following:

1) You have the right to remain silent

2) Anything you say can be used against you

3) You have the right to an attorney

4) An attorney will be provided by the government if you cannot pay

Review section I of the opinion to see where these specific warnings originated.

The Court finds the Constitutional basis in the 5th Amendment; an element of informal compulsion exists in any form of custodial interrogation, and specified warnings are needed to dispel the inherent pressure of custodial interrogation. Does the Court have the power to promulgate constitutional prophylactic rules?

The *Miranda* warnings may really be a way to avoid the difficulties of case-by-case determination of compulsion. How well do you think *Miranda* warnings work in practice to (1) reduce the compulsion suspects feel during custodial interrogations; and (2) reduce courts necessity to make case-by-case determinations of compulsion.

As you can imagine, suspects continue to confess, despite receiving appropriate *Miranda* warnings. Why do you think this is?

How Well Must Officers Administer the *Miranda* Warnings?

One issue not settled by *Miranda* was how closely police interrogators would be required to deliver the precise warnings set forth by the *Miranda* majority. Would word-for-word accuracy—or at least warnings materially identical to those provided by the Court—be necessary? Because police officers are human, perfect accuracy would not be a fair standard. The real question was how far officers could stray from the Court's language while still having their warnings count for purposes of getting confessions into evidence under *Miranda*.

Supreme Court of the United States

California v. Randall James Prysock

June 29, 1981 – 453 U.S. 355

PER CURIAM.

This case presents the question whether the warnings given to respondent prior to a recorded conversation with a police officer satisfied the requirements of *Miranda v. Arizona*. Although ordinarily this Court would not be inclined to review a case involving application of that precedent to a particular set of facts, the opinion of the California Court of Appeal essentially laid down a flat rule requiring that the content of *Miranda* warnings be a virtual incantation of the precise language contained in the *Miranda* opinion. Because such a rigid rule was not mandated by *Miranda* or any other decision of this Court, and is not required to serve the purposes of *Miranda*, we grant the motion of respondent for leave to proceed *in forma pauperis* and the petition for certiorari and reverse.

On January 30, 1978, Mrs. Donna Iris Erickson was brutally murdered. Later that evening respondent and a codefendant were apprehended for commission of the offense. Respondent was brought to a substation of the Tulare County Sheriff's Department and advised of his *Miranda* rights. He declined to talk and, since he was a minor, his parents were notified. Respondent's parents arrived and after meeting with them respondent decided to answer police questions. An officer questioned respondent, on tape, with respondent's parents present. The tape reflects that the following warnings were given prior to any questioning:

"Sgt. Byrd: ... Mr. Randall James Prysock, earlier today I advised you of your legal rights and at that time you advised me you did not wish to talk to me, is that correct?

"Randall P.: Yeh.

"Sgt. Byrd: And, uh, during, at the first interview your folks were not present, they are now present. I want to go through your legal rights again with you and after each legal right I would like for you to answer whether you understand it or not.... Your legal rights, Mr. Prysock, is [*sic*] follows: Number One, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this?

"Randall P.: Yeh.

"Sgt. Byrd: If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: You all, uh,—if,—you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?

"Randall P.: Yes."

At this point, at the request of Mrs. Prysock, a conversation took place with the tape recorder turned off. According to Sgt. Byrd,

Mrs. Prysock asked if respondent could still have an attorney at a later time if he gave a statement now without one. Sgt. Byrd assured Mrs. Prysock that respondent would have an attorney when he went to court and that "he could have one at this time if he wished one."

At trial in the Superior Court of Tulare County the court denied respondent's motion to suppress the taped statement. Respondent was convicted by a jury of first-degree murder with two special circumstances—torture and robbery. He was also convicted of robbery with the use of a dangerous weapon, burglary with the use of a deadly weapon, automobile theft, escape from a youth facility, and destruction of evidence.

The Court of Appeal for the Fifth Appellate District reversed respondent's convictions and ordered a new trial because of what it thought to be error under *Miranda*. The Court of Appeal ruled that respondent's recorded incriminating statements, given with his parents present, had to be excluded from consideration by the jury because respondent was not properly advised of his right to the services of a free attorney before and during interrogation. Although respondent was indisputably informed that he had "the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning," and further informed that he had "the right to have a lawyer appointed to represent you at no cost to yourself," the Court of Appeal ruled that these warnings were inadequate because respondent was not explicitly informed of his right to have an attorney appointed before further questioning. The Court of Appeal stated that "[o]ne of [*Miranda*'s] virtues is its precise requirements which are so easily met." The California Supreme Court denied a petition for hearing, with two justices dissenting.

This Court has never indicated that the "rigidity" of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. This Court and others *have* stressed as one virtue of *Miranda* the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused. Nothing in these observations suggests any desirable rigidity in the *form* of the required warnings.

Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant."

[N]othing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general, including the right "to a lawyer before you are questioned, ... while you are being questioned, and all during the questioning."

It is clear that the police in this case fully conveyed to respondent his rights as required by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one. These warnings conveyed to respondent his right to have a lawyer appointed if he could not afford one prior to and during interrogation. The Court of Appeal erred in holding that the warnings were inadequate simply because of the order in which they were given.

Because respondent was given the warnings required by *Miranda*, the decision of the California Court of Appeal to the contrary is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

* * *

The next case presented the Court with another deviation from the warning language set forth in *Miranda*.

Supreme Court of the United States

Jack R. Duckworth v. Gary James Eagan

Decided June 26, 1989 – 492 U.S. 195

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent confessed to stabbing a woman nine times after she refused to have sexual relations with him, and he was convicted of attempted murder. Before confessing, respondent was given warnings by the police, which included the advice that a lawyer would be appointed "if and when you go to court." The United States Court of Appeals for the Seventh Circuit held that such advice did not comply with the requirements of *Miranda v. Arizona*. We disagree and reverse.

Late on May 16, 1982, respondent contacted a Chicago police officer he knew to report that he had seen the naked body of a dead

woman lying on a Lake Michigan beach. Respondent denied any involvement in criminal activity. He then took several Chicago police officers to the beach, where the woman was crying for help. When she saw respondent, the woman exclaimed: "Why did you stab me? Why did you stab me?" Respondent told the officers that he had been with the woman earlier that night, but that they had been attacked by several men who abducted the woman in a van.

The next morning, after realizing that the crime had been committed in Indiana, the Chicago police turned the investigation over to the Hammond, Indiana, Police Department. Respondent repeated to the Hammond police officers his story that he had been attacked on the lakefront, and that the woman had been abducted by several men. After he filled out a battery complaint at a local police station, respondent agreed to go to the Hammond police headquarters for further questioning.

At about 11 a.m., the Hammond police questioned respondent. Before doing so, the police read to respondent a waiver form, entitled "Voluntary Appearance; Advice of Rights," and they asked him to sign it. The form provided:

"Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning*. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court*. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer."

Respondent signed the form and repeated his exculpatory explanation for his activities of the previous evening.

Respondent was then placed in the "lock up" at the Hammond police headquarters. Some 29 hours later, at about 4 p.m. on May 18, the police again interviewed respondent. Before this questioning, one of the officers read the following waiver form to respondent:

[The waiver form presented the *Miranda* warnings in a standard way.]

Respondent read the form back to the officers and signed it. He proceeded to confess to stabbing the woman. The next morning, respondent led the officers to the Lake Michigan beach where they recovered the knife he had used in the stabbing and several items of clothing.

At trial, over respondent's objection, the state court admitted his confession, his first statement denying any involvement in the crime, the knife, and the clothing. The jury found respondent guilty of attempted murder, but acquitted him of rape. He was sentenced to 35 years' imprisonment. The conviction was upheld on appeal.

Respondent sought a writ of habeas corpus, claiming, *inter alia,* that his confession was inadmissible because the first waiver form did not comply with *Miranda*. The District Court denied the petition, holding that the record "clearly manifests adherence to *Miranda* ... especially as to the so-called second statement."

A divided United States Court of Appeals for the Seventh Circuit reversed. The majority held that the advice that counsel would be appointed "if and when you go to court," which was included in the first warnings given to respondent, was "constitutionally defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation," and "link[s] an indigent's right to counsel before interrogation with a future event." Turning to the admissibility of respondent's confession, the majority thought that "as a result of the first warning, [respondent] arguably believed that he could not secure a lawyer during interrogation" and that the second warning "did not explicitly correct this misinformation." It therefore remanded the case for a determination whether respondent had knowingly and intelligently waived his right to an attorney during the second interview.

We then granted certiorari, to resolve a conflict among the lower courts as to whether informing a suspect that an attorney would be appointed for him "if and when you go to court" renders *Miranda* warnings inadequate. We agree with the majority of the lower courts that it does not.

In *Miranda* itself, the Court said that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent,* prerequisites to the admissibility of any statement made by a defendant."

We think the initial warnings given to respondent touched all of the bases required by *Miranda*. The police told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had "this right to the advice and presence of a lawyer even if [he could] not afford

to hire one," and that he had the "right to stop answering at any time until [he] talked to a lawyer." As noted, the police also added that they could not provide respondent with a lawyer, but that one would be appointed "if and when you go to court." The Court of Appeals thought this "if and when you go to court" language suggested that "only those accused who can afford an attorney have the right to have one present before answering any questions," and "implie[d] that if the accused does not 'go to court,' *i.e.*[,] the government does not file charges, the accused is not entitled to [counsel] at all."

In our view, the Court of Appeals misapprehended the effect of the inclusion of "if and when you go to court" language in *Miranda* warnings. First, this instruction accurately described the procedure for the appointment of counsel in Indiana. Under Indiana law, counsel is appointed at the defendant's initial appearance in court, and formal charges must be filed at or before that hearing. We think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel. The "if and when you go to court" advice simply anticipates that question. Second, *Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one. The Court in *Miranda* emphasized that it was not suggesting that "each police station must have a 'station house lawyer' present at all times to advise prisoners." If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel. Here, respondent did just that.

Justice MARSHALL, with whom Justice BRENNAN joins, and with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

The majority holds today that a police warning advising a suspect that he is entitled to an appointed lawyer only "if and when he goes to court" satisfies the requirements of *Miranda v. Arizona*. The majority reaches this result by seriously mischaracterizing that decision. Under *Miranda,* a police warning must "*clearly infor[m]*" a suspect taken into custody "that if he cannot afford an attorney one will be appointed for him *prior to any questioning* if he so desires." A warning qualified by an "if and when you go to court" caveat does nothing of the kind; instead, it leads the suspect to believe that a lawyer will not be provided until some indeterminate time in the future *after questioning*. I refuse to acquiesce in the continuing debasement of this historic precedent and therefore dissent.

Notes, Comments, and Questions

The Endurance of Miranda in the Face of Criticism

In 2000, the Court considered whether to abolish the *Miranda* Rule. *Miranda* had inspired intense criticism, including from William H. Rehnquist, who had been an assistant attorney general in the Nixon administration soon after *Miranda* was decided. He wrote in 1969 that "the court is now committed to the proposition that relevant, competent, uncoerced statements of the defendant will not be admissible at his trial unless an elaborate set of warnings be given, which is very likely to have the effect of preventing a defendant from making any statement at all." *See* Victor Li, "50-Year Story of the *Miranda* Warning Has the Twists of a Cop Show," ABA Journal (Aug. 2016). Three decades later, Rehnquist was Chief Justice of the United States, with the ability to shape constitutional law instead of merely commenting on it.

Supreme Court of the United States

Charles Thomas Dickerson v. United States

Decided June 26, 2000 – 530 U.S. 428

Chief Justice REHNQUIST delivered the opinion of the Court.

In *Miranda v. Arizona*, we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda,* being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

Petitioner Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence, all in violation of the applicable provisions of Title 18 of the United States Code. Before trial,

Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received "*Miranda* warnings" before being interrogated. The District Court granted his motion to suppress, and the Government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. That court, by a divided vote, reversed the District Court's suppression order. It agreed with the District Court's conclusion that petitioner had not received *Miranda* warnings before making his statement. But it went on to hold that § 3501, which in effect makes the admissibility of statements such as Dickerson's turn solely on whether they were made voluntarily, was satisfied in this case. It then concluded that our decision in *Miranda* was not a constitutional holding, and that, therefore, Congress could by statute have the final say on the question of admissibility.

Because of the importance of the questions raised by the Court of Appeals' decision, we granted certiorari and now reverse.

Given § 3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*. Because of the obvious conflict between our decision in *Miranda* and § 3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*. If Congress has such authority, § 3501's totality-of-the-circumstances approach must prevail over *Miranda's* requirement of warnings; if not, that section must yield to *Miranda's* more specific requirements.

The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals. However, the power to judicially create and enforce nonconstitutional "rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.

But Congress may not legislatively supersede our decisions interpreting and applying the Constitution. This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction. [T]he Court of Appeals concluded that the protections announced in *Miranda* are not constitutionally required.

We disagree with the Court of Appeals' conclusion, although we concede that there is language in some of our opinions that supports the view taken by that court. But first and foremost of the factors on the other side—that *Miranda* is a constitutional decision—is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts—to wit, Arizona, California, and New York. Since that time, we have consistently applied *Miranda's* rule to prosecutions arising in state courts. It is beyond dispute that we do not hold a supervisory power over the courts of the several States. With respect to proceedings in state courts, our "authority is limited to enforcing the commands of the United States Constitution."

Additional support for our conclusion that *Miranda* is constitutionally based is found in the *Miranda* Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination. After discussing the "compelling pressures" inherent in custodial police interrogation, the *Miranda* Court concluded that, "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." However, the Court emphasized that it could not foresee "the potential alternatives for protecting the privilege which might be devised by Congress or the States," and it accordingly opined that the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."

Miranda requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored. [Section] 3501 explicitly eschews a requirement of preinterrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession. The additional remedies cited by *amicus* do not, in our view, render them, together with § 3501, an adequate substitute for the warnings required by *Miranda*.

[W]e need not go further than *Miranda* to decide this case. In *Miranda,* the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary. [Section] 3501 reinstates the totality test as sufficient. Section 3501 therefore cannot be sustained if *Miranda* is to remain the law.

Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance,

the principles of *stare decisis* weigh heavily against overruling it now. While "'*stare decisis* is not an inexorable command,'" particularly when we are interpreting the Constitution, "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'"

We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, we do not believe that this has happened to the *Miranda* decision. If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.

The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his "rights," may nonetheless be excluded and a guilty defendant go free as a result. But experience suggests that the totality-of-the-circumstances test which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.

In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis,* we decline to overrule *Miranda* ourselves. The judgment of the Court of Appeals is therefore [r]eversed.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Those to whom judicial decisions are an unconnected series of judgments that produce either favored or disfavored results will doubtless greet today's decision as a paragon of moderation, since it declines to overrule *Miranda v. Arizona*. Those who understand the judicial process will appreciate that today's decision is not a reaffirmation of *Miranda,* but a radical revision of the most significant element of *Miranda* (as of all cases): the rationale that gives it a permanent place in our jurisprudence.

Marbury v. Madison held that an Act of Congress will not be enforced by the courts if what it prescribes violates the Constitution of the United States. That was the basis on which *Miranda* was decided. One will search today's opinion in vain, however, for a statement (surely simple enough to make) that what 18 U.S.C. § 3501 prescribes—the use at trial of a voluntary confession, even when a *Miranda* warning or its equivalent has failed to be given—violates the Constitution. The reason the statement does not appear is not only (and perhaps not so much) that it would be absurd, inasmuch as § 3501 excludes from trial precisely what the Constitution excludes from trial, viz., compelled confessions; but also that Justices whose votes are needed to compose today's majority are on record as believing that a violation of *Miranda* is *not* a violation of the Constitution. And so, to justify today's agreed-upon result, the Court must adopt a significant *new,* if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be disregarded, not only when what they prescribe violates the Constitution, but when what they prescribe contradicts a decision of this Court that "announced a constitutional rule." [T]he only thing that can possibly mean in the context of this case is that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful "prophylactic" restrictions upon Congress and the States. That is an immense and frightening antidemocratic power, and it does not exist.

It takes only a small step to bring today's opinion out of the realm of power-judging and into the mainstream of legal reasoning: The Court need only go beyond its carefully couched iterations that "*Miranda* is a constitutional decision," that "*Miranda* is constitutionally based," that *Miranda* has "constitutional underpinnings," and come out and say quite clearly: "We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States." It cannot say that, because a majority of the Court does not believe it. The Court therefore acts in plain violation of the Constitution when it denies effect to this Act of Congress.

I dissent from today's decision, and, until § 3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary.

Notes, Comments, and Questions

When given the opportunity, the Court did not overrule *Miranda*. Do you agree that *Miranda* warnings should still be required? Why or why not?

Our next chapters explore two important questions left open by *Miranda*—how the Court would define "custody" and how it would define "interrogation." Because the *Miranda* Rule applies only during "custodial interrogation," each of these definitions is essential to applying the rule.

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3.3: Chapter 24 - The Miranda Rule- What Is Custody?

INTERROGATIONS

Chapter 24

The *Miranda* Rule: What Is Custody?

The *Miranda* Rule applies only during "custodial interrogation." Therefore, unless a suspect is both (1) "in custody" and (2) being "interrogated," police need not provide the warnings described in *Miranda*. In this chapter, we consider how the Court has defined "custody" in cases applying the *Miranda* Rule. We also review some of the literature evaluating the practical effects of the doctrine on suspects and police.

In *Miranda*, the Court wrote: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Subsequent cases, however, have strayed from the expansive definition of "custody" implied by the words "deprived of his freedom of action in any significant way."

Students should note that the definition of "custody" under *Miranda* differs from the definition of a "seizure" for Fourth Amendment purposes. In other words, a person can be "seized" (or "detained") but not be in a situation in which *Miranda* warnings are required before police may begin interrogation. Yet Fourth Amendment law remains a useful touchstone because if a person is not "seized"—that is, if a reasonable person in her situation would have felt free to leave—then it will be difficult to argue that she was "in custody" for *Miranda* purposes.

Supreme Court of the United States

Oregon v. Carl Ray Mathiason

Jan. 25, 1977 – 429 U.S. 492

PER CURIAM.

Respondent Carl Mathiason was convicted of first-degree burglary after a bench trial in which his confession was critical to the State's case. At trial he moved to suppress the confession as the fruit of questioning by the police not preceded by the warnings required in *Miranda v. Arizona*. The trial court refused to exclude the confession because it found that Mathiason was not in custody at the time of the confession.

The Oregon Court of Appeals affirmed respondent's conviction, but on his petition for review in the Supreme Court of Oregon that court by a divided vote reversed the conviction. It found that although Mathiason had not been arrested or otherwise formally detained, "the interrogation took place in a 'coercive environment'" of the sort to which *Miranda* was intended to apply. The State of Oregon has petitioned for certiorari to review the judgment of the Supreme Court of Oregon. We think that court has read Miranda too broadly, and we therefore reverse its judgment.

The Supreme Court of Oregon described the factual situation surrounding the confession as follows:

"An officer of the State Police investigated a theft at a residence near Pendleton. He asked the lady of the house which had been burglarized if she suspected anyone. She replied that the defendant was the only one she could think of. The defendant was a parolee and a 'close associate' of her son. The officer tried to contact defendant on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at defendant's apartment with a note asking him to call because 'I'd like to discuss something with you.' The next afternoon the defendant did call. The officer asked where it would be convenient to meet. The defendant had no preference; so the officer asked if the defendant could meet him at the state patrol office in about an hour and a half, about 5:00 p.m. The patrol office was about two blocks from defendant's apartment. The building housed several state agencies."

"The officer met defendant in the hallway, shook hands and took him into an office. The defendant was told he was not under arrest. The door was closed. The two sat across a desk. The police radio in another room could be heard. The officer told defendant he wanted to talk to him about a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The officer further advised that the police believed defendant was involved in the burglary and (falsely stated that) defendant's fingerprints were found at the scene. The defendant sat for a few minutes and then said he had taken the property. This occurred within five minutes after defendant had come to the office. The officer then advised defendant of his *Miranda* rights and took a taped confession."

"At the end of the taped conversation the officer told defendant he was not arresting him at this time; he was released to go about his job and return to his family. The officer said he was referring the case to the district attorney for him to determine whether criminal charges would be brought. It was 5:30 p.m. when the defendant left the office."

"The officer gave all the testimony relevant to this issue. The defendant did not take the stand either at the hearing on the motion to suppress or at the trial."

Our decision in *Miranda* set forth rules of police procedure applicable to "custodial interrogation." "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Subsequently we have found the *Miranda* principle applicable to questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense, and to questioning taking place in a suspect's home, after he has been arrested and is no longer free to go where he pleases.

In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Supreme Court of Oregon to be another circumstance contributing to the coercive environment which makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule.

The petition for certiorari is granted, the judgment of the Oregon Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Mr. Justice MARSHALL, dissenting.

The respondent in this case was interrogated behind closed doors at police headquarters in connection with a burglary investigation. He had been named by the victim of the burglary as a suspect, and was told by the police that they believed he was involved. He was falsely informed that his fingerprints had been found at the scene, and in effect was advised that by cooperating with the police he could help himself. Not until after he had confessed was he given the warnings set forth in *Miranda v. Arizona*.

The Court today holds that for constitutional purposes all this is irrelevant because respondent had not "'been taken into custody or otherwise deprived of his freedom of action in any significant way.'" I do not believe that such a determination is possible on the record before us. It is true that respondent was not formally placed under arrest, but surely formalities alone cannot control. At the very least, if respondent entertained an objectively reasonable belief that he was not free to leave during the questioning, then he was "deprived of his freedom of action in a significant way." Plainly the respondent could have so believed, after being told by the police that they thought he was involved in a burglary and that his fingerprints had been found at the scene. Yet the majority is content to note that "there is no indication that ... respondent's freedom to depart was restricted in any way," as if a silent record (and no state-court findings) means that the State has sustained its burden of demonstrating that respondent

received his constitutional due.

More fundamentally, however, I cannot agree with the Court's conclusion that if respondent were not in custody no warnings were required. I recognize that *Miranda* is limited to custodial interrogations, but that is because [] the facts in the *Miranda* cases raised only this "narrow issue."

In my view, even if respondent were not in custody, the coercive elements in the instant case were so pervasive as to require *Miranda*-type warnings. Respondent was interrogated in "privacy" and in "unfamiliar surroundings," factors on which *Miranda* places great stress. The investigation had focused on respondent. And respondent was subjected to some of the "deceptive stratagems," which called forth the *Miranda* decision. I therefore agree with the Oregon Supreme Court that to excuse the absence of warnings given these facts is "contrary to the rationale expressed in *Miranda*."

The privilege against self-incrimination "has always been 'as broad as the mischief against which it seeks to guard.'" Today's decision means, however, that the Fifth Amendment privilege does not provide full protection against mischiefs equivalent to, but different from, custodial interrogation. I respectfully dissent.

Notes, Comments, and Questions

We have seen the Court's preference for objective tests—those based upon what a "reasonable" person would have done or believed in certain circumstances—over subjective tests based on what a specific person was actually thinking. When deciding whether Sylvia Mendenhall was detained (Chapter 19), for example, the question was not whether she felt free to leave but instead was whether a hypothetical reasonable person in her situation at the airport would have felt free to leave. Similar analysis pervades decisions about whether consent for searches was validly obtained.

Further, the Court has often seemed to adopt a one-size-fits-all concept of the reasonable person. To return to Mendenhall: The Court considered briefly that she was "22 years old and had not been graduated from high school ... [and was] a female and [Black]" interacting with white police officers. Nonetheless, the Court's "reasonable person" analysis paid little attention to these factors, finding them "not irrelevant" but not especially important. Critics have suggested (as they have in other legal contexts applying "reasonable person" standards, such as tort law) that the beliefs and behaviors of a reasonable person will depend significantly on factors such as race, sex, education, age, and social class, to which the Court gives little attention.

In the next case, the Court considered the potential relevance of someone's age to the question of whether he was "in custody" for purposes of *Miranda*. The result differed from the common one-size-fits-all concept of "reasonable" that the Court had previously applied in *Miranda* cases.

Supreme Court of the United States

J.D.B. v. North Carolina

Decided June 16, 2011 – 564 U.S. 261

Justice SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*. It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.

I

A

Petitioner J.D.B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour.

This was the second time that police questioned J.D.B. in the span of a week. Five days earlier, two home break-ins occurred, and

various items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J.D.B.'s grandmother—his legal guardian—as well as his aunt.

Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s middle school and seen in J.D.B.'s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J.D.B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J.D.B. about the break-ins. Although DiCostanzo asked the school administrators to verify J.D.B.'s date of birth, address, and parent contact information from school records, neither the police officers nor the school administrators contacted J.D.B.'s grandmother.

The uniformed officer interrupted J.D.B.'s afternoon social studies class, removed J.D.B. from the classroom, and escorted him to a school conference room. There, J.D.B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.

Questioning began with small talk—discussion of sports and J.D.B.'s family life. DiCostanzo asked, and J.D.B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J.D.B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J.D.B. for additional detail about his efforts to obtain work; asked J.D.B. to explain a prior incident, when one of the victims returned home to find J.D.B. behind her house; and confronted J.D.B. with the stolen camera. The assistant principal urged J.D.B. to "do the right thing," warning J.D.B. that "the truth always comes out in the end."

Eventually, J.D.B. asked whether he would "still be in trouble" if he returned the "stuff." In response, DiCostanzo explained that return of the stolen items would be helpful, but "this thing is going to court" regardless. DiCostanzo then warned that he may need to seek a secure custody order if he believed that J.D.B. would continue to break into other homes. When J.D.B. asked what a secure custody order was, DiCostanzo explained that "it's where you get sent to juvenile detention before court."

After learning of the prospect of juvenile detention, J.D.B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J.D.B. that he could refuse to answer the investigator's questions and that he was free to leave. Asked whether he understood, J.D.B. nodded and provided further detail, including information about the location of the stolen items. Eventually J.D.B. wrote a statement, at DiCostanzo's request. When the bell rang indicating the end of the schoolday, J.D.B. was allowed to leave to catch the bus home.

B

Two juvenile petitions were filed against J.D.B., each alleging one count of breaking and entering and one count of larceny. J.D.B.'s public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because J.D.B. had been "interrogated by police in a custodial setting without being afforded *Miranda* warning[s]" and because his statements were involuntary under the totality of the circumstances test. After a suppression hearing at which DiCostanzo and J.D.B. testified, the trial court denied the motion, deciding that J.D.B. was not in custody at the time of the schoolhouse interrogation and that his statements were voluntary. As a result, J.D.B. entered a transcript of admission to all four counts, renewing his objection to the denial of his motion to suppress, and the court adjudicated J.D.B. delinquent.

A divided panel of the North Carolina Court of Appeals affirmed. The North Carolina Supreme Court held, over two dissents, that J.D.B. was not in custody when he confessed, "declin[ing] to extend the test for custody to include consideration of the age ... of an individual subjected to questioning by police." We granted certiorari to determine whether the *Miranda* custody analysis includes consideration of a juvenile suspect's age.

II

A

Any police interview of an individual suspected of a crime has "coercive aspects to it." Only those interrogations that occur while a suspect is in police custody, however, "heighte[n] the risk" that statements obtained are not the product of the suspect's free

choice.

By its very nature, custodial police interrogation entails "inherently compelling pressures." Even for an adult, the physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and … compel him to speak where he would not otherwise do so freely." Indeed, the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

Recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements," this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Because these measures protect the individual against the coercive nature of custodial interrogation, they are required "'only where there has been such a restriction on a person's freedom as to render him "in custody."'" As we have repeatedly emphasized, whether a suspect is "in custody" is an objective inquiry.

The benefit of the objective custody analysis is that it is "designed to give clear guidance to the police."

B

The State and its *amici* contend that a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree. In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

A child's age is far "more than a chronological fact." It is a fact that "generates commonsense conclusions about behavior and perception." Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children "generally are less mature and responsible than adults," that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," that they "are more vulnerable or susceptible to … outside pressures" than adults, and so on. Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." Describing no one child in particular, these observations restate what "any parent knows"—indeed, what any person knows—about children generally.

Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Like this Court's own generalizations, the legal disqualifications placed on children as a class—*e.g.,* limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

Indeed, even where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, "[a]ll American jurisdictions accept the idea that a person's childhood is a relevant circumstance" to be considered.

As this discussion establishes, "[o]ur history is replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults. We see no justification for taking a different course here[,] [s]o long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer. The same "wide basis of community experience" that makes it possible, as an objective matter, "to determine what is to be expected" of children in other contexts likewise makes it possible to know what to expect of children subjected to police questioning.

In other words, a child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action. Precisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are "most susceptible to influence" and "outside pressures,"—considering age in the custody analysis in no way involves a determination of how youth "subjectively affect[s] the mindset" of any particular child.

In fact, in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect's age. This case is a prime example. Were the court precluded from taking J.D.B.'s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to "do the right thing"; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances.

Indeed, the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Without asking whether the person "questioned in school" is a "minor," the coercive effect of the schoolhouse setting is unknowable.

Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. It is, however, a reality that courts cannot simply ignore.

The question remains whether J.D.B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age at the time. The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

The Court's decision in this case may seem on first consideration to be modest and sensible, but in truth it is neither. It is fundamentally inconsistent with one of the main justifications for the *Miranda* rule: the perceived need for a clear rule that can be easily applied in all cases. And today's holding is not needed to protect the constitutional rights of minors who are questioned by the police.

Miranda's prophylactic regime places a high value on clarity and certainty. Dissatisfied with the highly fact-specific constitutional rule against the admission of involuntary confessions, the *Miranda* Court set down rigid standards that often require courts to ignore personal characteristics that may be highly relevant to a particular suspect's actual susceptibility to police pressure. This rigidity, however, has brought with it one of *Miranda*'s principal strengths—"the ease and clarity of its application" by law enforcement officials and courts. A key contributor to this clarity, at least up until now, has been *Miranda*'s objective reasonable-person test for determining custody.

Miranda's custody requirement is based on the proposition that the risk of unconstitutional coercion is heightened when a suspect is placed under formal arrest or is subjected to some functionally equivalent limitation on freedom of movement. When this custodial threshold is reached, *Miranda* warnings must precede police questioning. But in the interest of simplicity, the custody analysis considers only whether, under the circumstances, a hypothetical reasonable person would consider himself to be confined.

Many suspects, of course, will differ from this hypothetical reasonable person. Some, including those who have been hardened by past interrogations, may have no need for *Miranda* warnings at all. And for other suspects—those who are unusually sensitive to the pressures of police questioning—*Miranda* warnings may come too late to be of any use. That is a necessary consequence of *Miranda*'s rigid standards, but it does not mean that the constitutional rights of these especially sensitive suspects are left unprotected. A vulnerable defendant can still turn to the constitutional rule against *actual* coercion and contend that that his confession was extracted against his will.

Today's decision shifts the *Miranda* custody determination from a one-size-fits-all reasonable-person test into an inquiry that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures. Age, however, is in no way the only personal characteristic that may correlate with pliability, and in future cases the Court will be forced to choose between two unpalatable alternatives. It may choose to limit today's decision by arbitrarily distinguishing a suspect's age from other personal characteristics—such as intelligence, education, occupation, or prior experience with law enforcement—that may also correlate with susceptibility to coercive pressures. Or, if the Court is unwilling to draw these arbitrary lines, it will be forced to effect a fundamental transformation of the *Miranda* custody test—from a clear, easily

applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory.

For at least three reasons, there is no need to go down this road. First, many minors subjected to police interrogation are near the age of majority, and for these suspects the one-size-fits-all *Miranda* custody rule may not be a bad fit. Second, many of the difficulties in applying the *Miranda* custody rule to minors arise because of the unique circumstances present when the police conduct interrogations at school. The *Miranda* custody rule has always taken into account the setting in which questioning occurs, and accounting for the school setting in such cases will address many of these problems. Third, in cases like the one now before us, where the suspect is especially young, courts applying the constitutional voluntariness standard can take special care to ensure that incriminating statements were not obtained through coercion. Safeguarding the constitutional rights of minors does not require the extreme makeover of *Miranda* that today's decision may portend.

Notes, Comments, and Questions

The dissent in *J.D.B* raised concerns that the majority's decision will lead to a slippery slope. Should the court consider factors like race, sex, and socioeconomic status in the *Miranda* analysis? What are potential pros and cons of such an approach?

In addition, the dissent's argument presents an opportunity to consider "slippery slope" arguments more generally.[1] For a slippery slope claim to be compelling, the proponent must establish two things: First, the slope is truly slippery. Second, the place down at the bottom of the slope is a bad place to be. For example, when the Court decided *Lawrence v. Texas*, 539 U.S. 558 (2003), opponents of the decision attacked the majority's reasoning, often employing slippery slope arguments.

The Court's decision in *Lawrence* prohibits states from criminalizing consensual sexual activity among adults of the same sex (at least if the same activity would be lawful among opposite-sex couples). In his dissent, Justice Scalia decried the Court's decision to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), writing, "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices."

Supporters of the *Lawrence* decision responded to Scalia's slippery slope arguments on two fronts. First, for some items, the slope was not actually slippery, they argued (for example, bigamy need not follow from ending criminal punishment for same-sex consensual sex). Second, for some items, such as same-sex marriage, the bottom of the slope looks great. (In other words, yes, the slope there is slippery, and that's just fine.) Considering these two questions—is it slippery, and if so is that bad—will help students evaluate slippery slope arguments in various contexts.

Further, consider the prospect of a police department seeking to enforce criminal laws against adultery. What would be involved in seeking a warrant to search a house for evidence? How would communities react when homes were raided, and phones seized and searched, as officers sought proof of extramarital affairs?

Police investigations of masturbation seem even sillier. That said, the image of police establishing probable cause to search a house for proof of masturbation ("Well, Your Honor, a teenager lives there.")—and then emerging triumphantly with seized evidence—illustrates the power entrusted in the legislature to decide what counts as a "crime." Because tobacco is legal to possess and use on public sidewalks, a smoker can walk down the street without fear of being arrested, searched incident to the arrest, and then taken to jail, where officials can conduct far more invasive searches. Because marijuana is illegal to possess (and even in places where use has been legalized generally may not be smoked in public), a marijuana user walking down the street with a joint enjoys no such security.[2]

Ultimately, the application of every doctrine in this book depends upon the definition of what is and is not a crime, as well as what crimes (and persons) police choose to investigate.

The next case provides a stark example of the difference between "custody" under *Miranda* and the definition of a Fourth Amendment "seizure." The Court has long held that when police stop a car, the driver is "seized" and can later object if the stop was unlawful. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979). In 2007, the Court announced the additional holding that everyone in the car—including passengers—is "seized" during a vehicle stop. *See Brendlin v. California*, 551 U.S. 249 (2007). The Court explained: "We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission. A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on 'privacy and personal security' does not normally (and did not here) distinguish between passenger and driver."

Nonetheless, the Court held in *Berkemer v. McCarty*—in an opinion by Justice Marshall, normally among the Justices most supportive of expanding the scope of the *Miranda* Rule—that police need not recite *Miranda* warnings before questioning a driver during a vehicle stop. (The opinion was nearly unanimous. Justice Stevens wrote separately that the Court should not have reached the issue. No Justice disagreed on the merits.) Students should consider why the Court declined to apply the *Miranda* Rule to interrogations conducted during traffic stops.

Supreme Court of the United States

Harry J. Berkemer, Sheriff of Franklin County, Ohio v. Richard N. McCarty

Decided July 2, 1984 – 468 U.S. 420

Justice MARSHALL delivered the opinion of the Court.

This case presents two related questions: First, does our decision in *Miranda v. Arizona* govern the admissibility of statements made during custodial interrogation by a suspect accused of a misdemeanor traffic offense? Second, does the roadside questioning of a motorist detained pursuant to a traffic stop constitute custodial interrogation for the purposes of the doctrine enunciated in Miranda?

I

A

The parties have stipulated to the essential facts. On the evening of March 31, 1980, Trooper Williams of the Ohio State Highway Patrol observed respondent's car weaving in and out of a lane on Interstate Highway 270. After following the car for two miles, Williams forced respondent to stop and asked him to get out of the vehicle. When respondent complied, Williams noticed that he was having difficulty standing. At that point, "Williams concluded that [respondent] would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated." However, respondent was not told that he would be taken into custody. Williams then asked respondent to perform a field sobriety test, commonly known as a "balancing test." Respondent could not do so without falling.

While still at the scene of the traffic stop, Williams asked respondent whether he had been using intoxicants. Respondent replied that "he had consumed two beers and had smoked several joints of marijuana a short time before." Respondent's speech was slurred, and Williams had difficulty understanding him. Williams thereupon formally placed respondent under arrest and transported him in the patrol car to the Franklin County Jail.

At the jail, respondent was given an intoxilyzer test to determine the concentration of alcohol in his blood. The test did not detect any alcohol whatsoever in respondent's system. Williams then resumed questioning respondent in order to obtain information for inclusion in the State Highway Patrol Alcohol Influence Report. Respondent answered affirmatively a question whether he had been drinking. When then asked if he was under the influence of alcohol, he said, "I guess, barely." Williams next asked respondent to indicate on the form whether the marihuana he had smoked had been treated with any chemicals. In the section of the report headed "Remarks," respondent wrote, "No ang[el] dust or PCP in the pot. Rick McCarty."

At no point in this sequence of events did Williams or anyone else tell respondent that he had a right to remain silent, to consult with an attorney, and to have an attorney appointed for him if he could not afford one.

B

Respondent was charged with operating a motor vehicle while under the influence of alcohol and/or drugs. Under Ohio law, that offense is a first-degree misdemeanor and is punishable by fine or imprisonment for up to six months. Incarceration for a minimum of three days is mandatory.

Respondent moved to exclude the various incriminating statements he had made to Trooper Williams on the ground that introduction into evidence of those statements would violate the Fifth Amendment insofar as he had not been informed of his constitutional rights prior to his interrogation. When the trial court denied the motion, respondent pleaded "no contest" and was found guilty. He was sentenced to 90 days in jail, 80 of which were suspended, and was fined $300, $100 of which were

suspended.

On appeal to the Franklin County Court of Appeals, respondent renewed his constitutional claim. Relying on a prior decision by the Ohio Supreme Court, which held that the rule announced in *Miranda* "is not applicable to misdemeanors," the Court of Appeals rejected respondent's argument and affirmed his conviction. The Ohio Supreme Court dismissed respondent's appeal on the ground that it failed to present a "substantial constitutional question."

Respondent then filed an action for a writ of habeas corpus in the District Court for the Southern District of Ohio. The District Court dismissed the petition, holding that "*Miranda* warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense."

A divided panel of the Court of Appeals for the Sixth Circuit reversed, holding that "*Miranda* warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense." In applying this principle to the facts of the case, the Court of Appeals distinguished between the statements made by respondent before and after his formal arrest. The postarrest statements, the court ruled, were plainly inadmissible; because respondent was not warned of his constitutional rights prior to or "[a]t the point that Trooper Williams took [him] to the police station," his ensuing admissions could not be used against him. The court's treatment of respondent's prearrest statements was less clear. It eschewed a holding that "the mere stopping of a motor vehicle triggers *Miranda*" but did not expressly rule that the statements made by respondent at the scene of the traffic stop could be used against him. In the penultimate paragraph of its opinion, the court asserted that "[t]he failure to advise [respondent] of his constitutional rights rendered at least some of his statements inadmissible," suggesting that the court was uncertain as to the status of the prearrest confessions. "Because [respondent] was convicted on inadmissible evidence," the court deemed it necessary to vacate his conviction and order the District Court to issue a writ of habeas corpus. However, the Court of Appeals did not specify which statements, if any, could be used against respondent in a retrial.

We granted certiorari to resolve confusion in the federal and state courts regarding the applicability of our ruling in *Miranda* to interrogations involving minor offenses and to questioning of motorists detained pursuant to traffic stops.

II

In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt.

Petitioner asks us to carve an exception out of the foregoing principle. When the police arrest a person for allegedly committing a misdemeanor traffic offense and then ask him questions without telling him his constitutional rights, petitioner argues, his responses should be admissible against him. We cannot agree.

One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule. The exception to *Miranda* proposed by petitioner would substantially undermine this crucial advantage of the doctrine. The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony. Consider, for example, the reasonably common situation in which the driver of a car involved in an accident is taken into custody. Under Ohio law, both driving while under the influence of intoxicants and negligent vehicular homicide are misdemeanors, while reckless vehicular homicide is a felony. When arresting a person for causing a collision, the police may not know which of these offenses he may have committed. Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of the accident dies. It would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect.

Equally importantly, the doctrinal complexities that would confront the courts if we accepted petitioner's proposal would be Byzantine. Difficult questions quickly spring to mind: For instance, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters; at what point in the evolution of an affair of this sort would the police be obliged to give *Miranda* warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing him the safeguards prescribed by *Miranda*? The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations. Neither the police nor criminal defendants would benefit from such a development.

We do not suggest that there is any reason to think improper efforts were made in this case to induce respondent to make damaging admissions. More generally, we have no doubt that, in conducting most custodial interrogations of persons arrested for misdemeanor traffic offenses, the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will. But the same might be said of custodial interrogations of persons arrested for felonies. The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the "'inherently compelling pressures'" generated by the custodial setting itself, "'which work to undermine the individual's will to resist,'" and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary. Those purposes are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies.

Petitioner's second argument is that law enforcement would be more expeditious and effective in the absence of a requirement that persons arrested for traffic offenses be informed of their rights. Again, we are unpersuaded. The occasions on which the police arrest and then interrogate someone suspected only of a misdemeanor traffic offense are rare. The police are already well accustomed to giving *Miranda* warnings to persons taken into custody. Adherence to the principle that all suspects must be given such warnings will not significantly hamper the efforts of the police to investigate crimes.

We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.

The implication of this holding is that the Court of Appeals was correct in ruling that the statements made by respondent at the County Jail were inadmissible. There can be no question that respondent was "in custody" at least as of the moment he was formally placed under arrest and instructed to get into the police car. Because he was not informed of his constitutional rights at that juncture, respondent's subsequent admissions should not have been used against him.

III

To assess the admissibility of the self-incriminating statements made by respondent prior to his formal arrest, we are obliged to address a second issue concerning the scope of our decision in *Miranda*: whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered "custodial interrogation." Respondent urges that it should, on the ground that *Miranda* by its terms applies whenever "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Petitioner contends that a holding that every detained motorist must be advised of his rights before being questioned would constitute an unwarranted extension of the *Miranda* doctrine.

It must be acknowledged at the outset that a traffic stop significantly curtails the "freedom of action" of the driver and the passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission. Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so. Partly for these reasons, we have long acknowledged that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief."

However, we decline to accord talismanic power to the phrase in the *Miranda* opinion emphasized by respondent. Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced "to speak where he would not otherwise do so freely." First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.

Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions.

But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* itself and in the subsequent cases in which we have applied *Miranda*.

In both of these respects, the usual traffic stop is more analogous to a so-called "*Terry* stop" than to a formal arrest. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*.

Turning to the case before us, we find nothing in the record that indicates that respondent should have been given *Miranda* warnings at any point prior to the time Trooper Williams placed him under arrest. For the reasons indicated above, we reject the contention that the initial stop of respondent's car, by itself, rendered him "in custody." And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Only a short period of time elapsed between the stop and the arrest. At no point during that interval was respondent informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Nor do other aspects of the interaction of Williams and respondent support the contention that respondent was exposed to "custodial interrogation" at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

We conclude, in short, that respondent was not taken into custody for the purposes of *Miranda* until Williams arrested him. Consequently, the statements respondent made prior to that point were admissible against him.

Accordingly, the judgment of the Court of Appeals is [a]ffirmed.

Notes, Comments, and Questions

As the Court noted near the end of its opinion in *Berkemer*, the definition of "custody" under *Miranda* does not include seizures conducted pursuant to *Terry v. Ohio* on the basis of reasonable suspicion.

The Practical Consequences of the *Miranda* Rule

Before exploring more of the *Miranda* doctrine—defining "interrogation," learning what counts as a "waiver" of *Miranda* rights, and so on—we pause here to consider the practical effects of the doctrine. The *Miranda* Rule is now more than 50 years old, and debate rages on straightforward questions such as: (1) does the rule reduce the ability of police to obtain voluntary confessions,[3] (2) does it provide any real benefits to suspects, or to society as a whole, such as by promoting meaningful free choice and protecting the dignity of suspects under interrogation, (3) has it affected the crime rate?

For example, Professor Paul Cassell has argued that *Miranda* has increased the crime rate while providing no compelling benefits to compensate.[4] Challenging a perceived academic consensus that *Miranda*'s practical effects on crime-fighting have been "negligible," Professor Cassell offers an empirical analysis of the number of confessions police never obtain because of *Miranda*. He includes a corresponding analysis of lost convictions—as well as lenient plea bargains necessitated by missing evidence. He begins with the "common sense" premise that "[s]urely fewer persons will confess if police must warn them of their right to silence, obtain affirmative waivers from them, and end the interrogation if they ask for a lawyer or for questioning to stop." He also quotes the *Miranda* dissent of Justice White: "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."

While acknowledging that any empirical analysis must be a "sound estimate" rather than an exact calculation, Cassell argues that the costs are severe—well in excess of the insignificant harms commonly imagined by scholars and judges.[5] He concludes that

each year, *Miranda* results in tens of thousands of "lost cases" for violent crimes, along with tens of thousands more for property crimes. His numbers are based on an estimated loss of 3.8 percent of convictions in serious cases.

Replying to Cassell, Professor Stephen Schulhofer reached the opposite conclusion.[6] After adjusting for what he describes as Cassell's faulty data analysis and biased selection of samples, Schulhofer concludes, "For all practical purposes, *Miranda*'s empirically detectable harm to law enforcement shrinks virtually to zero." Schulhofer then offers a robust defense of *Miranda*'s benefits, noting that "[t]o carry the day, an alternative to *Miranda* not only must promise more convictions, but also must preserve justice and respect for constitutional values in the 99% (or perhaps only 96.2%) of convictions that will be obtained successfully under either regime—and in all the arrests that will not produce convictions under either regime."[7]

Noting that—according to his own analysis—police have managed to obtain confessions under *Miranda* at rates similar to those of the old days, Schulhofer confronts the question of why then we should care about *Miranda*. That is, if it doesn't reduce confessions, why bother? He replies that the Court's goal in *Miranda* was not "to reduce or eliminate confessions," recalling that the Court explicitly established a procedure "to ensure that confessions could continue to be elicited and used."[8] "*Miranda*'s stated objective was not to eliminate confessions, but to eliminate compelling pressure in the interrogation process."[9] In other words, under *Miranda*, police still get confessions, but they get them by tricking suspects (and exploiting their overconfidence) instead of by "pressure and fear." That difference, to Schulhofer, honors the Self-Incrimination Clause of the Fifth Amendment while imposing "detectable social costs [that] are vanishingly small."[10]

A decade later, Professors George C. Thomas III and Richard A. Leo reviewed "two generations of scholarship" and concluded that *Miranda* has "exerted a negligible effect" on the ability of police to obtain confessions.[11] They argued, as well, that *Miranda*'s "practical benefits—as a procedural safeguard against compulsion, coercion, false confessions, or any of the pernicious interrogation techniques that the Warren Court excoriated in the *Miranda* decision"—are similarly negligible.[12] They offered several potentially overlapping explanations for their findings of negligible effects. First, suspects know of their rights from television and elsewhere, yet overwhelming majorities "waive their rights and thus appear to consent to interrogation."[13] (They analogized *Miranda* warnings to those on cigarette packages.) Second, police have learned to recite the *Miranda* warnings in a way that encourages cooperation. Third, Supreme Court decisions have limited the effects of the *Miranda* Rule (for example, by making it easy for prosecutors to demonstrate "waiver"). Indeed, police and prosecutors now largely support *Miranda* and report that it does not interfere with their work.

The broad consensus is that *Miranda* is not a serious impediment to policework, meaning that suspects regularly confess to serious crimes despite being explicitly informed (1) that they need not do so and (2) that doing so could cause them harm in court. Students interested in how police obtain confessions should see an article titled *Ordinary Police Interrogation in the United States: The Destruction of Meaning and Persons: A Psychoanalytic-Ethical Investigation*.[14] The authors describe a suspect who falsely confessed to murdering his sister. The interrogation was videotaped, allowing analysis of how an innocent person (conclusive evidence of his innocence was later discovered) was pressured to confess by lawful police tactics. The authors argue, "The goal of interrogation is not to gather information. It is to obtain confessions."[15] That is, once police decide during an investigation who they believe committed the crime, the purpose of interrogation is to get the admissions needed to convict the suspect.

One author attended a training seminar for police interrogators, learning techniques such as how to "evade informing suspects of their rights during interrogation by giving suspects the impression that they have been arrested without in fact placing them under arrest." He reports, "Reid seminar attendees are told to walk into interviews with thick folders, videocassettes, or similar props spilling out to make subjects believe interrogators have evidence against them." After describing several other techniques effective against the innocent and guilty alike, the authors state, "The interrogator, armed and trained with these powerful rhetorical tools developed and refined over seventy years of systematic study and placed in the position of power and authority over the suspect, not surprisingly often extracts admissions of criminal conduct. But such admissions do not end the interrogation."[16] Because police prefer confessions that match other evidence, interrogators follow the initial admissions with leading questions designed to conform the suspect's story to what is already known about a crime.

A discussion of best practices for interrogations is beyond the scope of this chapter. It will suffice to state that if questioners seek to learn the truth during questioning—as opposed to confirming existing beliefs and obtaining evidence for trial—the process described in *Ordinary Police Interrogation* would be avoided.[17]

Regardless of one's views on the ultimate practical effects of *Miranda*, one cannot deny that Supreme Court doctrine affects the number of confessions admitted as evidence against defendants. In our next chapter, we review how the Court has defined

"interrogation" under *Miranda*.

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3.4: Chapter 25 - The Miranda Rule- What Is Interrogation?

INTERROGATIONS

Chapter 25

The *Miranda* Rule: What Is Interrogation?

Having considered how the Court defines “custody” in *Miranda* Rule cases, we now examine how the Court defines “interrogation.” Only during “custodial interrogation” does the *Miranda* Rule apply.

In addition, in this chapter we begin our review of the Court’s cases concerning waiver of rights under *Miranda*.

Supreme Court of the United States

Rhode Island v. Thomas J. Innis

Decided May 12, 1980 – 446 U.S. 291

Mr. Justice STEWART delivered the opinion of the Court.

In *Miranda v. Arizona*, the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present. The issue in this case is whether the respondent was “interrogated” in violation of the standards promulgated in the *Miranda* opinion.

I

On the night of January 12, 1975, John Mulvaney, a Providence, R.I., taxicab driver, disappeared after being dispatched to pick up a customer. His body was discovered four days later buried in a shallow grave in Coventry, R.I. He had died from a shotgun blast aimed at the back of his head.

On January 17, 1975, shortly after midnight, the Providence police received a telephone call from Gerald Aubin, also a taxicab driver, who reported that he had just been robbed by a man wielding a sawed-off shotgun. Aubin further reported that he had dropped off his assailant near Rhode Island College in a section of Providence known as Mount Pleasant. While at the Providence police station waiting to give a statement, Aubin noticed a picture of his assailant on a bulletin board. Aubin so informed one of the police officers present. The officer prepared a photo array, and again Aubin identified a picture of the same person. That person was the respondent. Shortly thereafter, the Providence police began a search of the Mount Pleasant area.

At approximately 4:30 a.m. on the same date, Patrolman Lovell, while cruising the streets of Mount Pleasant in a patrol car, spotted the respondent standing in the street facing him. When Patrolman Lovell stopped his car, the respondent walked towards it. Patrolman Lovell then arrested the respondent, who was unarmed, and advised him of his so-called *Miranda* rights. While the two men waited in the patrol car for other police officers to arrive, Patrolman Lovell did not converse with the respondent other than to respond to the latter’s request for a cigarette.

Within minutes, Sergeant Sears arrived at the scene of the arrest, and he also gave the respondent the *Miranda* warnings. Immediately thereafter, Captain Leyden and other police officers arrived. Captain Leyden advised the respondent of his *Miranda* rights. The respondent stated that he understood those rights and wanted to speak with a lawyer. Captain Leyden then directed that the respondent be placed in a “caged wagon,” a four-door police car with a wire screen mesh between the front and rear seats, and be driven to the central police station. Three officers, Patrolmen Gleckman, Williams, and McKenna, were assigned to accompany the respondent to the central station. They placed the respondent in the vehicle and shut the doors. Captain Leyden then instructed the officers not to question the respondent or intimidate or coerce him in any way. The three officers then entered the vehicle, and it departed.

While en route to the central station, Patrolman Gleckman initiated a conversation with Patrolman McKenna concerning the missing shotgun. As Patrolman Gleckman later testified:

"A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby,] there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."

Patrolman McKenna apparently shared his fellow officer's concern:

"A. I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it."

While Patrolman Williams said nothing, he overheard the conversation between the two officers:

"A. He [Gleckman] said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself."

The respondent then interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. At this point, Patrolman McKenna radioed back to Captain Leyden that they were returning to the scene of the arrest and that the respondent would inform them of the location of the gun. At the time the respondent indicated that the officers should turn back, they had traveled no more than a mile, a trip encompassing only a few minutes.

The police vehicle then returned to the scene of the arrest where a search for the shotgun was in progress. There, Captain Leyden again advised the respondent of his *Miranda* rights. The respondent replied that he understood those rights but that he "wanted to get the gun out of the way because of the kids in the area in the school." The respondent then led the police to a nearby field, where he pointed out the shotgun under some rocks by the side of the road.

On March 20, 1975, a grand jury returned an indictment charging the respondent with the kidnaping, robbery, and murder of John Mulvaney. Before trial, the respondent moved to suppress the shotgun and the statements he had made to the police regarding it. After an evidentiary hearing at which the respondent elected not to testify, the trial judge found that the respondent had been "repeatedly and completely advised of his *Miranda* rights." He further found that it was "entirely understandable that [the officers in the police vehicle] would voice their concern [for the safety of the handicapped children] to each other." The judge then concluded that the respondent's decision to inform the police of the location of the shotgun was "a waiver, clearly, and on the basis of the evidence that I have heard, and [*sic*] intelligent waiver, of his [*Miranda*] right to remain silent." Thus, without passing on whether the police officers had in fact "interrogated" the respondent, the trial court sustained the admissibility of the shotgun and testimony related to its discovery. That evidence was later introduced at the respondent's trial, and the jury returned a verdict of guilty on all counts.

On appeal, the Rhode Island Supreme Court, in a 3–2 decision, set aside the respondent's conviction. [T]he court concluded that the respondent had invoked his *Miranda* right to counsel and that, contrary to *Miranda*'s mandate that, in the absence of counsel, all custodial interrogation then cease, the police officers in the vehicle had "interrogated" the respondent without a valid waiver of his right to counsel. It was the view of the state appellate court that, even though the police officers may have been genuinely concerned about the public safety and even though the respondent had not been addressed personally by the police officers, the respondent nonetheless had been subjected to "subtle coercion" that was the equivalent of "interrogation" within the meaning of the *Miranda* opinion. Moreover, contrary to the holding of the trial court, the appellate court concluded that the evidence was insufficient to support a finding of waiver. Having concluded that both the shotgun and testimony relating to its discovery were obtained in violation of the *Miranda* standards and therefore should not have been admitted into evidence, the Rhode Island Supreme Court held that the respondent was entitled to a new trial.

We granted certiorari to address for the first time the meaning of "interrogation" under *Miranda v. Arizona*.

II

The Court in the *Miranda* opinion [] outlined in some detail the consequences that would result if a defendant sought to invoke those procedural safeguards. With regard to the right to the presence of counsel, the Court noted:

"Once warnings have been given, the subsequent procedure is clear. ... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent."

In the present case, the parties are in agreement that the respondent was fully informed of his *Miranda* rights and that he invoked his *Miranda* right to counsel when he told Captain Leyden that he wished to consult with a lawyer. It is also uncontested that the respondent was "in custody" while being transported to the police station.

The issue, therefore, is whether the respondent was "interrogated" by the police officers in violation of the respondent's undisputed right under *Miranda* to remain silent until he had consulted with a lawyer. In resolving this issue, we first define the term "interrogation" under *Miranda* before turning to a consideration of the facts of this case.

A

The starting point for defining "interrogation" in this context is, of course, the Court's *Miranda* opinion. There the Court observed that "[b]y custodial interrogation, we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." This passage and other references throughout the opinion to "questioning" might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.

We do not, however, construe the *Miranda* opinion so narrowly. The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. The police practices that evoked this concern included several that did not involve express questioning. For example, one of the practices discussed in *Miranda* was the use of line-ups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation. A variation on this theme discussed in *Miranda* was the so-called "reverse line-up" in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. The Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to "posi[t]" "the guilt of the subject," to "minimize the moral seriousness of the offense," and "to cast blame on the victim or on society." It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.

This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. It is clear [] that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.[1] But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

B

Turning to the facts of the present case, we conclude that the respondent was not "interrogated" within the meaning of *Miranda*. It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.

Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.

The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few off hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

The Rhode Island Supreme Court erred, in short, in equating "subtle compulsion" with interrogation. That the officers' comments struck a responsive chord is readily apparent. Thus, it may be said, as the Rhode Island Supreme Court did say, that the respondent was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response. This was not established in the present case.

For the reasons stated, the judgment of the Supreme Court of Rhode Island is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

I am substantially in agreement with the Court's definition of "interrogation" within the meaning of *Miranda v. Arizona*.

I am utterly at a loss, however, to understand how this objective standard as applied to the facts before us can rationally lead to the conclusion that there was no interrogation. Innis was arrested at 4:30 a.m., handcuffed, searched, advised of his rights, and placed in the back seat of a patrol car. Within a short time he had been twice more advised of his rights and driven away in a four-door sedan with three police officers. Two officers sat in the front seat and one sat beside Innis in the back seat. Since the car traveled no more than a mile before Innis agreed to point out the location of the murder weapon, Officer Gleckman must have begun almost immediately to talk about the search for the shotgun.

The Court attempts to characterize Gleckman's statements as "no more than a few off hand remarks" which could not reasonably have been expected to elicit a response. If the statements had been addressed to respondent, it would be impossible to draw such a conclusion. The simple message of the "talking back and forth" between Gleckman and McKenna was that they had to find the shotgun to avert a child's death.

One can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed. And not just any innocent person, but an innocent child—a little girl—a helpless, handicapped little girl on her way to school. The notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous. As a matter of fact, the appeal to a suspect to confess for the sake of others, to "display some evidence of decency and honor," is a classic interrogation technique.

Gleckman's remarks would obviously have constituted interrogation if they had been explicitly directed to respondent, and the result should not be different because they were nominally addressed to McKenna. This is not a case where police officers speaking among themselves are accidentally overheard by a suspect. These officers were "talking back and forth" in close quarters with the handcuffed suspect, traveling past the very place where they believed the weapon was located. They knew respondent would hear and attend to their conversation, and they are chargeable with knowledge of and responsibility for the pressures to speak which they created.

I firmly believe that this case is simply an aberration, and that in future cases the Court will apply the standard adopted today in accordance with its plain meaning.

Mr. Justice STEVENS, dissenting.

An original definition of an old term coupled with an original finding of fact on a cold record makes it possible for this Court to vacate the judgment of the Supreme Court of Rhode Island. That court, on the basis of the facts in the record before it, concluded that members of the Providence, R.I., police force had interrogated respondent, who was clearly in custody at the time, in the absence of counsel after he had requested counsel. In my opinion the state court's conclusion that there was interrogation rests on a proper interpretation of both the facts and the law; thus, its determination that the products of the interrogation were inadmissible at trial should be affirmed.

In short, in order to give full protection to a suspect's right to be free from any interrogation at all, the definition of "interrogation" must include any police statement or conduct that has the same purpose or effect as a direct question. Statements that appear to call for a response from the suspect, as well as those that are designed to do so, should be considered interrogation. By prohibiting only those relatively few statements or actions that a police officer should know are likely to elicit an incriminating response, the Court today accords a suspect considerably less protection. Indeed, since I suppose most suspects are unlikely to incriminate themselves even when questioned directly, this new definition will almost certainly exclude every statement that is not punctuated with a question mark from the concept of "interrogation."

The difference between the approach required by a faithful adherence to *Miranda* and the stinted test applied by the Court today can be illustrated by comparing three different ways in which Officer Gleckman could have communicated his fears about the possible dangers posed by the shotgun to handicapped children. He could have:

(1) directly asked Innis:

Will you please tell me where the shotgun is so we can protect handicapped school children from danger?

(2) announced to the other officers in the wagon:

If the man sitting in the back seat with me should decide to tell us where the gun is, we can protect handicapped children from danger.

or (3) stated to the other officers:

It would be too bad if a little handicapped girl would pick up the gun that this man left in the area and maybe kill herself.

In my opinion, all three of these statements should be considered interrogation because all three appear to be designed to elicit a response from anyone who in fact knew where the gun was located. Under the Court's test, on the other hand, the form of the statements would be critical. The third statement would not be interrogation because in the Court's view there was no reason for Officer Gleckman to believe that Innis was susceptible to this type of an implied appeal; therefore, the statement would not be reasonably likely to elicit an incriminating response. Assuming that this is true, then it seems to me that the first two statements, which would be just as unlikely to elicit such a response, should also not be considered interrogation. But, because the first statement is clearly an express question, it *would* be considered interrogation under the Court's test. The second statement, although just as clearly a deliberate appeal to Innis to reveal the location of the gun, would presumably not be interrogation because (a) it was not in form a direct question and (b) it does not fit within the "reasonably likely to elicit an incriminating response" category that applies to indirect interrogation.

As this example illustrates, the Court's test creates an incentive for police to ignore a suspect's invocation of his rights in order to make continued attempts to extract information from him. If a suspect does not appear to be susceptible to a particular type of psychological pressure, the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks. And if, contrary to all reasonable expectations, the suspect makes an incriminating statement, that statement can be used against him at trial. The Court thus turns *Miranda*'s unequivocal rule against any interrogation at all into a trap in which unwary suspects may be caught by police deception.

Notes, Comments, and Questions

Review the three questions presented by Justice Stevens. Can you articulate a rule under which they are not all interrogations? Look closely at how the majority applies the "functional equivalent" part of its interrogation rule. Will the application be easily transferred to other scenarios?

Consider a suspect who invokes his right to counsel after receiving his *Miranda* warnings. When the suspect's wife arrives, a police officer stays in the room as the suspect and wife converse. The officer secretly records the conversation. Is the creation of the recording (or, in slightly different facts, having the officer listen carefully to the conversation without recording it) the "functional equivalent" of interrogation? *See Arizona v. Mauro*, 481 U.S. 520 (1987).

Imagine that police arrest a suspect. They do not ask any questions. Instead, an officer tells the suspect "that any cooperation would be brought to the attention of the Assistant United States Attorney." Is that "interrogation" under *Innis*? *See United States v. Montana*, 958 F.2d 516, 518 (2d Cir. 1992).

The next case concerns whether an undercover agent—that is, someone working for police without a suspect's knowledge—must

deliver *Miranda* warnings before questioning a suspect who is in custody.

Supreme Court of the United States

Illinois v. Lloyd Perkins

Decided June 4, 1990 – 496 U.S. 292

Justice KENNEDY delivered the opinion of the Court.

An undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent's investigation. Respondent made statements that implicated him in the crime that the agent sought to solve. Respondent claims that the statements should be inadmissible because he had not been given *Miranda* warnings by the agent. We hold that the statements are admissible. *Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.

I

In November 1984, Richard Stephenson was murdered in a suburb of East St. Louis, Illinois. The murder remained unsolved until March 1986, when one Donald Charlton told police that he had learned about a homicide from a fellow inmate at the Graham Correctional Facility, where Charlton had been serving a sentence for burglary. The fellow inmate was Lloyd Perkins, who is the respondent here. Charlton told police that, while at Graham, he had befriended respondent, who told him in detail about a murder that respondent had committed in East St. Louis. On hearing Charlton's account, the police recognized details of the Stephenson murder that were not well known, and so they treated Charlton's story as a credible one.

By the time the police heard Charlton's account, respondent had been released from Graham, but police traced him to a jail in Montgomery County, Illinois, where he was being held pending trial on a charge of aggravated battery, unrelated to the Stephenson murder. The police wanted to investigate further respondent's connection to the Stephenson murder, but feared that the use of an eavesdropping device would prove impracticable and unsafe. They decided instead to place an undercover agent in the cellblock with respondent and Charlton. The plan was for Charlton and undercover agent John Parisi to pose as escapees from a work release program who had been arrested in the course of a burglary. Parisi and Charlton were instructed to engage respondent in casual conversation and report anything he said about the Stephenson murder.

Parisi, using the alias "Vito Bianco," and Charlton, both clothed in jail garb, were placed in the cellblock with respondent at the Montgomery County jail. The cellblock consisted of 12 separate cells that opened onto a common room. Respondent greeted Charlton who, after a brief conversation with respondent, introduced Parisi by his alias. Parisi told respondent that he "wasn't going to do any more time" and suggested that the three of them escape. Respondent replied that the Montgomery County jail was "rinky-dink" and that they could "break out." The trio met in respondent's cell later that evening, after the other inmates were asleep, to refine their plan. Respondent said that his girlfriend could smuggle in a pistol. Charlton said: "Hey, I'm not a murderer, I'm a burglar. That's your guys' profession." After telling Charlton that he would be responsible for any murder that occurred, Parisi asked respondent if he had ever "done" anybody. Respondent said that he had and proceeded to describe at length the events of the Stephenson murder. Parisi and respondent then engaged in some casual conversation before respondent went to sleep. Parisi did not give respondent *Miranda* warnings before the conversations.

Respondent was charged with the Stephenson murder. Before trial, he moved to suppress the statements made to Parisi in the jail. The trial court granted the motion to suppress, and the State appealed. The Appellate Court of Illinois affirmed, holding that *Miranda v. Arizona* prohibits all undercover contacts with incarcerated suspects that are reasonably likely to elicit an incriminating response.

We granted certiorari to decide whether an undercover law enforcement officer must give *Miranda* warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response. We now reverse.

II

Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. When a suspect

considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess.

It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent. Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist. The state court here mistakenly assumed that because the suspect was in custody, no undercover questioning could take place. When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners. "[W]hen the agent carries neither badge nor gun and wears not 'police blue,' but the same prison gray" as the suspect, there is no "*interplay* between police interrogation and police custody."

Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. As we recognized in *Miranda:* "[C]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns.

Miranda was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. This case is illustrative. Respondent had no reason to feel that undercover agent Parisi had any legal authority to force him to answer questions or that Parisi could affect respondent's future treatment. Respondent viewed the cellmate-agent as an equal and showed no hint of being intimidated by the atmosphere of the jail. In recounting the details of the Stephenson murder, respondent was motivated solely by the desire to impress his fellow inmates. He spoke at his own peril.

The tactic employed here to elicit a voluntary confession from a suspect does not violate the Self-Incrimination Clause. This Court's Sixth Amendment decisions [] also do not avail respondent. We held in those cases that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime. After charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel. In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable.

Respondent can seek no help from his argument that a bright-line rule for the application of *Miranda* is desirable. Law enforcement officers will have little difficulty putting into practice our holding that undercover agents need not give *Miranda* warnings to incarcerated suspects. The use of undercover agents is a recognized law enforcement technique, often employed in the prison context to detect violence against correctional officials or inmates, as well as for the purposes served here. The interests protected by *Miranda* are not implicated in these cases, and the warnings are not required to safeguard the constitutional rights of inmates who make voluntary statements to undercover agents.

We hold that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. The statements at issue in this case were voluntary, and there is no federal obstacle to their admissibility at trial. We now reverse and remand for proceedings not inconsistent with our opinion.

Justice MARSHALL, dissenting.

This Court clearly and simply stated its holding in *Miranda v. Arizona*: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court reaches the contrary conclusion by fashioning an exception to the *Miranda* rule that applies whenever "an undercover law enforcement officer posing as a fellow inmate ... ask[s] questions that may elicit an incriminating response" from an incarcerated suspect. This exception is inconsistent with the rationale supporting *Miranda* and allows police officers intentionally to take advantage of suspects unaware of their constitutional rights. I therefore dissent.

The Court does not dispute that the police officer here conducted a custodial interrogation of a criminal suspect. Perkins was incarcerated in county jail during the questioning at issue here; under these circumstances, he was in custody as that term is defined in *Miranda*. While Perkins was confined, an undercover police officer, with the help of a police informant, questioned him about a serious crime. Although the Court does not dispute that Perkins was interrogated, it downplays the nature of the

35-minute questioning by disingenuously referring to it as a "conversatio[n]." The officer's narration of the "conversation" at Perkins' suppression hearing however, reveals that it clearly was an interrogation.

"[Agent:] You ever do anyone?

"[Perkins:] Yeah, once in East St. Louis, in a rich white neighborhood.

"Informant: I didn't know they had any rich white neighborhoods in East St. Louis.

"Perkins: It wasn't in East St. Louis, it was by a race track in Fairview Heights....

"[Agent]: You did a guy in Fairview Heights?

"Perkins: Yeah in a rich white section where most of the houses look the same.

"[Informant]: If all the houses look the same, how did you know you had the right house?

"Perkins: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.

"[Agent]: How long ago did this happen?

"Perkins: Approximately about two years ago. I got paid $5,000 for that job.

"[Agent]: How did it go down?

"Perkins: I walked up [to] this guy['s] house with a sawed-off under my trench coat.

"[Agent]: What type gun[?]

"Perkins: A .12 gauge Remmington *[sic]* Automatic Model 1100 sawed-off."

The police officer continued the inquiry, asking a series of questions designed to elicit specific information about the victim, the crime scene, the weapon, Perkins' motive, and his actions during and after the shooting. This interaction was not a "conversation"; Perkins, the officer, and the informant were not equal participants in a free-ranging discussion, with each man offering his views on different topics. Rather, it was an interrogation: Perkins was subjected to express questioning likely to evoke an incriminating response.

Because Perkins was interrogated by police while he was in custody, *Miranda* required that the officer inform him of his rights. In rejecting that conclusion, the Court finds that "conversations" between undercover agents and suspects are devoid of the coercion inherent in station house interrogations conducted by law enforcement officials who openly represent the State. *Miranda* was not, however, concerned solely with police *coercion*. It dealt with *any* police tactics that may operate to compel a suspect in custody to make incriminating statements without full awareness of his constitutional rights. Thus, when a law enforcement agent structures a custodial interrogation so that a suspect feels compelled to reveal incriminating information, he must inform the suspect of his constitutional rights and give him an opportunity to decide whether or not to talk.

The Court's holding today complicates a previously clear and straightforward doctrine. The Court opines that "[l]aw enforcement officers will have little difficulty putting into practice our holding that undercover agents need not give *Miranda* warnings to incarcerated suspects." Perhaps this prediction is true with respect to fact patterns virtually identical to the one before the Court today. But the outer boundaries of the exception created by the Court are by no means clear. Would *Miranda* be violated, for instance, if an undercover police officer beat a confession out of a suspect, but the suspect thought the officer was another prisoner who wanted the information for his own purposes?

The Court's adoption of the "undercover agent" exception to the *Miranda* rule [] is necessarily also the adoption of a substantial loophole in our jurisprudence protecting suspects' Fifth Amendment rights.

I dissent.

Notes, Comments, and Questions

The rule desired by the defendant in *Perkins*—which the Court rejected—would essentially have prohibited undercover questioning of suspects who are in custody. Only the most foolish suspect imaginable could be fooled by an "undercover" agent who recites the *Miranda* warnings to the suspect. Students should note, however, that in the context of the Sixth Amendment right to the assistance of counsel, the Court has proven willing to accept this consequence. (In other words, the Court's Sixth Amendment decisions have created constitutional law that makes certain undercover questioning unlawful.) In Chapter 3Θ, we will consider how the Court has regulated interrogations under the Sixth Amendment after concluding our examination of the *Miranda* Rule.

The *Miranda* Rule: Waiver of Rights

After setting forth the warnings police must deliver before conducting "custodial interrogation," the *Miranda* Court wrote, "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." The Court did not, however, define "waiver." In the next two cases, the Court begins to answer what counts as waiver, explaining how police officers can determine when interrogation is permissible after a suspect has been warned.

Supreme Court of the United States

North Carolina v. Willie Thomas Butler

Decided April 24, 1979 – 441 U.S. 369

Mr. Justice STEWART delivered the opinion of the Court.

In evident conflict with the present view of every other court that has considered the issue, the North Carolina Supreme Court has held that *Miranda v. Arizona* requires that no statement of a person under custodial interrogation may be admitted in evidence against him unless, at the time the statement was made, he explicitly waived the right to the presence of a lawyer. We granted certiorari to consider whether this *per se* rule reflects a proper understanding of the *Miranda* decision.

The respondent was convicted in a North Carolina trial court of kidnaping, armed robbery, and felonious assault. The evidence at his trial showed that he and a man named Elmer Lee had robbed a gas station in Goldsboro, N.C., in December 1976, and had shot the station attendant as he was attempting to escape. The attendant was paralyzed, but survived to testify against the respondent.

The prosecution also produced evidence of incriminating statements made by the respondent shortly after his arrest by Federal Bureau of Investigation agents in the Bronx, N.Y., on the basis of a North Carolina fugitive warrant. Outside the presence of the jury, FBI Agent Martinez testified that at the time of the arrest he fully advised the respondent of the rights delineated in the *Miranda* case. According to the uncontroverted testimony of Martinez, the agents then took the respondent to the FBI office in nearby New Rochelle, N.Y. There, after the agents determined that the respondent had an 11th grade education and was literate, he was given the Bureau's "Advice of Rights" form which he read. When asked if he understood his rights, he replied that he did. The respondent refused to sign the waiver at the bottom of the form. He was told that he need neither speak nor sign the form, but that the agents would like him to talk to them. The respondent replied: "I will talk to you but I am not signing any form." He then made inculpatory statements. Agent Martinez testified that the respondent said nothing when advised of his right to the assistance of a lawyer. At no time did the respondent request counsel or attempt to terminate the agents' questioning.

At the conclusion of this testimony the respondent moved to suppress the evidence of his incriminating statements on the ground that he had not waived his right to the assistance of counsel at the time the statements were made. The court denied the motion, finding that

"the statement made by the defendant, William Thomas Butler, to Agent David C. Martinez, was made freely and voluntarily to said agent after having been advised of his rights as required by the *Miranda* ruling, including his right to an attorney being present at the time of the inquiry and that the defendant, Butler, understood his rights; [and] that he effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the Waiver of Rights ...."

The respondent's statements were then admitted into evidence, and the jury ultimately found the respondent guilty of each offense charged.

On appeal, the North Carolina Supreme Court reversed the convictions and ordered a new trial. It found that the statements had been admitted in violation of the requirements of the *Miranda* decision, noting that the respondent had refused to waive in writing his right to have counsel present and that there had not been a *specific* oral waiver.

We conclude that the North Carolina Supreme Court erred in its reading of the *Miranda* opinion. [T]he Court held that an express statement can constitute a waiver, and that silence alone after such warnings cannot do so. But the Court did not hold that such an express statement is indispensable to a finding of waiver.

An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda,* mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

The Court's opinion in *Miranda* explained the reasons for the prophylactic rules it created:

"We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."

The *per se* rule that the North Carolina Supreme Court has found in *Miranda* does not speak to these concerns. There is no doubt that this respondent was adequately and effectively apprised of his rights. The only question is whether he waived the exercise of one of those rights, the right to the presence of a lawyer. Neither the state court nor the respondent has offered any reason why there must be a negative answer to that question in the absence of an *express* waiver. This is not the first criminal case to question whether a defendant waived his constitutional rights. It is an issue with which courts must repeatedly deal. Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

We see no reason to discard that standard and replace it with an inflexible *per se* rule in a case such as this. As stated at the outset of this opinion, it appears that every court that has considered this question has now reached the same conclusion. Ten of the eleven United States Courts of Appeals and the courts of at least 17 States have held that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case. By creating an inflexible rule that no implicit waiver can ever suffice, the North Carolina Supreme Court has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution.

Accordingly, the judgment is vacated, and the case is remanded to the North Carolina Supreme Court for further proceedings not inconsistent with this opinion.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL and Mr. Justice STEVENS joins, dissenting.

The rule announced by the Court today allows a finding of waiver based upon "infer[ence] from the actions and words of the person interrogated." The Court thus shrouds in half-light the question of waiver, allowing courts to construct inferences from ambiguous words and gestures. But the very premise of *Miranda* requires that ambiguity be interpreted against the interrogator. That premise is the recognition of the "compulsion inherent in custodial" interrogation and of its purpose "to subjugate the individual to the will of [his] examiner." Under such conditions, only the most explicit waivers of rights can be considered knowingly and freely given.

The instant case presents a clear example of the need for an express waiver requirement. As the Court acknowledges, there is a disagreement over whether respondent was orally advised of his rights at the time he made his statement. The fact that Butler received a written copy of his rights is deemed by the Court to be sufficient basis to resolve the disagreement. But, unfortunately, there is also a dispute over whether Butler could read. And, obviously, if Butler did not have his rights read to him, and could not read them himself, there could be no basis upon which to conclude that he knowingly waived them. Indeed, even if Butler could read there is no reason to believe that his oral statements, which followed a refusal to sign a written waiver form, were intended to signify relinquishment of his rights.

Faced with “actions and words” of uncertain meaning, some judges may find waivers where none occurred. Others may fail to find them where they did. In the former case, the defendant’s rights will have been violated; in the latter, society’s interest in effective law enforcement will have been frustrated. A simple prophylactic rule requiring the police to obtain an express waiver of the right to counsel before proceeding with interrogation eliminates these difficulties. And since the Court agrees that *Miranda* requires the police to obtain some kind of waiver—whether express or implied—the requirement of an express waiver would impose no burden on the police not imposed by the Court’s interpretation. It would merely make that burden explicit. Had Agent Martinez simply elicited a clear answer from Willie Butler to the question, “Do you waive your right to a lawyer?” this journey through three courts would not have been necessary.

* * *

In the next case, the Court considered whether a “knowing” and “intelligent” waiver can be obtained only if a suspect knows all the crimes about which police might question him. In other words, is it enough that he be warned that anything he might say can be used to incriminate him, or must police also inform him of every crime he is suspected of having committed?

Supreme Court of the United States

Colorado v. John Leroy Spring

Decided Jan. 27, 1987 – 479 U.S. 564

Justice POWELL delivered the opinion of the Court.

This case presents the question whether the suspect’s awareness of all the crimes about which he may be questioned is relevant to determining the validity of his decision to waive the Fifth Amendment privilege.

I

In February 1979, respondent John Leroy Spring and a companion shot and killed Donald Walker during a hunting trip in Colorado. Shortly thereafter, an informant told agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) that Spring was engaged in the interstate transportation of stolen firearms. The informant also told the agents that Spring had discussed his participation in the Colorado killing. At the time the ATF agents received this information, Walker’s body had not been found and the police had received no report of his disappearance. Based on the information received from the informant relating to the firearms violations, the ATF agents set up an undercover operation to purchase firearms from Spring. On March 30, 1979, ATF agents arrested Spring in Kansas City, Missouri, during the undercover purchase.

An ATF agent on the scene of the arrest advised Spring of his *Miranda* rights. Spring was advised of his *Miranda* rights a second time after he was transported to the ATF office in Kansas City. At the ATF office, the agents also advised Spring that he had the right to stop the questioning at any time or to stop the questioning until the presence of an attorney could be secured. Spring then signed a written form stating that he understood and waived his rights, and that he was willing to make a statement and answer questions.

ATF agents first questioned Spring about the firearms transactions that led to his arrest. They then asked Spring if he had a criminal record. He admitted that he had a juvenile record for shooting his aunt when he was 10 years old. The agents asked if Spring had ever shot anyone else. Spring ducked his head and mumbled, “I shot another guy once.” The agents asked Spring if he had ever been to Colorado. Spring said no. The agents asked Spring whether he had shot a man named Walker in Colorado and thrown his body into a snowbank. Spring paused and then ducked his head again and said no. The interview ended at this point.

On May 26, 1979, Colorado law enforcement officials visited Spring while he was in jail in Kansas City pursuant to his arrest on the firearms offenses. The officers gave Spring the *Miranda* warnings, and Spring again signed a written form indicating that he understood his rights and was willing to waive them. The officers informed Spring that they wanted to question him about the Colorado homicide. Spring indicated that he “wanted to get it off his chest.” In an interview that lasted approximately 1 ½ hours, Spring confessed to the Colorado murder. During that time, Spring talked freely to the officers, did not indicate a desire to terminate the questioning, and never requested counsel. The officers prepared a written statement summarizing the interview. Spring read, edited, and signed the statement.

Spring was charged in Colorado state court with first-degree murder. Spring moved to suppress both statements on the ground

that his waiver of *Miranda* rights was invalid. The trial court found that the ATF agents' failure to inform Spring before the March 30 interview that they would question him about the Colorado murder did not affect his waiver of his *Miranda* rights.

Accordingly, the trial court concluded that the March 30 statement should not be suppressed on Fifth Amendment grounds. The trial court, however, subsequently ruled that Spring's statement that he "shot another guy once" was irrelevant, and that the context of the discussion did not support the inference that the statement related to the Walker homicide. For that reason, the March 30 statement was not admitted at Spring's trial. The court concluded that the May 26 statement "was made freely, voluntarily, and intelligently, after [Spring's] being properly and fully advised of his rights, and that the statement should not be suppressed, but should be admitted in evidence." The May 26 statement was admitted into evidence at trial, and Spring was convicted of first-degree murder.

Spring argued on appeal that his waiver of *Miranda* rights before the March 30 statement was invalid because he was not informed that he would be questioned about the Colorado murder. Although this statement was not introduced at trial, he claimed that its validity was relevant because the May 26 statement that was admitted against him was the illegal "fruit" of the March 30 statement and therefore should have been suppressed. The Colorado Court of Appeals agreed with Spring, holding that the ATF agents "had a duty to inform Spring that he was a suspect, or to readvise him of his *Miranda* rights, before questioning him about the murder."

The Colorado Supreme Court affirmed the judgment of the Court of Appeals. The court concluded:

"Here, the absence of an advisement to Spring that he would be questioned about the Colorado homicide, and the lack of any basis to conclude that at the time of the execution of the waiver, he reasonably could have expected that the interrogation would extend to that subject, *are* determinative factors in undermining the validity of the waiver."

We granted certiorari to resolve an arguable Circuit conflict and to review the Colorado Supreme Court's determination that a suspect's awareness of the possible subjects of questioning is a relevant and sometimes determinative consideration in assessing whether a waiver of the Fifth Amendment privilege is valid. We now reverse.

II

There is no dispute that the police obtained the May 26 confession after complete *Miranda* warnings and after informing Spring that he would be questioned about the Colorado homicide. The Colorado Supreme Court nevertheless held that the confession should have been suppressed because it was the illegal "fruit" of the March 30 statement. A confession cannot be "fruit of the poisonous tree" if the tree itself is not poisonous. Our inquiry, therefore, centers on the validity of the March 30 statement.

A

The Court's fundamental aim in designing the *Miranda* warnings was "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."

Consistent with this purpose, a suspect may waive his Fifth Amendment privilege, "provided the waiver is made voluntarily, knowingly and intelligently." In this case, the law enforcement officials twice informed Spring of his Fifth Amendment privilege in precisely the manner specified by *Miranda*. As we have noted, Spring indicated that he understood the enumerated rights and signed a written form expressing his intention to waive his Fifth Amendment privilege. The trial court specifically found that "there was no element of duress or coercion used to induce Spring's statements [on March 30, 1978]." Despite the explicit warnings and the finding by the trial court, Spring argues that his March 30 statement was in effect compelled in violation of his Fifth Amendment privilege because he signed the waiver form without being aware that he would be questioned about the Colorado homicide. Spring's argument strains the meaning of compulsion past the breaking point.

B

A statement is not "compelled" within the meaning of the Fifth Amendment if an individual "voluntarily, knowingly and intelligently" waives his constitutional privilege. The inquiry whether a waiver is coerced "has two distinct dimensions."

"First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances

surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."

There is no doubt that Spring's decision to waive his Fifth Amendment privilege was voluntary. He alleges no "coercion of a confession by physical violence or other deliberate means calculated to break [his] will" and the trial court found none. His allegation that the police failed to supply him with certain information does not relate to any of the traditional indicia of coercion: "the duration and conditions of detention ..., the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control." Absent evidence that Spring's "will [was] overborne and his capacity for self-determination critically impaired" because of coercive police conduct, his waiver of his Fifth Amendment privilege was voluntary under this Court's decision in *Miranda*.

There also is no doubt that Spring's waiver of his Fifth Amendment privilege was knowingly and intelligently made: that is, that Spring understood that he had the right to remain silent and that anything he said could be used as evidence against him. The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. The Fifth Amendment's guarantee is both simpler and more fundamental: A defendant may not be compelled to be a witness against himself in any respect. The *Miranda* warnings protect this privilege by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him.

In this case there is no allegation that Spring failed to understand the basic privilege guaranteed by the Fifth Amendment. Nor is there any allegation that he misunderstood the consequences of speaking freely to the law enforcement officials. In sum, we think that the trial court was indisputably correct in finding that Spring's waiver was made knowingly and intelligently within the meaning of *Miranda*.

III

A

Spring relies on this Court's statement in *Miranda* that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will ... show that the defendant did not voluntarily waive his privilege." He contends that the failure to inform him of the potential subjects of interrogation constitutes the police trickery and deception condemned in *Miranda,* thus rendering his waiver of *Miranda* rights invalid. Spring, however, reads this statement in *Miranda* out of context and without due regard to the constitutional privilege the *Miranda* warnings were designed to protect.

We note first that the Colorado courts made no finding of official trickery. In fact, as noted above, the trial court expressly found that "there was no element of duress or coercion used to induce Spring's statements." Spring nevertheless insists that the failure of the ATF agents to inform him that he would be questioned about the murder constituted official "trickery" sufficient to invalidate his waiver of his Fifth Amendment privilege, even if the official conduct did not amount to "coercion." Even assuming that Spring's proposed distinction has merit, we reject his conclusion. This Court has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is "trickery" sufficient to invalidate a suspect's waiver of *Miranda* rights, and we expressly decline so to hold today.

Once *Miranda* warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right—"his right to refuse to answer any question which might incriminate him." "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." We have held that a valid waiver does not require that an individual be informed of all information "useful" in making his decision or all information that "might ... affec[t] his decision to confess." "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature. Accordingly, the failure of the law enforcement officials to inform Spring of the subject matter of the interrogation could not affect Spring's decision to waive his Fifth Amendment privilege in a constitutionally significant manner.

B

This Court's holding in *Miranda* specifically required that the police inform a criminal suspect that he has the right to remain silent and that *anything* he says may be used against him. There is no qualification of this broad and explicit warning. The warning, as formulated in *Miranda,* conveys to a suspect the nature of his constitutional privilege and the consequences of abandoning it. Accordingly, we hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege.

IV

The judgment of the Colorado Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

[T]he Court[] hold[s] today: "[A] suspect's awareness of *all* the possible subjects of questioning in advance of interrogation is not relevant to determining" the validity of his waiver. This careful phraseology avoids the important question whether the lack of *any* indication of the identified subjects for questioning *is* relevant to determining the validity of the suspect's waiver.

I would include among the relevant factors for consideration whether before waiving his Fifth Amendment rights the suspect was aware, either through the circumstances surrounding his arrest or through a specific advisement from the arresting or interrogating officers, of the crime or crimes he was suspected of committing and about which they intended to ask questions. To hold that such knowledge is relevant would not undermine the "'virtue of informing police and prosecutors with specificity' as to how a pretrial questioning of a suspect must be conducted," nor would it interfere with the use of legitimate interrogation techniques. Indeed, requiring the officers to articulate at a minimum the crime or crimes for which the suspect has been arrested could contribute significantly toward ensuring that the arrest was in fact lawful and the suspect's statement not compelled because of an error at this stage alone.

The interrogation tactics utilized in this case demonstrate the relevance of the information Spring did not receive. The agents evidently hoped to obtain from Spring a valid confession to the federal firearms charge for which he was arrested and then parlay this admission into an additional confession of first-degree murder. Spring could not have expected questions about the latter, separate offense when he agreed to waive his rights, as it occurred in a different State and was a violation of state law outside the normal investigative focus of federal Alcohol, Tobacco, and Firearms agents.

The coercive aspects of the psychological ploy intended in this case, when combined with an element of surprise which may far too easily rise to a level of deception, cannot be justified in light of *Miranda*'s strict requirements that the suspect's waiver and confession be voluntary, knowing, and intelligent. If a suspect has signed a waiver form with the intention of making a statement regarding a specifically alleged crime, the Court today would hold this waiver valid with respect to questioning about any other crime, regardless of its relation to the charges the suspect believes he will be asked to address. Yet once this waiver is given and the intended statement made, the protections afforded by *Miranda* against the "inherently compelling pressures" of the custodial interrogation have effectively dissipated. Additional questioning about entirely separate and more serious suspicions of criminal activity can take unfair advantage of the suspect's psychological state, as the unexpected questions cause the compulsive pressures suddenly to reappear. Given this technique of interrogation, a suspect's understanding of the topics planned for questioning is, therefore, at the very least "relevant" to assessing whether his decision to talk to the officers was voluntarily, knowingly, and intelligently made.

I dissent.

* * *

In our next chapter, we will continue our examination of waiver of *Miranda* rights. Students should beware that the requirements set forth in *North Carolina v. Butler* have been watered down in subsequent cases.

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3.5: Chapter 26 - The Miranda Rule- Waiver

INTERROGATIONS

Chapter 26

The *Miranda* Rule: Waiver

In *North Carolina v. Butler* (Chapter 25), the Court stated that a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver," can sometimes be sufficient to count as waiver of *Miranda* rights, even absent an express waiver.

In this chapter, we see that the Court has defined "a course of conduct indicating waiver" expansively, effectively holding that "defendant's silence, coupled with an understanding of his rights" and an uncoerced statement to police constitutes waiver. In other words, an "uncoerced statement" will suffice as the "course of conduct indicating waiver" required by *Butler*.

In the next case, the Court considered whether police must inform a suspect that his attorney has been trying to reach him. More specifically, the issue was whether failure to do so invalidates an otherwise adequate waiver of *Miranda* rights.

Supreme Court of the United States

John Moran v. Brian K. Burbine

Decided March 10, 1986 – 475 U.S. 412

Justice O'CONNOR delivered the opinion of the Court.

After being informed of his rights pursuant to *Miranda v. Arizona*, and after executing a series of written waivers, respondent confessed to the murder of a young woman. At no point during the course of the interrogation, which occurred prior to arraignment, did he request an attorney. While he was in police custody, his sister attempted to retain a lawyer to represent him. The attorney telephoned the police station and received assurances that respondent would not be questioned further until the next day. In fact, the interrogation session that yielded the inculpatory statements began later that evening. The question presented is whether either the conduct of the police or respondent's ignorance of the attorney's efforts to reach him taints the validity of the waivers and therefore requires exclusion of the confessions.

I

On the morning of March 3, 1977, Mary Jo Hickey was found unconscious in a factory parking lot in Providence, Rhode Island. Suffering from injuries to her skull apparently inflicted by a metal pipe found at the scene, she was rushed to a nearby hospital. Three weeks later she died from her wounds.

Several months after her death, the Cranston, Rhode Island, police arrested respondent and two others in connection with a local burglary. Shortly before the arrest, Detective Ferranti of the Cranston police force had learned from a confidential informant that the man responsible for Ms. Hickey's death lived at a certain address and went by the name of "Butch." Upon discovering that respondent lived at that address and was known by that name, Detective Ferranti informed respondent of his *Miranda* rights. When respondent refused to execute a written waiver, Detective Ferranti spoke separately with the two other suspects arrested on the breaking and entering charge and obtained statements further implicating respondent in Ms. Hickey's murder. At approximately 6 p.m., Detective Ferranti telephoned the police in Providence to convey the information he had uncovered. An hour later, three officers from that department arrived at the Cranston headquarters for the purpose of questioning respondent about the murder.

That same evening, at about 7:45 p.m., respondent's sister telephoned the Public Defender's Office to obtain legal assistance for her brother. Her sole concern was the breaking and entering charge, as she was unaware that respondent was then under suspicion for murder. She asked for Richard Casparian who had been scheduled to meet with respondent earlier that afternoon

to discuss another charge unrelated to either the break-in or the murder. As soon as the conversation ended, the attorney who took the call attempted to reach Mr. Casparian. When those efforts were unsuccessful, she telephoned Allegra Munson, another Assistant Public Defender, and told her about respondent's arrest and his sister's subsequent request that the office represent him.

At 8:15 p.m., Ms. Munson telephoned the Cranston police station and asked that her call be transferred to the detective division. In the words of the Supreme Court of Rhode Island, whose factual findings we treat as presumptively correct, the conversation proceeded as follows:

"A male voice responded with the word 'Detectives.' Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence Police were at the Cranston police station or that Burbine was a suspect in Mary's murder."

At all relevant times, respondent was unaware of his sister's efforts to retain counsel and of the fact and contents of Ms. Munson's telephone conversation.

Less than an hour later, the police brought respondent to an interrogation room and conducted the first of a series of interviews concerning the murder. Prior to each session, respondent was informed of his *Miranda* rights, and on three separate occasions he signed a written form acknowledging that he understood his right to the presence of an attorney and explicitly indicating that he "[did] not want an attorney called or appointed for [him]" before he gave a statement. Uncontradicted evidence at the suppression hearing indicated that at least twice during the course of the evening, respondent was left in a room where he had access to a telephone, which he apparently declined to use. Eventually, respondent signed three written statements fully admitting to the murder.

Prior to trial, respondent moved to suppress the statements. The court denied the motion, finding that respondent had received the *Miranda* warnings and had "knowingly, intelligently, and voluntarily waived his privilege against self-incrimination [and] his right to counsel." Rejecting the contrary testimony of the police, the court found that Ms. Munson did telephone the detective bureau on the evening in question, but concluded that "there was no ... conspiracy or collusion on the part of the Cranston Police Department to secrete this defendant from his attorney." In any event, the court held, the constitutional right to request the presence of an attorney belongs solely to the defendant and may not be asserted by his lawyer. Because the evidence was clear that respondent never asked for the services of an attorney, the telephone call had no relevance to the validity of the waiver or the admissibility of the statements.

The jury found respondent guilty of murder in the first degree, and he appealed to the Supreme Court of Rhode Island. A divided court rejected his contention that the Fifth and Fourteenth Amendments to the Constitution required the suppression of the inculpatory statements and affirmed the conviction. Failure to inform respondent of Ms. Munson's efforts to represent him, the court held, did not undermine the validity of the waivers. "It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver." Nor, the court concluded, did *Miranda v. Arizona* or any other decision of this Court independently require the police to honor Ms. Munson's request that interrogation not proceed in her absence. In reaching that conclusion, the court noted that because two different police departments were operating in the Cranston station house on the evening in question, the record supported the trial court's finding that there was no "conspiracy or collusion" to prevent Ms. Munson from seeing respondent. In any case, the court held, the right to the presence of counsel belongs solely to the accused and may not be asserted by "benign third parties, whether or not they happen to be attorneys."

After unsuccessfully petitioning the United States District Court for the District of Rhode Island for a writ of habeas corpus, respondent appealed to the Court of Appeals for the First Circuit. That court reversed. Finding it unnecessary to reach any arguments under the Sixth and Fourteenth Amendments, the court held that the police's conduct had fatally tainted respondent's "otherwise valid" waiver of his Fifth Amendment privilege against self-incrimination and right to counsel. The court reasoned that by failing to inform respondent that an attorney had called and that she had been assured that no questioning would take place until the next day, the police had deprived respondent of information crucial to his ability to waive his rights knowingly and intelligently. The court also found that the record would support "no other explanation for the refusal to tell Burbine of Attorney Munson's call than ... deliberate or reckless irresponsibility." This kind of "blameworthy action by the police," the court concluded, together with respondent's ignorance of the telephone call, "vitiate[d] any claim that [the] waiver of counsel was knowing and voluntary."

We granted certiorari to decide whether a prearraignment confession preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney's efforts to reach him. We now reverse.

II

Respondent does not dispute that the Providence police followed the[] [*Miranda*] procedures with precision. The record amply supports the state-court findings that the police administered the required warnings, sought to assure that respondent understood his rights, and obtained an express written waiver prior to eliciting each of the three statements. Nor does respondent contest the Rhode Island courts' determination that he at no point requested the presence of a lawyer. He contends instead that the confessions must be suppressed because the police's failure to inform him of the attorney's telephone call deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights. In the alternative, he suggests that to fully protect the Fifth Amendment values served by *Miranda,* we should extend that decision to condemn the conduct of the Providence police. We address each contention in turn.

A

Miranda holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Under this standard, we have no doubt that respondent validly waived his right to remain silent and to the presence of counsel. The voluntariness of the waiver is not at issue. As the Court of Appeals correctly acknowledged, the record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements. Indeed it appears that it was respondent, and not the police, who spontaneously initiated the conversation that led to the first and most damaging confession. Nor is there any question about respondent's comprehension of the full panoply of rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them. Nonetheless, the Court of Appeals believed that the "[d]eliberate or reckless" conduct of the police, in particular their failure to inform respondent of the telephone call, fatally undermined the validity of the otherwise proper waiver. We find this conclusion untenable as a matter of both logic and precedent.

Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. The Court of Appeals' conclusion to the contrary was in error.

Nor do we believe that the level of the police's culpability in failing to inform respondent of the telephone call has any bearing on the validity of the waivers. In light of the state-court findings that there was no "conspiracy or collusion" on the part of the police, we have serious doubts about whether the Court of Appeals was free to conclude that their conduct constituted "deliberate or reckless irresponsibility." But whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident. Nor was the failure to inform respondent of the telephone call the kind of "trick[ery]" that can vitiate the validity of a waiver. Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Because respondent's voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey, the waivers were

valid.

B

At oral argument respondent acknowledged that a constitutional rule requiring the police to inform a suspect of an attorney's efforts to reach him would represent a significant extension of our precedents. He contends, however, that the conduct of the Providence police was so inimical to the Fifth Amendment values *Miranda* seeks to protect that we should read that decision to condemn their behavior. Regardless of any issue of waiver, he urges, the Fifth Amendment requires the reversal of a conviction if the police are less than forthright in their dealings with an attorney or if they fail to tell a suspect of a lawyer's unilateral efforts to contact him. Because the proposed modification ignores the underlying purposes of the *Miranda* rules and because we think that the decision as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights, we decline the invitation to further extend *Miranda*'s reach.

At the outset, while we share respondent's distaste for the deliberate misleading of an officer of the court, reading *Miranda* to forbid police deception of an *attorney* "would cut [the decision] completely loose from its own explicitly stated rationale." As is now well established, "[t]he ... *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination [is] protected.'" Their objective is not to mold police conduct for its own sake. Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege. The purpose of the *Miranda* warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda*'s mission and its only source of legitimacy.

Nor are we prepared to adopt a rule requiring that the police inform a suspect of an attorney's efforts to reach him. While such a rule might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption.

Moreover, problems of clarity to one side, reading *Miranda* to require the police in each instance to inform a suspect of an attorney's efforts to reach him would work a substantial and, we think, inappropriate shift in the subtle balance struck in that decision. Custodial interrogations implicate two competing concerns. On the one hand, "the need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. Admissions of guilt are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *Miranda* attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

The position urged by respondent would upset this carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendment privilege and injurious to legitimate law enforcement. Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt. Indeed, the very premise of the Court of Appeals was not that awareness of Ms. Munson's phone call would have dissipated the coercion of the interrogation room, but that it might have convinced respondent not to speak at all. Because neither the letter nor purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation.

III

[The Court analyzed and rejected respondent's Sixth Amendment argument because "the events that led to the inculpatory

statements preceded the formal initiation of adversary judicial proceedings."]

IV

[The Court rejected respondent's Due Process argument because "the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."]

We hold therefore that the Court of Appeals erred in finding that the Federal Constitution required the exclusion of the three inculpatory statements. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

This case poses fundamental questions about our system of justice. As this Court has long recognized "ours is an accusatorial and not an inquisitorial system." The Court's opinion today represents a startling departure from that basic insight.

The recognition that ours is an accusatorial, and not an inquisitorial system [] requires that the government's actions, even in responding to this brutal crime, respect those liberties and rights that distinguish this society from most others. As Justice Jackson observed shortly after his return from Nuremberg, cases of this kind present "a real dilemma in a free society ... for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him." Justice Frankfurter similarly emphasized that it is "a fair summary of history to say that the safeguards of liberty have been forged in controversies involving not very nice people." And, almost a century and a half ago, Macaulay observed that the guilt of Titus Oates could not justify his conviction by improper methods: "That Oates was a bad man is not a sufficient excuse; for the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent."

It is not only the Court's ultimate conclusion that is deeply disturbing; it is also its manner of reaching that conclusion. The Court completely rejects an entire body of law on the subject—the many carefully reasoned state decisions that have come to precisely the opposite conclusion. The Court similarly dismisses the fact that the police deception which it sanctions quite clearly violates the American Bar Association's Standards for Criminal Justice—Standards which THE CHIEF JUSTICE has described as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history," and which this Court frequently finds helpful. And, of course, the Court dismisses the fact that the American Bar Association has emphatically endorsed the prevailing state-court position and expressed its serious concern about the effect that a contrary view—a view, such as the Court's, that exalts incommunicado interrogation, sanctions police deception, and demeans the right to consult with an attorney—will have in police stations and courtrooms throughout this Nation. Of greatest importance, the Court misapprehends or rejects the central principles that have, for several decades, animated this Court's decisions concerning incommunicado interrogation.

This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today's decision makes no sense at all.

Like the conduct of the police in the Cranston station on the evening of June 29, 1977, the Court's opinion today serves the goal of insuring that the perpetrator of a vile crime is punished. Like the police on that June night as well, however, the Court has trampled on well-established legal principles and flouted the spirit of our accusatorial system of justice.

I respectfully dissent.

Notes, Comments, and Questions

In *Miranda*, the Court stated that a waiver of rights obtained by trickery will not be valid. "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." With the decisions in *Colorado v. Spring* (Chapter 25) and in *Moran v. Burbine* (above), the Court announced that mere failure to give useful information to a suspect is not the sort of "trick" that renders a waiver invalid.

Imagine, however, that instead of merely failing to mention the lawyer hired by the sister of their suspect, Burbine, the Cranston police instead lied about the lawyer's existence. In other words, imagine that Burbine asks a detective, "Has my sister gotten me a lawyer?" The detective replies, despite knowing about the sister's call, "We haven't heard from your sister about a lawyer or anything else." Is that the sort of trick that would make Burbine's subsequent waiver invalid?

Similarly, imagine that instead of police simply staying quiet about the "real" crime that interested them, officers lied to Spring about it. That is, Spring asks, "Is this really about some firearms charge, or are you holding me for some other reason?" Then an officer replies, despite secretly desiring to question Spring about a shooting, "I can't think of any other reason." If officers eventually do ask about the shooting, is that the sort of trick that would make Spring's subsequent waiver invalid?

In the next case, the Court considers what the prosecution must show to demonstrate that a suspect engaged in a "course of conduct indicating waiver" such that a court can find a waiver of *Miranda* rights without an express oral or written waiver.

Supreme Court of the United States

Mary Berghuis v. Van Chester Thomkins

Decided June 1, 2010 – 560 U.S. 370

Justice KENNEDY delivered the opinion of the Court.

The United States Court of Appeals for the Sixth Circuit, in a habeas corpus proceeding challenging a Michigan conviction for first-degree murder and certain other offenses, ruled that there had been two separate constitutional errors in the trial that led to the jury's guilty verdict. First, the Court of Appeals determined that a statement by the accused, relied on at trial by the prosecution, had been elicited in violation of *Miranda v. Arizona*. Second, it found that failure to ask for an instruction relating to testimony from an accomplice was ineffective assistance by defense counsel. Both of these contentions had been rejected in Michigan courts and in the habeas corpus proceedings before the United States District Court. Certiorari was granted to review the decision by the Court of Appeals on both points. The warden of a Michigan correctional facility is the petitioner here, and Van Chester Thompkins, who was convicted, is the respondent.

I

A

On January 10, 2000, a shooting occurred outside a mall in Southfield, Michigan. Among the victims was Samuel Morris, who died from multiple gunshot wounds. The other victim, Frederick France, recovered from his injuries and later testified. Thompkins, who was a suspect, fled. About one year later he was found in Ohio and arrested there.

Two Southfield police officers traveled to Ohio to interrogate Thompkins, then awaiting transfer to Michigan. The interrogation began around 1:30 p.m. and lasted about three hours. The interrogation was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on). At the beginning of the interrogation, one of the officers, Detective Helgert, presented Thompkins with a form derived from the *Miranda* rule. It stated:

"NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT

"1. You have the right to remain silent.

"2. Anything you say can and will be used against you in a court of law.

"3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.

"4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.

"5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."

Helgert asked Thompkins to read the fifth warning out loud. Thompkins complied. Helgert later said this was to ensure that Thompkins could read, and Helgert concluded that Thompkins understood English. Helgert then read the other four *Miranda* warnings out loud and asked Thompkins to sign the form to demonstrate that he understood his rights. Thompkins declined to sign the form. The record contains conflicting evidence about whether Thompkins then verbally confirmed that he understood the

rights listed on the form.

Officers began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. He moved to suppress the statements made during the interrogation. He argued that he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once, that he had not waived his right to remain silent, and that his inculpatory statements were involuntary. The trial court denied the motion.

The jury found Thompkins guilty on all counts. He was sentenced to life in prison without parole.

B

The trial court denied a motion for new trial filed by Thompkins' appellate counsel. Thompkins appealed [] the trial court's refusal to suppress his pretrial statements under *Miranda*. The Michigan Court of Appeals rejected the *Miranda* claim, ruling that Thompkins had not invoked his right to remain silent and had waived it. The Michigan Supreme Court denied discretionary review.

Thompkins filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The District Court rejected Thompkins' *Miranda* [] claim[]. The District Court reasoned that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation. It held further that the Michigan Court of Appeals was not unreasonable in determining that Thompkins had waived his right to remain silent.

The United States Court of Appeals for the Sixth Circuit reversed, ruling for Thompkins on [] his *Miranda* ... claim[]. The Court of Appeals ruled that the state court, in rejecting Thompkins' *Miranda* claim, unreasonably applied clearly established federal law and based its decision on an unreasonable determination of the facts. The Court of Appeals acknowledged that a waiver of the right to remain silent need not be express, as it can be "'inferred from the actions and words of the person interrogated.'" The panel held, nevertheless, that the state court was unreasonable in finding an implied waiver in the circumstances here. The Court of Appeals found that the state court unreasonably determined the facts because "the evidence demonstrates that Thompkins was silent for two hours and forty-five minutes." According to the Court of Appeals, Thompkins' "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights."

We granted certiorari.

III

All concede that the warning given in this case was in full compliance with the [*Miranda*] requirements. The dispute centers on the response—or nonresponse—from the suspect.

A

Thompkins makes various arguments that his answers to questions from the detectives were inadmissible. He first contends that he "invoke[d] his privilege" to remain silent by not saying anything for a sufficient period of time, so the interrogation should have "cease[d]" before he made his inculpatory statements.

This argument is unpersuasive. In the context of invoking the *Miranda* right to counsel, the Court [has] held that a suspect must do so "unambiguously." If an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants

to invoke his or her *Miranda* rights.

The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel. Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked.

There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and ... provide[s] guidance to officers" on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights "might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation." But "as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process."

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "'right to cut off questioning.'" Here he did neither, so he did not invoke his right to remain silent.

B

We next consider whether Thompkins waived his right to remain silent. The course of decisions since *Miranda,* informed by the application of *Miranda* warnings in the whole course of law enforcement, demonstrates that waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered. The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel. Thus, "[i]f anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."

The prosecution [] does not need to show that a waiver of *Miranda* rights was express. An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. If the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate "a valid waiver" of *Miranda* rights. The prosecution must make the additional showing that the accused understood these rights. Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.

Although *Miranda* imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a *Miranda* warning, it does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights. As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford. *Miranda* rights can [] be waived through means less formal than a typical waiver on the record in a courtroom, given the practical constraints and necessities of interrogation and the fact that *Miranda*'s main protection lies in advising defendants of their rights.

The record in this case shows that Thompkins waived his right to remain silent. First, there is no contention that Thompkins did not understand his rights; and from this it follows that he knew what he gave up when he spoke. There was more than enough evidence in the record to conclude that Thompkins understood his *Miranda* rights. Thompkins received a written copy of the *Miranda* warnings; Detective Helgert determined that Thompkins could read and understand English; and Thompkins was given time to read the warnings. Thompkins, furthermore, read aloud the fifth warning, which stated that "you have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." He was thus aware that his right to remain silent would not dissipate after a certain amount of time and that police would have to honor his right to be silent and his right to counsel during the whole course of interrogation. Those rights, the warning made clear, could be asserted at any time. Helgert, moreover, read the warnings aloud.

Second, Thompkins' answer to Detective Helgert's question about whether Thompkins prayed to God for forgiveness for shooting the victim is a "course of conduct indicating waiver" of the right to remain silent. If Thompkins wanted to remain silent, he could

have said nothing in response to Helgert's questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Police are not required to rewarn suspects from time to time. Thompkins' answer to Helgert's question about praying to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver. This is confirmed by the fact that before then Thompkins had given sporadic answers to questions throughout the interrogation.

Third, there is no evidence that Thompkins' statement was coerced. Thompkins does not claim that police threatened or injured him during the interrogation or that he was in any way fearful. The interrogation was conducted in a standard-sized room in the middle of the afternoon. It is true that apparently he was in a straight-backed chair for three hours, but there is no authority for the proposition that an interrogation of this length is inherently coercive. Indeed, even where interrogations of greater duration were held to be improper, they were accompanied, as this one was not, by other facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, and threats. The fact that Helgert's question referred to Thompkins' religious beliefs also did not render Thompkins' statement involuntary. "[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" In these circumstances, Thompkins knowingly and voluntarily made a statement to police, so he waived his right to remain silent.

C

Thompkins next argues that, even if his answer to Detective Helgert could constitute a waiver of his right to remain silent, the police were not allowed to question him until they obtained a waiver first. [*North Carolina v.*] *Butler* forecloses this argument. The *Butler* Court held that courts can infer a waiver of *Miranda* rights "from the actions and words of the person interrogated." This principle would be inconsistent with a rule that requires a waiver at the outset. This holding also makes sense given that "the primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves." The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.

Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps toward relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.

In order for an accused's statement to be admissible at trial, police must have given the accused a *Miranda* warning. If that condition is established, the court can proceed to consider whether there has been an express or implied waiver of *Miranda* rights. In making its ruling on the admissibility of a statement made during custodial questioning, the trial court, of course, considers whether there is evidence to support the conclusion that, from the whole course of questioning, an express or implied waiver has been established. Thus, after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights. On these premises, it follows the police were not required to obtain a waiver of Thompkins' *Miranda* rights before commencing the interrogation.

D

In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police. The police, moreover, were not required to obtain a waiver of Thompkins' right to remain silent before interrogating him. The state court's decision rejecting Thompkins' *Miranda* claim was thus correct.

IV

[The Court held that Thomkins could not show prejudice from ineffective assistance of counsel.]

The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to deny the petition.

Justice SOTOMAYOR, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court concludes today that a criminal suspect waives his right to remain silent if, after sitting tacit and uncommunicative through nearly three hours of police interrogation, he utters a few one-word responses. The Court also concludes that a suspect who wishes to guard his right to remain silent against such a finding of "waiver" must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police. Both propositions mark a substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona* has long provided during custodial interrogation.

This Court's decisions subsequent to *Miranda* have emphasized the prosecution's "heavy burden" in proving waiver. We have also reaffirmed that a court may not presume waiver from a suspect's silence or from the mere fact that a confession was eventually obtained.

Even in concluding that *Miranda* does not invariably require an express waiver of the right to silence or the right to counsel, this Court in *Butler* made clear that the prosecution bears a substantial burden in establishing an implied waiver.

It is undisputed here that Thompkins never expressly waived his right to remain silent. His refusal to sign even an acknowledgment that he understood his *Miranda* rights evinces, if anything, an intent not to waive those rights. That Thompkins did not make the inculpatory statements at issue until after approximately 2 hours and 45 minutes of interrogation serves as "strong evidence" against waiver. *Miranda* and *Butler* expressly preclude the possibility that the inculpatory statements themselves are sufficient to establish waiver.

In these circumstances, Thompkins' "actions and words" preceding the inculpatory statements simply do not evidence a "course of conduct indicating waiver" sufficient to carry the prosecution's burden. Although the Michigan court stated that Thompkins "sporadically" participated in the interview, that court's opinion and the record before us are silent as to the subject matter or context of even a single question to which Thompkins purportedly responded, other than the exchange about God and the statements respecting the peppermint and the chair. Unlike in *Butler,* Thompkins made no initial declaration akin to "I will talk to you." Indeed, Michigan and the United States concede that no waiver occurred in this case until Thompkins responded "yes" to the questions about God. I believe it is objectively unreasonable under our clearly established precedents to conclude the prosecution met its "heavy burden" of proof on a record consisting of three one-word answers, following 2 hours and 45 minutes of silence punctuated by a few largely nonverbal responses to unidentified questions.

Today's decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results, in my view, find no basis in *Miranda* or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded. Today's broad new rules are all the more unfortunate because they are unnecessary to the disposition of the case before us. I respectfully dissent.

* * *

What Counts as an Unambiguous Invocation of *Miranda* Rights?

As the Court noted in *Berghuis v. Thomkins*, only an "unambiguous invocation of *Miranda* rights" by a suspect is effective. Interrogation must cease upon an unambiguous invocation of either the right to counsel or the right to silence. In the next case, the Court considered what qualifies as an unambiguous invocation.

Supreme Court of the United States

Robert L. Davis v. United States

Decided June 24, 1994 – 512 U.S. 452

Justice O'CONNOR delivered the opinion of the Court.

In *Edwards v. Arizona,* 451 U.S. 477, (1981), we held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation. In this case we decide how law

enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning.

I

Pool brought trouble—not to River City, but to the Charleston Naval Base. Petitioner, a member of the United States Navy, spent the evening of October 2, 1988, shooting pool at a club on the base. Another sailor, Keith Shackleton, lost a game and a $30 wager to petitioner, but Shackleton refused to pay. After the club closed, Shackleton was beaten to death with a pool cue on a loading dock behind the commissary. The body was found early the next morning.

The investigation by the Naval Investigative Service (NIS) gradually focused on petitioner. Investigative agents determined that petitioner was at the club that evening, and that he was absent without authorization from his duty station the next morning. The agents also learned that only privately owned pool cues could be removed from the club premises, and that petitioner owned two cues—one of which had a bloodstain on it. The agents were told by various people that petitioner either had admitted committing the crime or had recounted details that clearly indicated his involvement in the killing.

On November 4, 1988, petitioner was interviewed at the NIS office. As required by military law, the agents advised petitioner that he was a suspect in the killing, that he was not required to make a statement, that any statement could be used against him at a trial by court-martial, and that he was entitled to speak with an attorney and have an attorney present during questioning. Petitioner waived his rights to remain silent and to counsel, both orally and in writing.

About an hour and a half into the interview, petitioner said, "Maybe I should talk to a lawyer." According to the uncontradicted testimony of one of the interviewing agents, the interview then proceeded as follows:

"[We m]ade it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, [']No, I'm not asking for a lawyer,' and then he continued on, and said, 'No, I don't want a lawyer.'"

After a short break, the agents reminded petitioner of his rights to remain silent and to counsel. The interview then continued for another hour, until petitioner said, "I think I want a lawyer before I say anything else." At that point, questioning ceased.

At his general court-martial, petitioner moved to suppress statements made during the November 4 interview. The Military Judge denied the motion, holding that "the mention of a lawyer by [petitioner] during the course of the interrogation [was] not in the form of a request for counsel and ... the agents properly determined that [petitioner] was not indicating a desire for or invoking his right to counsel." Petitioner was convicted on one specification of unpremeditated murder.

The United States Court of Military Appeals granted discretionary review and affirmed. The court recognized that the state and federal courts have developed three different approaches to a suspect's ambiguous or equivocal request for counsel:

"Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions ... have held that all interrogation about the offense must immediately cease whenever a suspect mentions counsel, but they allow interrogators to ask narrow questions designed to clarify the earlier statement and the [suspect's] desires respecting counsel."

Applying the third approach, the court held that petitioner's comment was ambiguous, and that the NIS agents properly clarified petitioner's wishes with respect to counsel before continuing questioning him about the offense.

Although we have twice previously noted the varying approaches the lower courts have adopted with respect to ambiguous or equivocal references to counsel during custodial interrogation, we have not addressed the issue on the merits. We granted certiorari to do so.

II

The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, we held in *Miranda v. Arizona* that a suspect subject to custodial interrogation has the right to consult with an attorney and to have

counsel present during questioning, and that the police must explain this right to him before questioning begins. The right to counsel established in *Miranda* was one of a "series of recommended 'procedural safeguards' ... [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."

The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it "requir[es] the special protection of the knowing and intelligent waiver standard." If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. This "second layer of prophylaxis for the *Miranda* right to counsel" is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." To that end, we have held that a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present.

The applicability of [this rule] requires courts to "determine whether the accused *actually invoked* his right to counsel." To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.

Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Although a suspect need not "speak with the discrimination of an Oxford don," *post* (SOUTER, J., concurring in judgment), 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 requisite level of clarity, *Edward*s does not require that the officers stop questioning the suspect.

We decline petitioner's invitation to require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. [T]he police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.

We recognize that requiring 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. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. "[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edward*s provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement. Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The *Edward*s rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

To recapitulate: We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

The courts below found that petitioner's remark to the NIS agents—"Maybe I should talk to a lawyer"—was not a request for counsel, and we see no reason to disturb that conclusion. The NIS agents therefore were not required to stop questioning petitioner, though it was entirely proper for them to clarify whether petitioner in fact wanted a lawyer. Because there is no ground for suppression of petitioner's statements, the judgment of the Court of Military Appeals is

Affirmed.

Justice SOUTER, with whom Justice BLACKMUN, Justice STEVENS, and Justice GINSBURG join, concurring in the judgment.

In the midst of his questioning by naval investigators, petitioner said "Maybe I should talk to a lawyer." The investigators promptly stopped questioning Davis about the killing of Keith Shackleton and instead undertook to determine whether he meant to invoke his right to counsel. According to testimony accepted by the courts below, Davis answered the investigators' questions on that point by saying, "I'm not asking for a lawyer," and "No, I don't want to talk to a lawyer." Only then did the interrogation resume (stopping for good when petitioner said, "I think I want a lawyer before I say anything else").

I agree with the majority that the Constitution does not forbid law enforcement officers to pose questions (like those directed at Davis) aimed solely at clarifying whether a suspect's ambiguous reference to counsel was meant to assert his Fifth Amendment right. Accordingly I concur in the judgment affirming Davis's conviction, resting partly on evidence of statements given after agents ascertained that he did not wish to deal with them through counsel. I cannot, however, join in my colleagues' further conclusion that if the investigators here had been so inclined, they were at liberty to disregard Davis's reference to a lawyer entirely, in accordance with a general rule that interrogators have no legal obligation to discover what a custodial subject meant by an ambiguous statement that could reasonably be understood to express a desire to consult a lawyer.

Our own precedent, the reasonable judgments of the majority of the many courts already to have addressed the issue before us, and the advocacy of a considerable body of law enforcement officials are to the contrary. All argue against the Court's approach today, which draws a sharp line between interrogated suspects who "clearly" assert their right to counsel and those who say something that may, but may not, express a desire for counsel's presence, the former suspects being assured that questioning will not resume without counsel present, the latter being left to fend for themselves. The concerns of fairness and practicality that have long anchored our *Miranda* case law point to a different response: when law enforcement officials "reasonably do not know whether or not the suspect wants a lawyer," they should stop their interrogation and ask him to make his choice clear.

While the question we address today is an open one, its answer requires coherence with nearly three decades of case law addressing the relationship between police and criminal suspects in custodial interrogation. Throughout that period, two precepts have commanded broad assent: that the *Miranda* safeguards exist "'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process,'" and that the justification for *Miranda* rules, intended to operate in the real world, "must be consistent with ... practical realities." A rule barring government agents from further interrogation until they determine whether a suspect's ambiguous statement was meant as a request for counsel fulfills both ambitions. It assures that a suspect's choice whether or not to deal with police through counsel will be "scrupulously honored," and it faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules.

Tested against the same two principles, the approach the Court adopts does not fare so well. First, as the majority expressly acknowledges, criminal suspects who may (in *Miranda*'s words) be "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures," would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language, and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them. Indeed, the awareness of just these realities has, in the past, dissuaded the Court from placing any burden of clarity upon individuals in custody, but has led it instead to require that requests for counsel be "give[n] a broad, rather than a narrow, interpretation," and that courts "indulge every reasonable presumption" that a suspect has not waived his right to counsel under *Miranda*.

The Court defends as tolerable the certainty that some poorly expressed requests for counsel will be disregarded on the ground that *Miranda* warnings suffice to alleviate the inherent coercion of the custodial interrogation. But, "[a] once-stated warning,

delivered by those who will conduct the interrogation, cannot itself suffice" to "assure that the … right to choose between silence and speech remains unfettered throughout the interrogation process."

Indeed, it is easy, amidst the discussion of layers of protection, to lose sight of a real risk in the majority's approach, going close to the core of what the Court has held that the Fifth Amendment provides. The experience of the timid or verbally inept suspect (whose existence the Court acknowledges) may not always closely follow that of the defendant in *Edwards v. Arizona* (whose purported waiver of his right to counsel, made after having invoked the right, was held ineffective, lest police be tempted to "badge[r]" others like him. When a suspect understands his (expressed) wishes to have been ignored (and by hypothesis, he has said something that an objective listener could "reasonably," although not necessarily, take to be a request), in contravention of the "rights" just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.

Nor is it enough to say that a "'statement either is … an assertion of the right to counsel or it is not.'" While it might be fair to say that every statement is meant either to express a desire to deal with police through counsel or not, this fact does not dictate the rule that interrogators who hear a statement consistent with either possibility may presume the latter and forge ahead; on the contrary, clarification is the intuitively sensible course.

Our cases are best respected by a rule that when a suspect under custodial interrogation makes an ambiguous statement that might reasonably be understood as expressing a wish that a lawyer be summoned (and questioning cease), interrogators' questions should be confined to verifying whether the individual meant to ask for a lawyer. While there is reason to expect that trial courts will apply today's ruling sensibly (without requiring criminal suspects to speak with the discrimination of an Oxford don) and that interrogators will continue to follow what the Court rightly calls "good police practice" (compelled up to now by a substantial body of state and Circuit law), I believe that the case law under *Miranda* does not allow them to do otherwise.

Notes, Comments, and Questions

A recent case from the Supreme Court of Louisiana demonstrates how easily a court can find a suspect's request for counsel to be "ambiguous." In *State v. Demesme*, 228 So.3d 1206 (La. 2017) the defendant argued he was improperly questioned after invoking his right to counsel. The Court rejected his claim, and Justice Scott J. Crichton wrote separately as follows:

"I agree with the Court's decision to deny the defendant's writ application and write separately to spotlight the very important constitutional issue regarding the invocation of counsel during a law enforcement interview. The defendant voluntarily agreed to be interviewed twice regarding his alleged sexual misconduct with minors. At both interviews detectives advised the defendant of his *Miranda* rights and the defendant stated he understood and waived those rights. Nonetheless, the defendant argues he invoked his right to counsel. And the basis for this comes from the second interview, where I believe the defendant ambiguously referenced a lawyer—prefacing that statement with 'if y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up.'"

"In my view, the defendant's ambiguous and equivocal reference to a 'lawyer dog' does not constitute an invocation of counsel that warrants termination of the interview and does not violate *Edwards v. Arizona*."

Justice Crichton's apparent belief that the defendant said "lawyer dog"—instead of perhaps saying to the detective, "give me a lawyer, dawg"—inspired widespread ridicule. Note, however, that even with a better understanding of common American vernacular, one might still find the request in *Demesme* to be "ambiguous" under *Davis*. Because the suspect prefaced his request with "if y'all think I did it," it might lack sufficient clarity to impose any burden on police—either to cease questioning or to clarify the suspect's intention. Under the rule proposed in Justice Souter's concurrence in *Davis*, which attracted four votes, police would have been required to verify whether the suspect meant to ask for a lawyer before continuing with interrogation.

* * *

In our next chapter, we will examine the consequences of a suspect's successful invocation of either the right to counsel or the right to silence.

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3.6: Chapter 27 - The Miranda Rule- Effect of Invocations of Rights

In our previous chapter, we read that suspects must invoke their rights unambiguously; otherwise, police have no duty to cease questioning or to clarify the suspect's intent. In this chapter, we examine what happens when suspects do successfully invoke their rights. As we will see, the Court has treated an invocation of the right to silence differently from an invocation of the right to counsel.

Invocation of the Right to Silence

We begin with a case in which a suspect invoked his right to remain silent. The question was how the suspect's invocation constrained the interrogation tactics of the police. In particular, the Court considered the length of time after invocation that police must wait before again asking a suspect whether he wishes to waive his right to silence.

Supreme Court of the United States

Michigan v. Richard Bert Mosley

Decided Dec. 9, 1975 – 423 U.S. 96

Mr. Justice STEWART delivered the opinion of the Court.

The respondent, Richard Bert Mosley, was arrested in Detroit, Mich., in the early afternoon of April 8, 1971, in connection with robberies that had recently occurred at the Blue Goose Bar and the White Tower Restaurant on that city's lower east side. The arresting officer, Detective James Cowie of the Armed Robbery Section of the Detroit Police Department, was acting on a tip implicating Mosley and three other men in the robberies. After effecting the arrest, Detective Cowie brought Mosley to the Robbery, Breaking and Entering Bureau of the Police Department, located on the fourth floor of the departmental headquarters building. The officer advised Mosley of his rights under this Court's decision in *Miranda v. Arizona* and had him read and sign the department's constitutional rights notification certificate. After filling out the necessary arrest papers, Cowie began questioning Mosley about the robbery of the White Tower Restaurant. When Mosley said he did not want to answer any questions about the robberies, Cowie promptly ceased the interrogation. The completion of the arrest papers and the questioning of Mosley together took approximately 20 minutes. At no time during the questioning did Mosley indicate a desire to consult with a lawyer, and there is no claim that the procedures followed to this point did not fully comply with the strictures of the *Miranda* opinion. Mosley was then taken to a ninth-floor cell block.

Shortly after 6 p.m., Detective Hill of the Detroit Police Department Homicide Bureau brought Mosley from the cell block to the fifth-floor office of the Homicide Bureau for questioning about the fatal shooting of a man named Leroy Williams. Williams had been killed on January 9, 1971, during a holdup attempt outside the 101 Ranch Bar in Detroit. Mosley had not been arrested on this charge or interrogated about it by Detective Cowie. Before questioning Mosley about this homicide, Detective Hill carefully advised him of his "*Miranda* rights." Mosley read the notification form both silently and aloud, and Detective Hill then read and explained the warnings to him and had him sign the form. Mosley at first denied any involvement in the Williams murder, but after the officer told him that Anthony Smith had confessed to participating in the slaying and had named him as the "shooter," Mosley made a statement implicating himself in the homicide.[1] The interrogation by Detective Hill lasted approximately 15 minutes, and at no time during its course did Mosley ask to consult with a lawyer or indicate that he did not want to discuss the homicide. In short, there is no claim that the procedures followed during Detective Hill's interrogation of Mosley, standing alone, did not fully comply with the strictures of the *Miranda* opinion.

Mosley was subsequently charged in a one-count information with first-degree murder. Before the trial he moved to suppress his incriminating statement on a number of grounds, among them the claim that under the doctrine of the *Miranda* case it was constitutionally impermissible for Detective Hill to question him about the Williams murder after he had told Detective Cowie that he did not want to answer any questions about the robberies. The trial court denied the motion to suppress after an evidentiary hearing, and the incriminating statement was subsequently introduced in evidence against Mosley at his trial. The jury convicted Mosley of first-degree murder, and the court imposed a mandatory sentence of life imprisonment.

On appeal to the Michigan Court of Appeals, Mosley renewed his previous objections to the use of his incriminating statement in evidence. The appellate court reversed the judgment of conviction, holding that Detective Hill's interrogation of Mosley had been a per se violation of the *Miranda* doctrine. Accordingly, without reaching Mosley's other contentions, the Court remanded the case for a new trial with instructions that Mosley's statement be suppressed as evidence. After further appeal was denied by the Michigan Supreme Court, the State filed a petition for certiorari here. We granted the writ because of the important constitutional question presented.

The issue in this case [] is whether the conduct of the Detroit police that led to Mosley's incriminating statement did in fact violate the *Miranda* "guidelines," so as to render the statement inadmissible in evidence against Mosley at his trial. Resolution of the question turns almost entirely on the interpretation of a single passage in the *Miranda* opinion, upon which the Michigan appellate court relied in finding a per se violation of *Miranda*:

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."

This passage states that "the interrogation must cease" when the person in custody indicates that "he wishes to remain silent." It does not state under what circumstances, if any, a resumption of questioning is permissible. The passage could be literally read to mean that a person who has invoked his "right to silence" can never again be subjected to custodial interrogation by any police officer at any time or place on any subject. Another possible construction of the passage would characterize "any statement taken after the person invokes his privilege" as "the product of compulsion" and would therefore mandate its exclusion from evidence, even if it were volunteered by the person in custody without any further interrogation whatever. Or the passage could be interpreted to require only the immediate cessation of questioning, and to permit a resumption of interrogation after a momentary respite.

It is evident that any of these possible literal interpretations would lead to absurd and unintended results. To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means ... to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored ...." The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

A review of the circumstances leading to Mosley's confession reveals that his "right to cut off questioning" was fully respected in this case. Before his initial interrogation, Mosley was carefully advised that he was under no obligation to answer any questions and could remain silent if he wished. He orally acknowledged that he understood the *Miranda* warnings and then signed a printed notification-of-rights form. When Mosley stated that he did not want to discuss the robberies, Detective Cowie immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position. After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete *Miranda* warnings at the outset of the second interrogation. He was thus reminded again that he could remain silent and could consult with a lawyer, and was carefully given a full and fair opportunity to exercise these options. The subsequent questioning did not undercut Mosley's previous decision not to answer Detective Cowie's inquiries. Detective Hill did not resume the interrogation about the White Tower Restaurant robbery or inquire about the Blue Goose Bar robbery, but instead focused exclusively on the Leroy Williams homicide, a crime different in nature and in time and place of occurrence from the robberies for which Mosley had been arrested and interrogated by Detective Cowie. Although it is not clear from the record how much Detective Hill knew about the earlier interrogation, his questioning of Mosley about an unrelated homicide was quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions

about the robberies.

This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

For these reasons, we conclude that the admission in evidence of Mosley's incriminating statement did not violate the principles of *Miranda v. Arizona*. Accordingly, the judgment of the Michigan Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

[T]he process of eroding *Miranda* rights [] continues with today's holding that police may renew the questioning of a suspect who has once exercised his right to remain silent, provided the suspect's right to cut off questioning has been "scrupulously honored." Today's distortion of Miranda's constitutional principles can be viewed only as yet another stop in the erosion and, I suppose, ultimate overruling of *Miranda*'s enforcement of the privilege against self-incrimination.

The *Miranda* guidelines were necessitated by the inherently coercive nature of in-custody questioning. As the Court today continues to recognize, under *Miranda*, the cost of assuring voluntariness by procedural tests, independent of any actual inquiry into voluntariness, is that some voluntary statements will be excluded. Thus the consideration in the task confronting the Court is not whether voluntary statements will be excluded, but whether the procedures approved will be sufficient to assure with reasonable certainty that a confession is not obtained under the influence of the compulsion inherent in interrogation and detention. The procedures approved by the Court today fail to provide that assurance.

We observed in *Miranda*: "In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." And, as that portion of *Miranda* which the majority finds controlling observed, "the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." Thus, as to statements which are the product of renewed questioning, *Miranda* established a virtually irrebuttable presumption of compulsion and that presumption stands strongest where, as in this case, a suspect, having initially determined to remain silent, is subsequently brought to confess his crime. Only by adequate procedural safeguards could the presumption be rebutted.

In formulating its procedural safeguard, the Court skirts the problem of compulsion and thereby fails to join issue with the dictates of *Miranda*. The language which the Court finds controlling in this case teaches that renewed questioning itself is part of the process which invariably operates to overcome the will of a suspect. That teaching is embodied in the form of a proscription on any further questioning once the suspect has exercised his right to remain silent. Today's decision uncritically abandons that teaching. The Court assumes, contrary to the controlling language, that "scrupulously honoring" an initial exercise of the right to remain silent preserves the efficaciousness of initial and future warnings despite the fact that the suspect has once been subjected to interrogation and then has been detained for a lengthy period of time.

[The dissent then suggested that once a suspect invokes the right to silence, police should be allowed to reinitiate questioning only if the suspect either has appeared before a judicial officer or has counsel present.]

* * *

Invocation of the Right to Counsel

In comparison with an invocation of the right to silence, a suspect's invocation of the right to counsel is more powerful. When a suspect says, "I want a lawyer," that statement restricts police more effectively than something like, "I don't want to talk to you"—or even something more legalistic like, "I invoke my right to silence."

Supreme Court of the United States

Robert Edwards v. Arizona

Decided May 18, 1981 – 451 U.S. 477

Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case limited to Q 1 presented in the petition, which in relevant part was "whether the Fifth, Sixth, and Fourteenth Amendments require suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation ...."

I

On January 19, 1976, a sworn complaint was filed against Edwards in Arizona state court charging him with robbery, burglary, and first-degree murder. An arrest warrant was issued pursuant to the complaint, and Edwards was arrested at his home later that same day. At the police station, he was informed of his rights as required by *Miranda v. Arizona*. Petitioner stated that he understood his rights, and was willing to submit to questioning. After being told that another suspect already in custody had implicated him in the crime, Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal." The interrogating officer told him that he wanted a statement, but that he did not have the authority to negotiate a deal. The officer provided Edwards with the telephone number of a county attorney. Petitioner made the call, but hung up after a few moments. Edwards then said: "I want an attorney before making a deal." At that point, questioning ceased and Edwards was taken to county jail.

At 9:15 the next morning, two detectives, colleagues of the officer who had interrogated Edwards the previous night, came to the jail and asked to see Edwards. When the detention officer informed Edwards that the detectives wished to speak with him, he replied that he did not want to talk to anyone. The guard told him that "he had" to talk and then took him to meet with the detectives. The officers identified themselves, stated they wanted to talk to him, and informed him of his *Miranda* rights. Edwards was willing to talk, but he first wanted to hear the taped statement of the alleged accomplice who had implicated him. After listening to the tape for several minutes, petitioner said that he would make a statement so long as it was not tape-recorded. The detectives informed him that the recording was irrelevant since they could testify in court concerning whatever he said. Edwards replied: "I'll tell you anything you want to know, but I don't want it on tape." He thereupon implicated himself in the crime.

Prior to trial, Edwards moved to suppress his confession on the ground that his *Miranda* rights had been violated when the officers returned to question him after he had invoked his right to counsel. The trial court initially granted the motion to suppress, but reversed its ruling when presented with a supposedly controlling decision of a higher Arizona court. The court stated without explanation that it found Edwards' statement to be voluntary. Edwards was tried twice and convicted. Evidence concerning his confession was admitted at both trials.

On appeal, the Arizona Supreme Court held that Edwards had invoked both his right to remain silent and his right to counsel during the interrogation conducted on the night of January 19. The court then went on to determine, however, that Edwards had waived both rights during the January 20 meeting when he voluntarily gave his statement to the detectives after again being informed that he need not answer questions and that he need not answer without the advice of counsel: "The trial court's finding that the waiver and confession were voluntarily and knowingly made is upheld."

Because the use of Edwards' confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments as construed in *Miranda v. Arizona,* we reverse the judgment of the Arizona Supreme Court.[2]

II

Here, the critical facts as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holdings of the state courts, Edwards insists that having exercised his right on the 19th to have counsel present during interrogation, he did not validly waive that right on the 20th. For the following reasons, we agree.

First, the Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct

of the accused."

Here, however sound the conclusion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.

Second, although we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." Our later cases have not abandoned that view. We reconfirm [that] view[] and emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

In concluding that the fruits of the interrogation initiated by the police on January 20 could not be used against Edwards, we do not hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver.

But this is not what the facts of this case show. Here, the officers conducting the interrogation on the evening of January 19 ceased interrogation when Edwards requested counsel as he had been advised he had the right to do. The Arizona Supreme Court was of the opinion that this was a sufficient invocation of his *Miranda* rights, and we are in accord. It is also clear that without making counsel available to Edwards, the police returned to him the next day. This was not at his suggestion or request. Indeed, Edwards informed the detention officer that he did not want to talk to anyone. At the meeting, the detectives told Edwards that they wanted to talk to him and again advised him of his *Miranda* rights. Edwards stated that he would talk, but what prompted this action does not appear. He listened at his own request to part of the taped statement made by one of his alleged accomplices and then made an incriminating statement, which was used against him at his trial. We think it is clear that Edwards was subjected to custodial interrogation on January 20 and that this occurred at the instance of the authorities. His statement made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible.

Accordingly, the holding of the Arizona Supreme Court that Edwards had waived his right to counsel was infirm, and the judgment of that court is reversed.

Notes, Comments, and Questions

Several years after deciding *Arizona v. Edwards*, the Court considered whether the rule applied if a suspect invoked his right to counsel when questioned about one crime and police later obtained a waiver of rights for the purpose of interrogating the suspect about a different crime. For example, imagine that police arrest a suspect for larceny, and he invokes his right to counsel. Then, another officer notices the suspect and recognizes him as someone police believe was involved in an unrelated murder. May that officer read the suspect his *Miranda* warnings and seek permission to question him about the murder?

In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court held that *Edwards* prohibits police from seeking a waiver regardless of the crime they wish to discuss. *Roberson* concerned a suspect arrested for one burglary who invoked his right to counsel and was later questioned about a different burglary. Quoting an Arizona Supreme Court decision with approval, the Court stated, "The only difference between Edwards and the appellant is that Edwards was questioned about the same offense after a request for counsel while the appellant was reinterrogated about an unrelated offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes."

The Court reiterated "the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*," and it rejected arguments relying on *Michigan v. Mosely*, which concerned a waiver obtained after a suspect had invoked his right to silence. The Court distinguished *Mosely* by reasoning that a "suspect's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice." In other words, if a suspect invokes his right to silence, he is asserting his own ability to decide how to act while in custody, in addition to asserting that he does not wish to speak at that time. Because he remains confident of his own judgment, he can change his mind without seeking advice, and police may inquire—after a respectful delay—whether he wishes to change course. A suspect who invokes his right to counsel, by contrast, is announcing his recognition that he needs help. Once he does so, police cannot reasonably ask whether he has somehow gained new power to manage the difficult situation without assistance.

In *Minnick v. Mississippi*, the Court reaffirmed and extended the rule of *Edwards*. The question was whether the rule of *Edwards* applied once a suspect who invoked his right to counsel had met with a lawyer, or if instead the meeting with counsel allowed the police to attempt to reinitiate interrogation.

Students should compare *Roberson* with *McNeil v. Wisconsin* (U.S. 1991), which appears in Chapter 29. In *McNeil*, the Court held that a suspect's appearance with a lawyer in court for *one crime* (which causes the Sixth Amendment right to counsel to attach for that crime), does not prevent officers from questioning the suspect about *other crimes* for which no charges had been filed (and for which Sixth Amendment right had accordingly not yet attached). This will be easier to understand once students have studied other Sixth Amendment cases. But because similar facts yield different results under a *Miranda* analysis than they do under a Sixth Amendment analysis, we flag the issue now so that students can note the contrast later.

Supreme Court of the United States

Robert S. Minnick v. Mississippi

Decided Dec. 3, 1990 – 498 U.S. 146

Justice KENNEDY delivered the opinion of the Court.

The issue in the case before us is whether *Edwards'* protection ceases once the suspect has consulted with an attorney.

Petitioner Robert Minnick and fellow prisoner James Dyess escaped from a county jail in Mississippi and, a day later, broke into a mobile home in search of weapons. In the course of the burglary they were interrupted by the arrival of the trailer's owner, Ellis Thomas, accompanied by Lamar Lafferty and Lafferty's infant son. Dyess and Minnick used the stolen weapons to kill Thomas and the senior Lafferty. Minnick's story is that Dyess murdered one victim and forced Minnick to shoot the other. Before the escapees could get away, two young women arrived at the mobile home. They were held at gunpoint, then bound hand and foot. Dyess and Minnick fled in Thomas' truck, abandoning the vehicle in New Orleans. The fugitives continued to Mexico, where they fought, and Minnick then proceeded alone to California. Minnick was arrested in Lemon Grove, California, on a Mississippi warrant, some four months after the murders.

The confession at issue here resulted from the last interrogation of Minnick while he was held in the San Diego jail, but we first recount the events which preceded it. Minnick was arrested on Friday, August 22, 1986. Petitioner testified that he was mistreated by local police during and after the arrest. The day following the arrest, Saturday, two Federal Bureau of Investigation (FBI) agents came to the jail to interview him. Petitioner testified that he refused to go to the interview, but was told he would "have to go down or else." The FBI report indicates that the agents read petitioner his *Miranda* warnings, and that he acknowledged he understood his rights. He refused to sign a rights waiver form, however, and said he would not answer "very many" questions. Minnick told the agents about the jailbreak and the flight, and described how Dyess threatened and beat him. Early in the interview, he sobbed "[i]t was my life or theirs," but otherwise he hesitated to tell what happened at the trailer. The agents reminded him he did not have to answer questions without a lawyer present. According to the report, "Minnick stated 'Come back Monday when I have a lawyer,' and stated that he would make a more complete statement then with his lawyer present." The FBI interview ended.

After the FBI interview, an appointed attorney met with petitioner. Petitioner spoke with the lawyer on two or three occasions, though it is not clear from the record whether all of these conferences were in person.

On Monday, August 25, Deputy Sheriff J.C. Denham of Clarke County, Mississippi, came to the San Diego jail to question Minnick. Minnick testified that his jailers again told him he would "have to talk" to Denham and that he "could not refuse." Denham advised petitioner of his rights, and petitioner again declined to sign a rights waiver form. Petitioner told Denham about the escape and then proceeded to describe the events at the mobile home. According to petitioner, Dyess jumped out of the mobile home and shot the first of the two victims, once in the back with a shotgun and once in the head with a pistol. Dyess then handed the pistol

to petitioner and ordered him to shoot the other victim, holding the shotgun on petitioner until he did so. Petitioner also said that when the two girls arrived, he talked Dyess out of raping or otherwise hurting them.

Minnick was tried for murder in Mississippi. He moved to suppress all statements given to the FBI or other police officers, including Denham. The trial court denied the motion with respect to petitioner's statements to Denham, but suppressed his other statements. Petitioner was convicted on two counts of capital murder and sentenced to death.

On appeal, petitioner argued that the confession to Denham was taken in violation of his rights to counsel under the Fifth and Sixth Amendments. The Mississippi Supreme Court rejected the claims. With respect to the Fifth Amendment aspect of the case, the court found "the *Edwards* bright-line rule as to initiation" inapplicable. Relying on language in *Edwards* indicating that the bar on interrogating the accused after a request for counsel applies "'until counsel has been made available to him,'" the court concluded that "[s]ince counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied." The court also rejected the Sixth Amendment claim, finding that petitioner waived his Sixth Amendment right to counsel when he spoke with Denham. We granted certiorari and, without reaching any Sixth Amendment implications in the case, we decide that the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel.

Edwards is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms.

The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application. We have confirmed that the *Edwards* rule provides "'clear and unequivocal' guidelines to the law enforcement profession." Even before *Edwards,* we noted that *Miranda*'s "relatively rigid requirement that interrogation must cease upon the accused's request for an attorney ... has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." This pre-*Edwards* explanation applies as well to *Edwards* and its progeny.

The Mississippi Supreme Court relied on our statement in *Edwards* that an accused who invokes his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him...." We do not interpret this language to mean, as the Mississippi court thought, that the protection of *Edwards* terminates once counsel has consulted with the suspect. In context, the requirement that counsel be "made available" to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room.

In *Edwards,* we focused on *Miranda*'s instruction that when the accused invokes his right to counsel, "the interrogation must cease until an attorney is *present,*" agreeing with Edwards' contention that he had not waived his right "to have counsel *present* during custodial interrogation." Our emphasis on counsel's *presence* at interrogation is not unique to *Edwards.* It derives from *Miranda,* where we said that in the cases before us "[t]he presence of counsel ... would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." Our cases following *Edwards* have interpreted the decision to mean that the authorities may not initiate questioning of the accused in counsel's absence. These descriptions of *Edwards'* holding are consistent with our statement that "[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny." In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.

We consider our ruling to be an appropriate and necessary application of the *Edwards* rule. A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged. The case before us well illustrates the pressures, and abuses, that may be concomitants of custody. Petitioner testified that though he resisted, he was required to submit to both the FBI and the Denham interviews. In the latter instance, the compulsion to submit to interrogation followed petitioner's unequivocal request during the FBI interview that questioning cease until counsel was present. The case illustrates also that consultation is not always effective in instructing the suspect of his rights. One plausible interpretation of the record is that petitioner thought he could keep his admissions out of evidence by refusing to sign a formal waiver of rights. If the authorities

had complied with Minnick's request to have counsel present during interrogation, the attorney could have corrected Minnick's misunderstanding, or indeed counseled him that he need not make a statement at all. We decline to remove protection from police-initiated questioning based on isolated consultations with counsel who is absent when the interrogation resumes.

The exception to *Edwards* here proposed is inconsistent with *Edwards'* purpose to protect the suspect's right to have counsel present at custodial interrogation. It is inconsistent as well with *Miranda,* where we specifically rejected respondent's theory that the opportunity to consult with one's attorney would substantially counteract the compulsion created by custodial interrogation. We noted in *Miranda* that "[e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."

The exception proposed, furthermore, would undermine the advantages flowing from *Edwards'* "clear and unequivocal" character. Respondent concedes that even after consultation with counsel, a second request for counsel should reinstate the *Edwards* protection. We are invited by this formulation to adopt a regime in which *Edwards'* protection could pass in and out of existence multiple times prior to arraignment, at which point the same protection might reattach by virtue of our Sixth Amendment jurisprudence. Vagaries of this sort spread confusion through the justice system and lead to a consequent loss of respect for the underlying constitutional principle.

In addition, adopting the rule proposed would leave far from certain the sort of consultation required to displace *Edwards*. Consultation is not a precise concept, for it may encompass variations from a telephone call to say that the attorney is en route, to a hurried interchange between the attorney and client in a detention facility corridor, to a lengthy in-person conference in which the attorney gives full and adequate advice respecting all matters that might be covered in further interrogations. And even with the necessary scope of consultation settled, the officials in charge of the case would have to confirm the occurrence and, possibly, the extent of consultation to determine whether further interrogation is permissible. The necessary inquiries could interfere with the attorney-client privilege.

Added to these difficulties in definition and application of the proposed rule is our concern over its consequence that the suspect whose counsel is prompt would lose the protection of *Edwards,* while the one whose counsel is dilatory would not. There is more than irony to this result. There is a strong possibility that it would distort the proper conception of the attorney's duty to the client and set us on a course at odds with what ought to be effective representation.

Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause. The *Edwards* rule sets forth a specific standard to fulfill these purposes, and we have declined to confine it in other instances. It would detract from the efficacy of the rule to remove its protections based on consultation with counsel.

Edwards does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities; but that is not the case before us. There can be no doubt that the interrogation in question was initiated by the police; it was a formal interview which petitioner was compelled to attend. Since petitioner made a specific request for counsel before the interview, the police-initiated interrogation was impermissible. Petitioner's statement to Denham was not admissible at trial.

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

The Court today establishes an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can *never* validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple *Miranda* warnings and has actually consulted his attorney. Because I see no justification for applying the *Edwards* irrebuttable presumption when a criminal suspect has actually consulted with his attorney, I respectfully dissent.

The Court today reverses the trial court's conclusion. It holds that, because Minnick had asked for counsel during the interview with the FBI agents, he could not—as a matter of law—validly waive the right to have counsel present during the conversation initiated by Denham. That Minnick's original request to see an attorney had been honored, that Minnick had consulted with his attorney on several occasions, and that the attorney had specifically warned Minnick not to speak to the authorities, are irrelevant. That Minnick was familiar with the criminal justice system in general or *Miranda* warnings in particular (he had previously been convicted of robbery in Mississippi and assault with a deadly weapon in California) is also beside the point. The confession must be suppressed, not because it was "compelled," nor even because it was obtained from an individual who could realistically be

assumed to be unaware of his rights, but simply because this Court sees fit to prescribe as a "systemic assuranc[e]" that a person in custody who has once asked for counsel cannot thereafter be approached by the police unless counsel is present. Of course the Constitution's proscription of compelled testimony does not remotely authorize this incursion upon state practices; and even our recent precedents are not a valid excuse.

In this case [] we have not been called upon to reconsider *Edwards,* but simply to determine whether its irrebuttable presumption should continue after a suspect has actually consulted with his attorney. Whatever justifications might support *Edwards* are even less convincing in this context.

The existence and the importance of the *Miranda*-created right "to have counsel *present*" are unquestioned here. What *is* questioned is why a State should not be given the opportunity to prove that the right was *voluntarily waived* by a suspect who, after having been read his *Miranda* rights twice and having consulted with counsel at least twice, chose to speak to a police officer (and to admit his involvement in two murders) without counsel present.

Edwards did not assert the principle that no waiver of the *Miranda* right "to have counsel *present*" is possible. It simply adopted the presumption that no waiver is *voluntary* in certain circumstances, and the issue before us today is how broadly those circumstances are to be defined. They should not, in my view, extend beyond the circumstances present in *Edwards* itself—where the suspect in custody asked to consult an attorney and was interrogated before that attorney had ever been provided. In those circumstances, the *Edwards* rule rests upon an assumption similar to that of *Miranda* itself: that when a suspect in police custody is first questioned he is likely to be ignorant of his rights and to feel isolated in a hostile environment. This likelihood is thought to justify special protection against unknowing or coerced waiver of rights. After a suspect has seen his request for an attorney honored, however, and has actually spoken with that attorney, the probabilities change. The suspect then knows that he has an advocate on his side, and that the police will permit him to consult that advocate. He almost certainly also has a heightened awareness (above what the *Miranda* warning itself will provide) of his right to remain silent—since at the earliest opportunity "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances."

Under these circumstances, an irrebuttable presumption that any police-prompted confession is the result of ignorance of rights, or of coercion, has no genuine basis in fact. After the first consultation, therefore, the *Edwards* exclusionary rule should cease to apply.

One should not underestimate the extent to which the Court's expansion of *Edwards* constricts law enforcement. Today's ruling, that the invocation of a right to counsel permanently prevents a police-initiated waiver, makes it largely impossible for the police to urge a prisoner who has initially declined to confess to change his mind—or indeed, even to ask whether he has changed his mind. Many persons in custody will invoke the *Miranda* right to counsel during the first interrogation, so that the permanent prohibition will attach at once. Those who do not do so will almost certainly request or obtain counsel at arraignment. We have held that a general request for counsel, after the Sixth Amendment right has attached, also triggers the *Edwards* prohibition of police-solicited confessions, and I presume that the perpetuality of prohibition announced in today's opinion applies in that context as well. "Perpetuality" is not too strong a term, since, although the Court rejects one logical moment at which the *Edwards* presumption might end, it suggests no alternative. In this case Minnick was reapproached by the police three days after he requested counsel, but the result would presumably be the same if it had been three months, or three years, or even three decades. This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime, but to those involving other subjects as well.

Today's extension of the *Edwards* prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement. This newest tower, according to the Court, is needed to avoid "inconsisten[cy] with [the] purpose" of *Edwards'* prophylactic rule, which was needed to protect *Miranda*'s prophylactic right to have counsel present, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution.

It seems obvious to me that, even in *Edwards* itself but surely in today's decision, we have gone far beyond any genuine concern about suspects who do not *know* their right to remain silent, or who have been *coerced* to abandon it. Both holdings are explicable, in my view, only as an effort to protect suspects against what is regarded as their own folly. The sharp-witted criminal would know better than to confess; why should the dull-witted suffer for his lack of mental endowment? Providing him an attorney at every stage where he might be induced or persuaded (though not coerced) to incriminate himself will even the odds. Apart from the fact that this protective enterprise is beyond our authority under the Fifth Amendment or any other provision of the Constitution, it is unwise. The procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free. That some clever criminals may employ those protections to their advantage is poor reason to allow criminals who have not done so to escape justice.

Thus, even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it; a rule that foolish mistakes do not count would leave most offenders not only unconvicted but undetected. More fundamentally, however, it is wrong, and subtly corrosive of our criminal justice system, to regard an honest confession as a "mistake." While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, "admissio[n] of guilt ..., if not coerced, [is] inherently desirable," because it advances the goals of both "justice *and* rehabilitation." A confession is rightly regarded by the Sentencing Guidelines as warranting a reduction of sentence, because it "demonstrates a recognition and affirmative acceptance of personal responsibility for ... criminal conduct," which is the beginning of reform. We should, then, rejoice at an honest confession, rather than pity the "poor fool" who has made it; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage it. To design our laws on premises contrary to these is to abandon belief in either personal responsibility or the moral claim of just government to obedience. Today's decision is misguided.

Notes, Comments, and Questions

In *Maryland v. Shatzer*, the Court considered whether the rule of *Arizona v. Edwards*—which prohibits police from attempting to question a suspect absent counsel once that suspect has invoked the right to counsel—applies after a "break in custody." The facts of the case made it an odd vehicle for the Court to reach this question. Shatzer was in prison during his interrogation, meaning he was "in custody" as that term is normally used, and he was never at liberty (out of custody) during any of the events relevant to the *Miranda* issue in the case. Students should read the case carefully to see how the Court found a "break in custody."

Students should realize, too, that the rule of *Shatzer* applies in the following more common scenario: (1) A suspect is taken into custody and read the *Miranda* warnings, (2) the suspect invokes his right to counsel, and interrogation stops, (3) the suspect is released, perhaps after a bail hearing, and (4) later, perhaps after several weeks, the suspect is arrested and taken back into custody. The question before the Court was whether the invocation during the suspect's earlier custodial interrogation prohibits police efforts to question the suspect after the new arrest.

What are the advantages of the bright-line rule advocated by Justice Kennedy in *Minnick*? Why do you think the Court treats the suspect's invocation of her right to counsel differently than her invocation of her right to remain silent?

Supreme Court of the United States

Maryland v. Michael Blaine Shatzer, Sr.

Decided Feb. 24, 2010 – 559 U.S. 98

Justice SCALIA delivered the opinion of the Court.

We consider whether a break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*.

I

In August 2003, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department referred to the department allegations that respondent Michael Shatzer, Sr., had sexually abused his 3-year-old son. At that time, Shatzer was incarcerated at the Maryland Correctional Institution–Hagerstown, serving a sentence for an unrelated child-sexual-abuse offense. Detective Shane Blankenship was assigned to the investigation and interviewed Shatzer at the correctional institution on August 7, 2003. Before asking any questions, Blankenship reviewed Shatzer's *Miranda* rights with him, and obtained a written waiver of those rights. When Blankenship explained that he was there to question Shatzer about sexually abusing his son, Shatzer expressed confusion—he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated. Blankenship clarified the purpose of his visit, and Shatzer declined to speak without an attorney. Accordingly, Blankenship ended the interview, and Shatzer was released back into the general prison population. Shortly thereafter, Blankenship closed the investigation.

Two years and six months later, the same social worker referred more specific allegations to the department about the same incident involving Shatzer. Detective Paul Hoover, from the same division, was assigned to the investigation. He and the social worker interviewed the victim, then eight years old, who described the incident in more detail. With this new information in hand, on March 2, 2006, they went to the Roxbury Correctional Institute, to which Shatzer had since been transferred, and interviewed Shatzer in a maintenance room outfitted with a desk and three chairs. Hoover explained that he wanted to ask Shatzer about the

alleged incident involving Shatzer's son. Shatzer was surprised because he thought that the investigation had been closed, but Hoover explained they had opened a new file. Hoover then read Shatzer his *Miranda* rights and obtained a written waiver on a standard department form.

Hoover interrogated Shatzer about the incident for approximately 30 minutes. Shatzer denied ordering his son to perform fellatio on him, but admitted to masturbating in front of his son from a distance of less than three feet. Before the interview ended, Shatzer agreed to Hoover's request that he submit to a polygraph examination. At no point during the interrogation did Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without one.

Five days later, on March 7, 2006, Hoover and another detective met with Shatzer at the correctional facility to administer the polygraph examination. After reading Shatzer his *Miranda* rights and obtaining a written waiver, the other detective administered the test and concluded that Shatzer had failed. When the detectives then questioned Shatzer, he became upset, started to cry, and incriminated himself by saying, "'I didn't force him. I didn't force him.'" After making this inculpatory statement, Shatzer requested an attorney, and Hoover promptly ended the interrogation.

The State's Attorney for Washington County charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer moved to suppress his March 2006 statements pursuant to *Edwards*. The trial court held a suppression hearing and later denied Shatzer's motion. The *Edwards* protections did not apply, it reasoned, because Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations. Shatzer pleaded not guilty, waived his right to a jury trial, and proceeded to a bench trial based on an agreed statement of facts. In accordance with the agreement, the State described the interview with the victim and Shatzer's 2006 statements to the detectives. Based on the proffered testimony of the victim and the "admission of the defendant as to the act of masturbation," the trial court found Shatzer guilty of sexual child abuse of his son.

Over the dissent of two judges, the Court of Appeals of Maryland reversed and remanded. The court held that "the passage of time *alone* is insufficient to [end] the protections afforded by *Edwards,*" and that, assuming, *arguendo,* a break-in-custody exception to *Edwards* existed, Shatzer's release back into the general prison population between interrogations did not constitute a break in custody. We granted certiorari.

II

The rationale of *Edwards* is that once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." Under this rule, a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect's right to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to "increase as custody is prolonged." The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of "prolonged police custody" by repeatedly attempting to question a suspect who previously requested counsel until the suspect is "badgered into submission."

We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis. Because *Edwards* is "our rule, not a constitutional command," "it is our obligation to justify its expansion."

A judicially crafted rule is "justified only by reference to its prophylactic purpose" and applies only where its benefits outweigh its costs. We begin with the benefits. *Edwards'* presumption of involuntariness has the incidental effect of "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations of voluntariness." Its fundamental purpose, however, is to "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel" by "prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights." Thus, the benefits of the rule are measured by the number of coerced confessions it suppresses that otherwise would have been admitted.

It is easy to believe that a suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm *Edwards* case. That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interrogation, and up to and including the second one, he remains cut off from his normal life and companions, "thrust into" and isolated in an "unfamiliar," "police-dominated atmosphere" where his captors "appear to control [his] fate." That was the situation confronted by the suspects in *Edwards, Roberson,* and *Minnick,* the three cases in which we have held the *Edwards* rule applicable. None of these suspects

regained a sense of control or normalcy after they were initially taken into custody for the crime under investigation.

When, unlike what happened in these three cases, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is farfetched to think that a police officer's asking the suspect whether he would like to waive his *Miranda* rights will any more "wear down the accused" than did the first such request at the original attempted interrogation—which is of course not deemed coercive. His change of heart is less likely attributable to "badgering" than it is to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest. Uncritical extension of *Edwards* to this situation would not significantly increase the number of genuinely coerced confessions excluded. The "justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time."

At the same time that extending the *Edwards* rule yields diminished benefits, extending the rule also increases its costs: the in-fact voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain. Voluntary confessions are not merely "a proper element in law enforcement," they are an "unmitigated good" "'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"

The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects. Without that limitation—and barring some purely arbitrary time limit—every *Edwards* prohibition of custodial interrogation of a particular suspect would be eternal. The prohibition applies, of course, when the subsequent interrogation pertains to a different crime, when it is conducted by a different law enforcement authority, and even when the suspect has met with an attorney after the first interrogation. And it not only prevents questioning *ex ante*; it would render invalid, *ex post,* confessions invited and obtained from suspects who (unbeknownst to the interrogators) have acquired *Edwards* immunity previously in connection with any offense in any jurisdiction. In a country that harbors a large number of repeat offenders, this consequence is disastrous.

We conclude that such an extension of *Edwards* is not justified; we have opened its "'protective umbrella'" far enough. The protections offered by *Miranda,* which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects.

If Shatzer's return to the general prison population qualified as a break in custody (a question we address in Part III, *infra*), there is no doubt that it lasted long enough (two years) to meet that durational requirement. But what about a break that has lasted only one year? Or only one week? It is impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful. And while it is certainly unusual for this Court to set forth precise time limits governing police action, it is not unheard of.

[T]his is a case in which the requisite police action has not been prescribed by statute but has been established by opinion of this Court. We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption "will not reach the correct result most of the time." It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.

The 14-day limitation meets Shatzer's concern that a break-in-custody rule lends itself to police abuse. He envisions that once a suspect invokes his *Miranda* right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for reinterrogation. But once the suspect has been out of custody long enough (14 days) to eliminate its coercive effect, there will be nothing to gain by such gamesmanship—nothing, that is, except the entirely appropriate gain of being able to interrogate a suspect who has made a valid waiver of his *Miranda* rights.

Shatzer argues that ending the *Edwards* protections at a break in custody will undermine *Edwards* purpose to conserve judicial resources. To be sure, we have said that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." But clarity and certainty are not goals in themselves. They are valuable only when they reasonably further the achievement of some substantive end—here, the exclusion of compelled confessions. Confessions obtained after a 2-week break in custody and a waiver of *Miranda* rights are most unlikely to be compelled, and hence are unreasonably excluded. In any case, a break-in-custody exception will dim only marginally, if at all, the bright-line nature of *Edwards*. In every case involving *Edwards,* the courts must determine whether the suspect was in custody when he requested counsel and when he later made the statements he seeks to suppress. Now, in cases where there is an alleged break in custody, they simply have to repeat the inquiry for the time between the initial invocation and reinterrogation. In most cases that determination will be easy. And when

it is determined that the defendant pleading *Edwards* has been out of custody for two weeks before the contested interrogation, the court is spared the fact-intensive inquiry into whether he ever, anywhere, asserted his *Miranda* right to counsel.

III

We have never decided whether incarceration constitutes custody for *Miranda* purposes, and have indeed explicitly declined to address the issue. Whether it does depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against—the "danger of coercion [that] results from the *interaction* of custody and official interrogation." To determine whether a suspect was in *Miranda* custody we have asked whether "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." This test, no doubt, is satisfied by all forms of incarceration. Our cases make clear, however, that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. We have declined to accord it "talismanic power," because *Miranda* is to be enforced "only in those types of situations in which the concerns that powered the decision are implicated." Thus, the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody.

Here, we are addressing the interim period during which a suspect was not interrogated, but was subject to a baseline set of restraints imposed pursuant to a prior conviction. Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.

Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.

IV

Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his March 2006 statements. Accordingly, we reverse the judgment of the Court of Appeals of Maryland, and remand the case for further proceedings not inconsistent with this opinion.

Justice STEVENS, concurring in the judgment.

While I agree that the presumption from *Edwards v. Arizona* is not "eternal" and does not mandate suppression of Shatzer's statement made after a 2 ½-year break in custody, I do not agree with the Court's newly announced rule: that *Edwards always* ceases to apply when there is a 14-day break in custody.

The most troubling aspect of the Court's time-based rule is that it disregards the compulsion caused by a second (or third, or fourth) interrogation of an indigent suspect who was told that if he requests a lawyer, one will be provided for him. When police tell an indigent suspect that he has the right to an attorney, that he is not required to speak without an attorney present, and that an attorney will be provided to him at no cost before questioning, the police have made a significant promise. If they cease questioning and then reinterrogate the suspect 14 days later without providing him with a lawyer, the suspect is likely to feel that the police lied to him and that he really does not have any right to a lawyer.

When officers informed Shatzer of his rights during the first interrogation, they presumably informed him that if he requested an attorney, one would be appointed for him before he was asked any further questions. But if an indigent suspect requests a lawyer, "any further interrogation" (even 14 days later) "without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." When police have not honored an earlier commitment to provide a detainee with a lawyer, the detainee likely will "understan[d] his (expressed) wishes to have been ignored" and "may well see further objection as futile and confession (true or not) as the only way to end his interrogation." Simply giving a "fresh se[t] of *Miranda* warnings" will not "'reassure' a suspect who has been denied the counsel he has clearly requested that his rights have remained untrammeled."

The Court ... speculates that if a suspect is reinterrogated and eventually talks, it must be that "further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest." But it is not apparent why that is the case. The answer, we are told, is that once a suspect has been out of *Miranda* custody for 14 days, "[h]e has likely been able to seek advice from an attorney, family members, and friends." This speculation, however, is overconfident and only questionably relevant. As a factual matter, we do not know whether the defendant has been able to seek advice: First of all, suspects are told that if they cannot afford a lawyer, one will be provided for them. Yet under the majority's rule, an indigent

suspect who took the police at their word when he asked for a lawyer will nonetheless be assumed to have "been able to seek advice from an attorney." Second, even suspects who are not indigent cannot necessarily access legal advice (or social advice as the Court presumes) within 14 days. Third, suspects may not realize that they *need* to seek advice from an attorney. Unless police warn suspects that the interrogation will resume in 14 days, why contact a lawyer? When a suspect is let go, he may assume that the police were satisfied. In any event, it is not apparent why interim advice matters. In *Minnick v. Mississippi* we held that it is not sufficient that a detainee happened to speak at some point with a lawyer. If the actual interim advice of an attorney is not sufficient, the hypothetical, interim advice of "an attorney, family members, and friends" is not enough.

Because, at the very least, we do not know whether Shatzer could obtain a lawyer, and thus would have felt that police had lied about providing one, I cannot join the Court's opinion. I concur in today's judgment, however, on another ground: Even if Shatzer could not consult a lawyer and the police never provided him one, the 2 ½-year break in custody is a basis for treating the second interrogation as no more coercive than the first. Neither a break in custody nor the passage of time has an inherent, curative power. But certain things change over time. An indigent suspect who took police at their word that they would provide an attorney probably will feel that he has "been denied the counsel he has clearly requested" when police begin to question him, without a lawyer, only 14 days later. But, when a suspect has been left alone for a significant period of time, he is not as likely to draw such conclusions when the police interrogate him again. It is concededly "impossible to determine with precision" where to draw such a line. In the case before us, however, the suspect was returned to the general prison population for two years. I am convinced that this period of time is sufficient. I therefore concur in the judgment.

Notes, Comments, and Questions

The Court holds that the cessation of custody (plus 14 days) ends the lawyer-invocation rule of *Edwards*. Where does the 14 days come from? Why should a suspect who asked for his lawyer 13 days ago be treated differently than a suspect who asked for his lawyer 15 days ago? The Court articulates a 14-day rule that is unrelated to the actual time lapse in the facts of the case (which was far longer). Why might this be problematic? Why should or shouldn't the Court wait for facts that are a closer call before articulating a bright-line rule?

Under *Edwards*, a suspect remains free to initiate conversations with police even after invoking his right to counsel. The rule of *Edwards* restricts only the behavior of police, not of suspects. As the Court wrote, a suspect who invokes "is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication*, exchanges, or conversations with the police" (emphasis added). Because of the importance of who initiated a conversation, lawyers sometimes argue about the details of who exactly said what when. A suspect who asks an officer what time it is or requests permission to visit the bathroom has not opened the door for an attempt by police to obtain a *Miranda* waiver. But if a suspect asks about his case or starts talking about what happened, he may well open the door for police seek a waiver. Further, anything the suspect simply blurts out without being interrogated is admissible because it is not the product of "interrogation."

In our next chapter, we consider exceptions to the *Miranda* rule. These are situations in which the Court has held that even if police do not read a suspect the *Miranda* warnings, a prosecutor may nonetheless use the results of custodial interrogation against a criminal defendant.

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3.7: Chapter 29 - The Sixth Amendment- The Massiah Doctrine

The text of the Sixth Amendment says nothing about interrogations. But it does have at least one useful hint about its applicability—the phrase “in all criminal prosecutions.” If there is no “prosecution,” there is no Sixth Amendment. The Court has clarified that “prosecution” is not limited to trials, and it has also stated that mere arrest isn’t enough. There must be some sort of formal proceeding.

The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.” The Court has held that once a defendant’s right to counsel has “attached”—a concept we will examine later—additional rules restrict interrogations. These rules differ from the *Miranda* Rule in important ways. For example, the Assistance of Counsel Clause applies regardless of whether a suspect is in custody. Further, the restrictions imposed under the Clause apply to undercover agents as well as to interrogators whom suspects know to be police officers.

The cases beginning with *Massiah v. United States* compose the third and final interrogation doctrine included in this book. Students should recall that the Due Process Clauses, the *Miranda* Rule, and the *Massiah* doctrine impose overlapping commands that police must obey during their investigations of crime.

Supreme Court of the United States

Winston Massiah v. United States

Decided May 18, 1964 – 377 U.S. 201

Mr. Justice STEWART delivered the opinion of the Court.

The petitioner was indicted for violating the federal narcotics laws. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. Evidence of these statements was introduced against the petitioner at his trial over his objection. He was convicted, and the Court of Appeals affirmed. We granted certiorari to consider whether, under the circumstances here presented, the prosecution’s use at the trial of evidence of the petitioner’s own incriminating statements deprived him of any right secured to him under the Federal Constitution.

The petitioner, a merchant seaman, was in 1958 a member of the crew of the S.S. Santa Maria. In April of that year federal customs officials in New York received information that he was going to transport a quantity of narcotics aboard that ship from South America to the United States. As a result of this and other information, the agents searched the Santa Maria upon its arrival in New York and found in the afterpeak of the vessel five packages containing about three and a half pounds of cocaine. They also learned of circumstances, not here relevant, tending to connect the petitioner with the cocaine. He was arrested, promptly arraigned, and subsequently indicted for possession of narcotics aboard a United States vessel. In July a superseding indictment was returned, charging the petitioner and a man named Colson with the same substantive offense, and in separate counts charging the petitioner, Colson, and others with having conspired to possess narcotics aboard a United States vessel, and to import, conceal, and facilitate the sale of narcotics. The petitioner, who had retained a lawyer, pleaded not guilty and was released on bail, along with Colson.

A few days later, and quite without the petitioner’s knowledge, Colson decided to cooperate with the government agents in their continuing investigation of the narcotics activities in which the petitioner, Colson, and others had allegedly been engaged. Colson permitted an agent named Murphy to install a Schmidt radio transmitter under the front seat of Colson’s automobile, by means of which Murphy, equipped with an appropriate receiving device, could overhear from some distance away conversations carried on in Colson’s car.

On the evening of November 19, 1959, Colson and the petitioner held a lengthy conversation while sitting in Colson’s automobile, parked on a New York street. By prearrangement with Colson, and totally unbeknown to the petitioner, the agent Murphy sat in a car parked out of sight down the street and listened over the radio to the entire conversation. The petitioner made several incriminating statements during the course of this conversation. At the petitioner’s trial these incriminating statements were brought before the jury through Murphy’s testimony, despite the insistent objection of defense counsel. The jury convicted the

petitioner of several related narcotics offenses, and the convictions were affirmed by the Court of Appeals.

The petitioner argues that it was an error of constitutional dimensions to permit the agent Murphy at the trial to testify to the petitioner's incriminating statements which Murphy had overheard under the circumstances disclosed by this record. This argument is based upon two distinct and independent grounds. First, we are told that Murphy's use of the radio equipment violated the petitioner's rights under the Fourth Amendment, and, consequently, that all evidence which Murphy thereby obtained was, under the rule of *Weeks v. United States*, 232 U.S. 383 (1914), inadmissible against the petitioner at the trial. Secondly, it is said that the petitioner's Fifth and Sixth Amendment rights were violated by the use in evidence against him of incriminating statements which government agents had deliberately elicited from him after he had been indicted and in the absence of his retained counsel. Because of the way we dispose of the case, we do not reach the Fourth Amendment issue.

It was said [in the *Spano v. New York* concurrence] that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him." Ever since this Court's decision in the *Spano* case, the New York courts have unequivocally followed this constitutional rule. "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."

This view no more than reflects a constitutional principle [] that "...during perhaps the most critical period of the proceedings ... that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants ... [are] as much entitled to such aid [of counsel] during that period as at the trial itself." And since the *Spano* decision the same basic constitutional principle has been broadly reaffirmed by this Court.

Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the Sixth Amendment directly applies. We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. It is true that in the *Spano* case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, "if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon ... because he did not even know that he was under interrogation by a government agent."

The Solicitor General, in his brief and oral argument, has strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associates even though the petitioner had been indicted. He points out that the Government was continuing its investigation in order to uncover not only the source of narcotics found on the S.S. Santa Maria, but also their intended buyer. He says that the quantity of narcotics involved was such as to suggest that the petitioner was part of a large and well-organized ring, and indeed that the continuing investigation confirmed this suspicion, since it resulted in criminal charges against many defendants. Under these circumstances the Solicitor General concludes that the Government agents were completely "justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them."

We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.

Mr. Justice WHITE, with whom Mr. Justice CLARK and Mr. Justice HARLAN join, dissenting.

The current incidence of serious violations of the law represents not only an appalling waste of the potentially happy and useful lives of those who engage in such conduct but also an overhanging, dangerous threat to those unidentified and innocent people who will be the victims of crime today and tomorrow. This is a festering problem for which no adequate cures have yet been devised. At the very least there is much room for discontent with remedial measures so far undertaken. And admittedly there remains much to be settled concerning the disposition to be made of those who violate the law.

But dissatisfaction with preventive programs aimed at eliminating crime and profound dispute about whether we should punish, deter, rehabilitate or cure cannot excuse concealing one of our most menacing problems until the millennium has arrived. In my view, a civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it. This

much is necessary even to know the scope of the problem, much less to formulate intelligent counter-measures. It will just not do to sweep these disagreeable matters under the rug or to pretend they are not there at all.

It is therefore a rather portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it—whether the accused committed the act with which he is charged. Without the evidence, the quest for truth may be seriously impeded and in many cases the trial court, although aware of proof showing defendant's guilt, must nevertheless release him because the crucial evidence is deemed inadmissible. This result is entirely justified in some circumstances because exclusion serves other policies of overriding importance, as where evidence seized in an illegal search is excluded, not because of the quality of the proof, but to secure meaningful enforcement of the Fourth Amendment. But this only emphasizes that the soundest of reasons is necessary to warrant the exclusion of evidence otherwise admissible and the creation of another area of privileged testimony. With all due deference, I am not at all convinced that the additional barriers to the pursuit of truth which the Court today erects rest on anything like the solid foundations which decisions of this gravity should require.

The importance of the matter should not be underestimated, for today's rule promises to have wide application well beyond the facts of this case. The reason given for the result here—the admissions were obtained in the absence of counsel—would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not; to admissions made prior to arraignment, at least where the defendant has counsel or asks for it; to the fruits of admissions improperly obtained under the new rule; to criminal proceedings in state courts; and to defendants long since convicted upon evidence including such admissions. The new rule will immediately do service in a great many cases.

Whatever the content or scope of the rule may prove to be, I am unable to see how this case presents an unconstitutional interference with Massiah's right to counsel. Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism—an unsound one, besides—to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence. The right to counsel has never meant as much before, and its extension in this case requires some further explanation, so far unarticulated by the Court.

Since the new rule would exclude all admissions made to the police, no matter how voluntary and reliable, the requirement of counsel's presence or approval would seem to rest upon the probability that counsel would foreclose any admissions at all. This is nothing more than a thinly disguised constitutional policy of minimizing or entirely prohibiting the use in evidence of voluntary out-of-court admissions and confessions made by the accused. Carried as far as blind logic may compel some to go, the notion that statements from the mouth of the defendant should not be used in evidence would have a severe and unfortunate impact upon the great bulk of criminal cases.

Viewed in this light, the Court's newly fashioned exclusionary principle goes far beyond the constitutional privilege against self-incrimination, which neither requires nor suggests the barring of voluntary pretrial admissions. The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself ..." The defendant may thus not be compelled to testify at his trial, but he may if he wishes. Likewise he may not be compelled or coerced into saying anything before trial; but until today he could if he wished to, and if he did, it could be used against him. Whether as a matter of self-incrimination or of due process, the proscription is against compulsion—coerced incrimination. Under the prior law, announced in countless cases in this Court, the defendant's pretrial statements were admissible evidence if voluntarily made; inadmissible if not the product of his free will. Hardly any constitutional area has been more carefully patrolled by this Court, and until now the Court has expressly rejected the argument that admissions are to be deemed involuntary if made outside the presence of counsel.

The Court presents no facts, no objective evidence, no reasons to warrant scrapping the voluntary-involuntary test for admissibility in this area. Without such evidence I would retain it in its present form.

Applying the new exclusionary rule is peculiarly inappropriate in this case. At the time of the conversation in question, petitioner was not in custody but free on bail. He was not questioned in what anyone could call an atmosphere of official coercion. What he said was said to his partner in crime who had also been indicted. There was no suggestion or any possibility of coercion. What petitioner did not know was that Colson had decided to report the conversation to the police. Had there been no prior arrangements between Colson and the police, had Colson simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said that Massiah risked talking to a friend who decided to disclose what he knew of Massiah's criminal activities. But, if, as occurred here, Colson had been cooperating with the police prior to his meeting with Massiah, both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same—the defection of a confederate in crime.

Reporting criminal behavior is expected or even demanded of the ordinary citizen. Friends may be subpoenaed to testify about friends, relatives about relatives and partners about partners. I therefore question the soundness of insulating Massiah from the apostasy of his partner in crime and of furnishing constitutional sanction for the strict secrecy and discipline of criminal organizations. Neither the ordinary citizen nor the confessed criminal should be discouraged from reporting what he knows to the authorities and from lending his aid to secure evidence of crime. Certainly after this case the Colsons will be few and far between; and the Massiahs can breathe much more easily, secure in the knowledge that the Constitution furnishes an important measure of protection against faithless compatriots and guarantees sporting treatment for sporting peddlers of narcotics.

Meanwhile, of course, the public will again be the loser and law enforcement will be presented with another serious dilemma. The general issue lurking in the background of the Court's opinion is the legitimacy of penetrating or obtaining confederates in criminal organizations. For the law enforcement agency, the answer for the time being can only be in the form of a prediction about the future application of today's new constitutional doctrine. More narrowly, and posed by the precise situation involved here, the question is this: when the police have arrested and released on bail one member of a criminal ring and another member, a confederate, is cooperating with the police, can the confederate be allowed to continue his association with the ring or must he somehow be withdrawn to avoid challenge to trial evidence on the ground that it was acquired after rather than before the arrest, after rather than before the indictment?

Undoubtedly, the evidence excluded in this case would not have been available but for the conduct of Colson in cooperation with Agent Murphy, but is it this kind of conduct which should be forbidden to those charged with law enforcement? It is one thing to establish safeguards against procedures fraught with the potentiality of coercion and to outlaw "easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection." But here there was no substitution of brutality for brains, no inherent danger of police coercion justifying the prophylactic effect of another exclusionary rule.

Notes, Comments, and Questions

Because under *Massiah* police cannot use undercover agents to question a suspect whose right to counsel has "attached," two suspects in the same jail can have different rules apply to them. If one has been arrested but not yet indicted or brought before a judge, chances are that *Miranda* applies to her and *Massiah* does not. In that case, because undercover questioning is not "interrogation" under *Miranda*, a secret informant could freely question the suspect, with only the Due Process Clauses regulating the tactics. A cellmate who had been indicted—or for whom adversary proceedings had otherwise commenced—would be protected by *Massiah* doctrine, which applies regardless of whether a suspect is in custody.

In *Brewer v. Williams*, the Court was forced to decide whether to apply the *Massiah* doctrine in the case of a murder of a ten-year-old child. Perhaps because the straightforward application of the rule would lead to such an unappealing outcome—the state's inability to punish a killer whose guilt was seemingly in little doubt—the case caused sharp disagreements among the Justices.

Supreme Court of the United States

Lou V. Brewer v. Robert Anthony Williams

Decided March 23, 1977 – 430 U.S. 387

Mr. Justice STEWART delivered the opinion of the Court.

An Iowa trial jury found the respondent, Robert Williams, guilty of murder. The judgment of conviction was affirmed in the Iowa Supreme Court by a closely divided vote. In a subsequent habeas corpus proceeding a Federal District Court ruled that under the United States Constitution Williams is entitled to a new trial, and a divided Court of Appeals for the Eighth Circuit agreed. The question before us is whether the District Court and the Court of Appeals were wrong.

I

On the afternoon of December 24, 1968, a 10-year-old girl named Pamela Powers went with her family to the YMCA in Des Moines, Iowa, to watch a wrestling tournament in which her brother was participating. When she failed to return from a trip to the washroom, a search for her began. The search was unsuccessful.

Robert Williams, who had recently escaped from a mental hospital, was a resident of the YMCA. Soon after the girl's disappearance Williams was seen in the YMCA lobby carrying some clothing and a large bundle wrapped in a blanket. He obtained

help from a 14-year-old boy in opening the street door of the YMCA and the door to his automobile parked outside. When Williams placed the bundle in the front seat of his car the boy "saw two legs in it and they were skinny and white." Before anyone could see what was in the bundle Williams drove away. His abandoned car was found the following day in Davenport, Iowa, roughly 160 miles east of Des Moines. A warrant was then issued in Des Moines for his arrest on a charge of abduction.

On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long-distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender that morning to the police in Davenport, and they booked him on the charge specified in the arrest warrant and gave him the warnings required by *Miranda v. Arizona*. The Davenport police then telephoned their counterparts in Des Moines to inform them that Williams had surrendered. McKnight, the lawyer, was still at the Des Moines police headquarters, and Williams conversed with McKnight on the telephone. In the presence of the Des Moines chief of police and a police detective named Leaming, McKnight advised Williams that Des Moines police officers would be driving to Davenport to pick him up, that the officers would not interrogate him or mistreat him, and that Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines. As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip.

In the meantime Williams was arraigned before a judge in Davenport on the outstanding arrest warrant. The judge advised him of his *Miranda* rights and committed him to jail. Before leaving the courtroom, Williams conferred with a lawyer named Kelly, who advised him not to make any statements until consulting with McKnight back in Des Moines.

Detective Leaming and his fellow officer arrived in Davenport about noon to pick up Williams and return him to Des Moines. Soon after their arrival they met with Williams and Kelly, who, they understood, was acting as Williams' lawyer. Detective Leaming repeated the *Miranda* warnings, and told Williams:

"[W]e both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and ... I want you to remember this because we'll be visiting between here and Des Moines."

Williams then conferred again with Kelly alone, and after this conference Kelly reiterated to Detective Leaming that Williams was not to be questioned about the disappearance of Pamela Powers until after he had consulted with McKnight back in Des Moines. When Leaming expressed some reservations, Kelly firmly stated that the agreement with McKnight was to be carried out that there was to be no interrogation of Williams during the automobile journey to Des Moines. Kelly was denied permission to ride in the police car back to Des Moines with Williams and the two officers.

The two detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.

The detective and his prisoner soon embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said:

"I want to give you something to think about while we're traveling down the road. ... Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville a town they would be passing on the way to Des Moines. Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."

As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim's shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

Williams was indicted for first-degree murder. Before trial, his counsel moved to suppress all evidence relating to or resulting from any statements Williams had made during the automobile ride from Davenport to Des Moines. After an evidentiary hearing the trial judge denied the motion. He found that "an agreement was made between defense counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines," and that the evidence in question had been elicited from Williams during "a critical stage in the proceedings requiring the presence of counsel on his request." The judge ruled, however, that Williams had "waived his right to have an attorney present during the giving of such information."

The evidence in question was introduced over counsel's continuing objection at the subsequent trial. The jury found Williams guilty of murder, and the judgment of conviction was affirmed by the Iowa Supreme Court, a bare majority of whose members agreed with the trial court that Williams had "waived his right to the presence of his counsel" on the automobile ride from Davenport to Des Moines.

Williams then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. Counsel for the State and for Williams stipulated that "the case would be submitted on the record of facts and proceedings in the trial court, without taking of further testimony." The District Court made findings of fact as summarized above, and concluded as a matter of law that the evidence in question had been wrongly admitted at Williams' trial.

The Court of Appeals for the Eighth Circuit, with one judge dissenting affirmed this judgment and denied a petition for rehearing en banc. We granted certiorari to consider the constitutional issues presented.

II

[T]here is no need to review in this case the doctrine of *Miranda v. Arizona*, a doctrine designed to secure the constitutional privilege against compulsory self-incrimination. It is equally unnecessary to evaluate the ruling of the District Court that Williams' self-incriminating statements were, indeed, involuntarily made. For it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived of a different constitutional right—the right to the assistance of counsel.

This right, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. Its vital need at the pretrial stage has perhaps nowhere been more succinctly explained than in Mr. Justice Sutherland's memorable words for the Court 44 years ago in *Powell v. Alabama,* 287 U.S. 45 (1932):

"[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right. But its basic contours, which are identical in state and federal contexts, are too well established to require extensive elaboration here. Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. The State does not contend otherwise.

There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him. Detective Leaming was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams' trial:

"Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?

"A. I was sure hoping to find out where that little girl was, yes, sir.

"Q. Well, I'll put it this way: You was [sic] hoping to get all the information you could before Williams got back to McKnight, weren't you?

"A. Yes, sir."

The state courts clearly proceeded upon the hypothesis that Detective Leaming's "Christian burial speech" had been tantamount to interrogation. Both courts recognized that Williams had been entitled to the assistance of counsel at the time he made the incriminating statements. Yet no such constitutional protection would have come into play if there had been no interrogation.

The circumstances of this case are thus constitutionally indistinguishable from those presented in *Massiah v. United States*. That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant. Rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. It thus requires no wooden or technical application of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments.

III

The Iowa courts recognized that Williams had been denied the constitutional right to the assistance of counsel. They held, however, that he had waived that right during the course of the automobile trip from Davenport to Des Moines. The state trial court explained its determination of waiver as follows:

"The time element involved on the trip, the general circumstances of it, and more importantly the absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of his attorney, are the main foundations for the Court's conclusion that he voluntarily waived such right."

In the federal habeas corpus proceeding, the Court of Appeals [disagreed, stating]:

"[T]his court recently held that an accused can voluntarily, knowingly and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed. ... The prosecution, however, has the weighty obligation to show that the waiver was knowingly and intelligently made. [T]he state here failed to so show."

[I]t was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.

We conclude [] that, judged by these standards, the record in this case falls far short of sustaining petitioner's burden. It is true that Williams had been informed of and appeared to understand his right to counsel. But waiver requires not merely comprehension but relinquishment, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right.

Despite Williams' express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.

IV

The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important. Yet "[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues." Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers charged

with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all. The judgment of the Court of Appeals is affirmed.

Mr. Justice MARSHALL, concurring.

I concur wholeheartedly in my Brother STEWART's opinion for the Court, but add these words in light of the dissenting opinions filed today. The dissenters have, I believe, lost sight of the fundamental constitutional backbone of our criminal law. They seem to think that Detective Leaming's actions were perfectly proper, indeed laudable, examples of "good police work." In my view, good police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its commands scrupulously. For "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

Mr. Justice STEVENS, concurring.

Underlying the surface issues in this case is the question whether a fugitive from justice can rely on his lawyer's advice given in connection with a decision to surrender voluntarily. The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentially dangerous person. Under any analysis, this was a critical stage of the proceeding in which the participation of an independent professional was of vital importance to the accused and to society. At this stage as in countless others in which the law profoundly affects the life of the individual the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.

Mr. Chief Justice BURGER, dissenting.

The result in this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court by the narrowest margin on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error.

Williams is guilty of the savage murder of a small child; no member of the Court contends he is not. While in custody, and after no fewer than five warnings of his rights to silence and to counsel, he led police to the concealed body of his victim. The Court concedes Williams was not threatened or coerced and that he spoke and acted voluntarily and with full awareness of his constitutional rights. In the face of all this, the Court now holds that because Williams was prompted by the detective's statement—not interrogation but a statement—the jury must not be told how the police found the body.

Today's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.

[Chief Justice Burger's dissent then raised two main points. First, he argued that Williams's statements were voluntary. Second, he urged that the exclusionary rule should not be applied to "non-egregious police conduct."]

Mr. Justice WHITE, with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

The respondent in this case killed a 10-year-old child. The majority sets aside his conviction, holding that certain statements of unquestioned reliability were unconstitutionally obtained from him, and under the circumstances probably makes it impossible to retry him. Because there is nothing in the Constitution or in our previous cases which requires the Court's action, I dissent.

The issue in this case is whether respondent who was entitled not to make any statements to the police without consultation with and/or presence of counsel validly waived those rights. In order to show that a right has been waived [], the State must prove "an intentional relinquishment or abandonment of a known right or privilege." The majority creates no new rule preventing an accused who has retained a lawyer from waiving his right to the lawyer's presence during questioning. The majority simply finds that no waiver was proved in this case. I disagree. That respondent knew of his right not to say anything to the officers without advice and presence of counsel is established on this record to a moral certainty. He was advised of the right by three officials of the State—telling at least one that he understood the right and by two lawyers. Finally, he further demonstrated his knowledge of the right by informing the police that he would tell them the story in the presence of McKnight when they arrived in Des Moines. The

issue in this case, then, is whether respondent relinquished that right intentionally.

Respondent relinquished his right not to talk to the police about his crime when the car approached the place where he had hidden the victim's clothes. Men usually intend to do what they do, and there is nothing in the record to support the proposition that respondent's decision to talk was anything but an exercise of his own free will. Apparently, without any prodding from the officers, respondent—who had earlier said that he would tell the whole story when he arrived in Des Moines—spontaneously changed his mind about the timing of his disclosures when the car approached the places where he had hidden the evidence. However, even if his statements were influenced by Detective Leaming's above-quoted statement, respondent's decision to talk in the absence of counsel can hardly be viewed as the product of an overborne will. The statement by Leaming was not coercive; it was accompanied by a request that respondent not respond to it; and it was delivered hours before respondent decided to make any statement. Respondent's waiver was thus knowing and intentional.

The majority's contrary conclusion seems to rest on the fact that respondent "asserted" his right to counsel by retaining and consulting with one lawyer and by consulting with another. How this supports the conclusion that respondent's later relinquishment of his right not to talk in the absence of counsel was unintentional is a mystery. The fact that respondent consulted with counsel on the question whether he should talk to the police in counsel's absence makes his later decision to talk in counsel's absence better informed and, if anything, more intelligent.

The majority recognizes that even after this "assertion" of his right to counsel, it would have found that respondent waived his right not to talk in counsel's absence if his waiver had been express—*i.e.*, if the officers had asked him in the car whether he would be willing to answer questions in counsel's absence and if he had answered "yes." But waiver is not a formalistic concept. Waiver is shown whenever the facts establish that an accused knew of a right and intended to relinquish it. Such waiver, even if not express, was plainly shown here. The only other conceivable basis for the majority's holding is the implicit suggestion that the right involved in *Massiah v. United States*, as distinguished from the right involved in *Miranda v. Arizona*, is a right not to be asked any questions in counsel's absence rather than a right not to answer any questions in counsel's absence, and that the right not to be asked questions must be waived before the questions are asked. Such wafer-thin distinctions cannot determine whether a guilty murderer should go free. The only conceivable purpose for the presence of counsel during questioning is to protect an accused from making incriminating answers. Questions, unanswered, have no significance at all. Absent coercion—no matter how the right involved is defined—an accused is amply protected by a rule requiring waiver before or simultaneously with the giving by him of an answer or the making by him of a statement.

The consequence of the majority's decision is, as the majority recognizes, extremely serious. A mentally disturbed killer whose guilt is not in question may be released. Why? Apparently the answer is that the majority believes that the law enforcement officers acted in a way which involves some risk of injury to society and that such conduct should be deterred. However, the officers' conduct did not, and was not likely to, jeopardize the fairness of respondent's trial or in any way risk the conviction of an innocent man the risk against which the Sixth Amendment guarantee of assistance of counsel is designed to protect. The police did nothing "wrong," let alone anything "unconstitutional." To anyone not lost in the intricacies of the prophylactic rules of *Miranda v. Arizona*, the result in this case seems utterly senseless; and for the reasons stated [above] even applying those rules as well as the rule of *Massiah v. United States*, the statements made by respondent were properly admitted. In light of these considerations, the majority's protest that the result in this case is justified by a "clear violation" of the Sixth and Fourteenth Amendments has a distressing hollow ring. I respectfully dissent.

Mr. Justice BLACKMUN, with whom Mr. Justice WHITE and Mr. Justice REHNQUIST join, dissenting.

What the Court chooses to do here, and with which I disagree, is to hold that respondent Williams' situation was in the mold of *Massiah v. United States*, that is, that it was dominated by a denial to Williams of his Sixth Amendment right to counsel after criminal proceedings had been instituted against him. The Court rules that the Sixth Amendment was violated because Detective Leaming "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." I cannot regard that as unconstitutional per se.

First, the police did not deliberately seek to isolate Williams from his lawyers so as to deprive him of the assistance of counsel. The isolation in this case was a necessary incident of transporting Williams to the county where the crime was committed.

Second, Leaming's purpose was not solely to obtain incriminating evidence. The victim had been missing for only two days, and the police could not be certain that she was dead. Leaming, of course, and in accord with his duty, was "hoping to find out where that little girl was" but such motivation does not equate with an intention to evade the Sixth Amendment. Moreover, the Court seems to me to place an undue emphasis and aspersion on what it and the lower courts have chosen to call the "Christian burial speech," and on Williams' "deeply religious" convictions.

Third, not every attempt to elicit information should be regarded as "tantamount to interrogation." I am not persuaded that Leaming's observations and comments, made as the police car traversed the snowy and slippery miles between Davenport and Des Moines that winter afternoon, were an interrogation, direct or subtle, of Williams. Contrary to this Court's statement, the Iowa Supreme Court appears to me to have thought and held otherwise and I agree. Williams, after all, was counseled by lawyers, and warned by the arraigning judge in Davenport and by the police, and yet it was he who started the travel conversations and brought up the subject of the criminal investigation. Without further reviewing the circumstances of the trip, I would say it is clear there was no interrogation.

In summary, it seems to me that the Court is holding that *Massiah* is violated whenever police engage in any conduct, in the absence of counsel, with the subjective desire to obtain information from a suspect after arraignment. Such a rule is far too broad. Persons in custody frequently volunteer statements in response to stimuli other than interrogation. When there is no interrogation, such statements should be admissible as long as they are truly voluntary.

The *Massiah* point thus being of no consequence, I would vacate the judgment of the Court of Appeals and remand the case for consideration of the issue of voluntariness, in the constitutional sense, of Williams' statements, an issue the Court of Appeals did not reach when the case was before it.

Notes, Comments, and Questions

Compare the outcome in *Williams* to *Rhode Island v. Innis* (Chapter 25). Why are the outcomes different in these cases?

The Court in Williams took the defendant's guilt for granted, which one can understand because Williams was seen leaving the YMCA with a body and eventually led police to the hidden body of the victim. Subsequent research, however, suggests another possibility—that a different YMCA resident killed Pamela Powers and put her body in Williams's room, after which Williams panicked and tried to hide the evidence. For a discussion of the facts, see Tom N. McInnis, *Nix v. Williams and the Inevitable Discovery Exception: Creation of a Legal Safety Net*, 28 St. Louis U. Pub. L. Rev. 397, 417-27 (2009). While Williams may well be guilty, his guilt is not as obvious as the Justices seemed to believe. The title of Professor McInnis's article refers to this case as "*Nix v. Williams*," the name under which we will see the case again later in the semester.

Double Jeopardy and the "Offense-Specific" Sixth Amendment

In *McNeil v. Wisconsin*, 501 U.S. 171 (1991) the Court stated that the Sixth Amendment right to the assistance of counsel "is offense-specific." Accordingly, even if a suspect's right to counsel has attached for one crime, the Sixth Amendment does not preclude questioning by law enforcement about a different offense. Under the *Miranda* Rule, a suspect who invokes his right to counsel cannot be questioned about any crime,[1] but in situations where *Miranda* does not apply (for example, when a suspect is not in custody or is questioned by an undercover officer), the offense-specific nature of the *Massiah* doctrine may allow questioning about some crimes while preventing questioning about others. The Court explained this principle further in *Texas v. Cobb,* which appears below.

Cobb will be easier to understand following a brief review of decisions interpreting the Double Jeopardy Clause of the Fifth Amendment. That amendment provides, "No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." In "Double Jeopardy Law Made Simple," Professor Akhil Amar observed, "The Double Jeopardy Clause speaks of the 'same' offense, and yet the Court casually applies the Clause to offenses that are not the same but obviously different."[2] Professor Amar's criticism cannot be denied. Rather than consider the strengths and weaknesses of double jeopardy jurisprudence, we will focus on the basic definition of "same offense" articulated by the Court.

In *Blockburger v. United States*, 284 U.S. 299 (1932), the Court set forth a test for determining whether, "where the same act or transaction constitutes a violation of two distinct statutory provisions," someone has committed two separate crimes for double jeopardy purposes. If the two statutes charge the defendant with committing the "same offense," then the defendant may be punished for violating only one of them. If, however, the two statutes do not describe the "same offense," then the defendant's conduct can be punished under both statutes. "[T]he test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

A few examples will illustrate how the test works in practice:

If a suspect possesses cocaine with intent to sell it, she likely could be charged either with "simple possession" of the contraband or with "possession with intent to distribute." Often, the elements of "possession with intent to distribute" are exactly the same

as those of "simple possession"—other than the culpable mental state of "intent to distribute." If so, then these two crimes are the "same offense" under *Blockburger*. (As Professor Amar and others have noted, these are certainly not the "same offense" under plain English.) They are the same offense because while "possession with intent to distribute" has an element that "simple possession" lacks, "simple possession" has no element that is not part of "possession with intent to distribute." In other words, "simple possession" is a lesser included offense of "possession with intent to distribute." This example shows the general principle that lesser included offenses are the "same offense" as the greater offenses in which they are included.

Note that the "same offense" definition is symmetric. If Crime A is the same offense as Crime B, then Crime B is the same offense as Crime A.

Continuing with the theme of lesser included offenses, negligent homicide is the "same offense" as involuntary manslaughter—assuming that the only difference between the crimes is the culpable mental state that the prosecution must prove. Both crimes require a homicide, and negligent homicide is the lesser included offense of reckless (involuntary) manslaughter. (Recall that anyone who is reckless is also by definition negligent.)

By contrast, consider a devious business owner who burns down his rival's warehouse and accidentally kills a security guard who was inside during the fire. If the malefactor were tried for arson, could he later be tried for negligent homicide? Yes. Arson has an element that negligent homicide lacks—burning. And negligent homicide has an element that arson lacks—a death. Thus, even though the charges arise from the same transaction, they are not the "same offense" under *Blockburger*. Therefore, regardless of the result of the arson trial, prosecutors may freely charge the defendant for negligent homicide without offending the Court's double jeopardy doctrine.

Here, now, is a trickier one: Imagine that the same warehouse arsonist is not charged with the crimes listed above, but is instead charged with felony murder. If he is acquitted, may frustrated prosecutors charge him with arson? Probably not. Chances are that when he was charged with felony murder, the predicate felony was arson. In that case, the elements of the offense included all the elements of arson, along with the death arising from the crime. Therefore, ordinary arson, standing alone, is a lesser included offense of the felony murder charge for which the defendant was put in jeopardy.

The result of this doctrine is that if the defendant is tried first for arson, the prosecution may not subsequently charge him with felony murder (because that is the "same offense" as arson), but may subsequently charge him with negligent homicide or reckless manslaughter (which are not the "same offense").

To determine whether two charges arising from the same conduct are the "same offense," a student should list the elements of each crime. If each crime has an element that the other lacks, then the crimes are not the "same offense." If one crime's elements are fully included among those of the other crime, then they are the "same offense."

Note that if two charges arise from separate events—for example, two different bank robberies—a defendant may be tried for both of them (in whatever order) without offending the Double Jeopardy Clause. For instance, a suspect observed selling cocaine to ten different buyers may be tried separately for each of the sales.

One last point: In *Gamble v. United States*, 139 S. Ct. 1960 (2019), the Court upheld the longstanding "dual-sovereignty doctrine." Under this doctrine, a state prosecution does not preclude a subsequent federal prosecution for the same conduct, regardless of the elements of the crimes charged. Similarly, a federal prosecution does not preclude a subsequent state prosecution.

Armed with a basic understanding of double jeopardy law, students will better grasp the importance of *Texas v. Cobb*, which imports this jurisprudence into Sixth Amendment doctrine.

Supreme Court of the United States

Texas v. Raymond Levi Cobb

Decided April 2, 2001 – 532 U.S. 162

Chief Justice REHNQUIST delivered the opinion of the Court.

The Texas Court of Criminal Appeals held that a criminal defendant's Sixth Amendment right to counsel attaches not only to the offense with which he is charged, but to other offenses "closely related factually" to the charged offense. We hold that our decision in *McNeil v. Wisconsin* meant what it said, and that the Sixth Amendment right is "offense specific."

In December 1993, Lindsey Owings reported to the Walker County, Texas, Sheriff's Office that the home he shared with his wife, Margaret, and their 16-month-old daughter, Kori Rae, had been burglarized. He also informed police that his wife and daughter were missing. Respondent Raymond Levi Cobb lived across the street from the Owings. Acting on an anonymous tip that respondent was involved in the burglary, Walker County investigators questioned him about the events. He denied involvement. In July 1994, while under arrest for an unrelated offense, respondent was again questioned about the incident. Respondent then gave a written statement confessing to the burglary, but he denied knowledge relating to the disappearances. Respondent was subsequently indicted for the burglary, and Hal Ridley was appointed in August 1994 to represent respondent on that charge.

Shortly after Ridley's appointment, investigators asked and received his permission to question respondent about the disappearances. Respondent continued to deny involvement. Investigators repeated this process in September 1995, again with Ridley's permission and again with the same result.

In November 1995, respondent, free on bond in the burglary case, was living with his father in Odessa, Texas. At that time, respondent's father contacted the Walker County Sheriff's Office to report that respondent had confessed to him that he killed Margaret Owings in the course of the burglary. Walker County investigators directed respondent's father to the Odessa police station, where he gave a statement. Odessa police then faxed the statement to Walker County, where investigators secured a warrant for respondent's arrest and faxed it back to Odessa. Shortly thereafter, Odessa police took respondent into custody and administered warnings pursuant to *Miranda v. Arizona*. Respondent waived these rights.

After a short time, respondent confessed to murdering both Margaret and Kori Rae [in detail].

Respondent later led police to the location where he had buried the victims' bodies.

Respondent was convicted of capital murder for murdering more than one person in the course of a single criminal transaction. He was sentenced to death. On appeal to the Court of Criminal Appeals of Texas, respondent argued, *inter alia,* that his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel. [R]espondent contended that his right to counsel had attached when Ridley was appointed in the burglary case and that Odessa police were therefore required to secure Ridley's permission before proceeding with the interrogation.

The Court of Criminal Appeals reversed respondent's conviction by a divided vote and remanded for a new trial. The court held that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." Finding the capital murder charge to be "factually interwoven with the burglary," the court concluded that respondent's Sixth Amendment right to counsel had attached on the capital murder charge even though respondent had not yet been charged with that offense.

The State sought review in this Court, and we granted certiorari to consider first whether the Sixth Amendment right to counsel extends to crimes that are "factually related" to those that have actually been charged, and second whether respondent made a valid unilateral waiver of that right in this case. Because we answer the first question in the negative, we do not reach the second.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." In *McNeil v. Wisconsin,* we explained when this right arises:

"The Sixth Amendment right [to counsel] ... is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Accordingly, we held that a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses.

Some state courts and Federal Courts of Appeals, however, have read into *McNeil*'s offense-specific definition an exception for crimes that are "factually related" to a charged offense. Respondent predicts that the offense-specific rule will prove "disastrous" to suspects' constitutional rights and will "permit law enforcement officers almost complete and total license to conduct unwanted and uncounseled interrogations." Besides offering no evidence that such a parade of horribles has occurred in those jurisdictions that have not enlarged upon *McNeil,* he fails to appreciate the significance of two critical considerations. First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. In the present case, police scrupulously followed *Miranda*'s dictates when questioning respondent. Second, it is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

"Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"

Although it is clear that the Sixth Amendment right to counsel attaches only to charged offenses, we have recognized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging instrument. In *Blockburger v. United State*s, we explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." We have since applied the *Blockburger* test to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offence." We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.

It remains only to apply these principles to the facts at hand. At the time he confessed to Odessa police, respondent had been indicted for burglary of the Owings residence, but he had not been charged in the murders of Margaret and Kori Rae. As defined by Texas law, burglary and capital murder are not the same offense under *Blockburger*. Accordingly, the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders, and respondent's confession was therefore admissible.

The judgment of the Court of Criminal Appeals of Texas is reversed.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

This case focuses upon the meaning of a single word, "offense," when it arises in the context of the Sixth Amendment. Several basic background principles define that context.

First, the Sixth Amendment right to counsel plays a central role in ensuring the fairness of criminal proceedings in our system of justice.

Second, the right attaches when adversary proceedings, triggered by the government's formal accusation of a crime, begin.

Third, once this right attaches, law enforcement officials are required, in most circumstances, to deal with the defendant through counsel rather than directly, even if the defendant has waived his Fifth Amendment rights.

Fourth, the particular aspect of the right here at issue—the rule that the police ordinarily must communicate with the defendant through counsel—has important limits. In particular, recognizing the need for law enforcement officials to investigate "new or additional crimes" not the subject of current proceedings, this Court has made clear that the right to counsel does not attach to any and every crime that an accused may commit or have committed. The right "cannot be invoked once for all future prosecutions," and it does not forbid "interrogation unrelated to the charge." In a word, as this Court previously noted, the right is "offense specific."

This case focuses upon the last-mentioned principle, in particular upon the meaning of the words "offense specific." These words appear in this Court's Sixth Amendment case law, not in the Sixth Amendment's text. The definition of these words is not self-evident. Sometimes the term "offense" may refer to words that are written in a criminal statute; sometimes it may refer generally to a course of conduct in the world, aspects of which constitute the elements of one or more crimes; and sometimes it may refer, narrowly and technically, just to the conceptually severable aspects of the latter. This case requires us to determine whether an "offense"—for Sixth Amendment purposes—includes factually related aspects of a single course of conduct other than those few acts that make up the essential elements of the crime charged.

We should answer this question in light of the Sixth Amendment's basic objectives as set forth in this Court's case law. At the very least, we should answer it in a way that does not undermine those objectives. But the Court today decides that "offense" means the crime set forth within "the four corners of a charging instrument," along with other crimes that "would be considered the same offense" under the test established by *Blockburger v. United State*s. In my view, this unnecessarily technical definition undermines Sixth Amendment protections while doing nothing to further effective law enforcement.

For one thing, the majority's rule, while leaving the Fifth Amendment's protections in place, threatens to diminish severely the additional protection that, under this Court's rulings, the Sixth Amendment provides when it grants the right to counsel to defendants who have been charged with a crime and insists that law enforcement officers thereafter communicate with them

through that counsel.

[T]he Sixth Amendment right at issue is independent of the Fifth Amendment's protections; and the importance of this Sixth Amendment right has been repeatedly recognized in our cases. The majority's rule permits law enforcement officials to question those charged with a crime without first approaching counsel, through the simple device of asking questions about any other related crime not actually charged in the indictment. Thus, the police could ask the individual charged with robbery about, say, the assault of the cashier not yet charged, or about any other uncharged offense (unless under *Blockburger's* definition it counts as the "same crime"), all *without notifying counsel*. Indeed, the majority's rule would permit law enforcement officials to question anyone charged with any crime in any one of the examples just given about his or her conduct on the single relevant occasion without notifying counsel unless the prosecutor has charged every possible crime arising out of that same brief course of conduct. What Sixth Amendment sense—what common sense—does such a rule make? What is left of the "communicate through counsel" rule? The majority's approach is inconsistent with any common understanding of the scope of counsel's representation. It will undermine the lawyer's role as "'medium'" between the defendant and the government. And it will, on a random basis, remove a significant portion of the protection that this Court has found inherent in the Sixth Amendment.

At the same time, the majority's rule threatens the legal clarity necessary for effective law enforcement. That is because the majority, aware that the word "offense" ought to encompass something beyond "the four corners of the charging instrument," imports into Sixth Amendment law the definition of "offense" set forth in *Blockburger v. United State*s, a case interpreting the Double Jeopardy Clause of the Fifth Amendment, which Clause uses the word "offence" but otherwise has no relevance here. Whatever Fifth Amendment virtues *Blockburger* may have, to import it into this Sixth Amendment context will work havoc.

In theory, the test says that two offenses are the "same offense" unless each requires proof of a fact that the other does not. That means that most of the different crimes mentioned above are not the "same offense." Under many States' laws, for example, the statute defining assault and the statute defining robbery each requires proof of a fact that the other does not. Hence the extension of the definition of "offense" that is accomplished by the use of the *Blockburger* test does nothing to address the substantial concerns about the circumvention of the Sixth Amendment right that are raised by the majority's rule.

But, more to the point, the simple-sounding *Blockburger* test has proved extraordinarily difficult to administer in practice. Judges, lawyers, and law professors often disagree about how to apply it. The test has emerged as a tool in an area of our jurisprudence that THE CHIEF JUSTICE has described as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Yet the Court now asks, not the lawyers and judges who ordinarily work with double jeopardy law, but police officers in the field, to navigate *Blockburger* when they question suspects. Some will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's "Serbonian Bog ... Where Armies whole have sunk."

There is, of course, an alternative. We can, and should, define "offense" in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are "closely related to" or "inextricably intertwined with" the particular crime set forth in the charging instrument. This alternative is not perfect. The language used lacks the precision for which police officers may hope; and it requires lower courts to specify its meaning further as they apply it in individual cases. Yet virtually every lower court in the United States to consider the issue has defined "offense" in the Sixth Amendment context to encompass such closely related acts. These courts have found offenses "closely related" where they involved the same victim, set of acts, evidence, or motivation. They have found offenses unrelated where time, location, or factual circumstances significantly separated the one from the other.

One cannot say in favor of this commonly followed approach that it is perfectly clear—only that, because it comports with common sense, it is far easier to apply than that of the majority. One might add that, unlike the majority's test, it is consistent with this Court's assumptions in previous cases. And, most importantly, the "closely related" test furthers, rather than undermines, the Sixth Amendment's "right to counsel," a right so necessary to the realization in practice of that most "noble ideal," a fair trial.

The Texas Court of Criminal Appeals, following this commonly accepted approach, found that the charged burglary and the uncharged murders were "closely related." All occurred during a short period of time on the same day in the same basic location. The victims of the murders were also victims of the burglary. Cobb committed one of the murders in furtherance of the robbery, the other to cover up the crimes. The police, when questioning Cobb, knew that he already had a lawyer representing him on the burglary charges and had demonstrated their belief that this lawyer also represented Cobb in respect to the murders by asking his permission to question Cobb about the murders on previous occasions. The relatedness of the crimes is well illustrated by the impossibility of questioning Cobb about the murders without eliciting admissions about the burglary. Nor, in my view, did Cobb waive his right to counsel. These considerations are sufficient. The police officers ought to have spoken to Cobb's counsel before questioning Cobb. I would affirm the decision of the Texas court. Consequently, I dissent.

Notes, Comments, and Questions

When Has the Right to Counsel Attached?

In *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the Court reviewed when the Sixth Amendment right to counsel attaches. After reiterating that "it does not attach until a prosecution is commenced," the Court quoted precedent stating that commencement occurs upon "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Turning to the issue presented in *Rothgery*, the Court held that "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty," regardless of whether a prosecutor attends this hearing or is even aware of it.

Students should note that mere arrest does not trigger the right to counsel. Accordingly, for an arrested suspect who has not been indicted—or otherwise the subject of formal proceedings—the primary regulation of interrogation will come from *Miranda*, not *Massiah*. For a suspect in custody whose right to counsel has attached, both doctrines will apply.

Consider these scenarios:

A suspect is arrested and taken to jail. Police place an undercover agent (disguised as a fellow prisoner) in the suspect's cell. The agent asks the suspect questions about the crimes leading to the suspect's arrest. Permissible? Why or why not?

Assume this same suspect is taken the next day to the courthouse. A judge sets bail, which the suspect cannot afford, and the suspect returns to jail. The same undercover agent asks the suspect questions about the crimes leading to the suspect's arrest. Permissible? Why or why not?

In our next chapter, we continue our study of the *Massiah* doctrine. In particular, we examine how undercover agents can obtain information from a suspect whose right to counsel has attached without violating the Sixth Amendment.

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3.8: Chapter 28 - The Miranda Rule- Exceptions

INTERROGATIONS

Chapter 28

The *Miranda* Rule: Exceptions

In *Miranda v. Arizona*, the Court summarized its holding as follows: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court then explained that "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it," police would be required to provide certain information—the *Miranda* warnings—to suspects.

We have learned that this holding spawned controversy about the meaning of "custody" and "interrogation," as well as over when a suspect's waiver of rights has been "made voluntarily, knowingly and intelligently."

In this chapter, we will review three exceptions that the Court has created to the *Miranda* Rule. Under each of these exceptions, a prosecutor may use statements against a defendant even though (1) those statements were obtained through custodial interrogation and (2) police either did not provide the *Miranda* warnings or did so but did not obtain a valid waiver. The three exceptions are known as the "impeachment exception," the "emergency exception" (also known as the "public safety exception"), and the "routine booking exception." We begin with impeachment.

Supreme Court of the United States

Viven Harris v. New York

Decided Feb. 24, 1971 – 401 U.S. 222

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted the writ in this case to consider petitioner's claim that a statement made by him to police under circumstances rendering it inadmissible to establish the prosecution's case in chief under *Miranda v. Arizona* may not be used to impeach his credibility.

The State of New York charged petitioner in a two-count indictment with twice selling heroin to an undercover police officer. At a subsequent jury trial the officer was the State's chief witness, and he testified as to details of the two sales. A second officer verified collateral details of the sales, and a third offered testimony about the chemical analysis of the heroin.

Petitioner took the stand in his own defense. He admitted knowing the undercover police officer but denied a sale on January 4, 1966. He admitted making a sale of contents of a glassine bag to the officer on January 6 but claimed it was baking powder and part of a scheme to defraud the purchaser.

On cross-examination petitioner was asked seriatim whether he had made specified statements to the police immediately following his arrest on January 7—statements that partially contradicted petitioner's direct testimony at trial. In response to the cross-examination, petitioner testified that he could not remember virtually any of the questions or answers recited by the prosecutor. At the request of petitioner's counsel the written statement from which the prosecutor had read questions and answers in his impeaching process was placed in the record for possible use on appeal; the statement was not shown to the jury.

The trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in passing on petitioner's credibility and not as evidence of guilt. In closing summations both counsel argued the substance of the impeaching statements. The jury then found petitioner guilty on the second count of the indictment. The New York Court of Appeals affirmed in a per curiam opinion.

At trial the prosecution made no effort in its case in chief to use the statements allegedly made by petitioner, conceding that they were inadmissible under *Miranda v. Arizona*. The transcript of the interrogation used in the impeachment, but not given to the jury, shows that no warning of a right to appointed counsel was given before questions were put to petitioner when he was taken into custody. Petitioner makes no claim that the statements made to the police were coerced or involuntary.

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. '[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.'"

Petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements. Affirmed.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL, join, dissenting.

The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. The "essential mainstay" of that system is the privilege against self-incrimination, which for that reason has occupied a central place in our jurisprudence since before the Nation's birth. Moreover, "we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. ... All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government ... must accord to the dignity and integrity of its citizens." These values are plainly jeopardized if an exception against admission of tainted statements is made for those used for impeachment purposes. Moreover, it is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Thus even to the extent that *Miranda* was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution. I dissent.

Notes, Comments, and Questions

Justice Brennan's dissent in *Harris* raises the concern that police officers will intentionally defy *Miranda*, knowing that the results of impermissible interrogations can be used to impeach defendants (or to deter them from testifying). The Court of Appeals of Alaska addressed the issue in *State v. Batts*, 195 P.3d 144 (2008). Following the reasoning of the *Harris* majority, the *Batts* Court held that—under Alaska law—statements made during interrogations conducted in violation of *Miranda* normally may be used for impeachment. However, the Alaska court held that "in cases where the violation of *Miranda* was either intentional or egregious—by which we mean a violation that would have been obvious to any reasonable police officer"—the resulting statements are inadmissible, even for impeachment. The court's aim was to balance deterrence of police misconduct (achieved by excluding evidence in cases of especially bad police misbehavior) with the state's interest in deterring perjury and presenting

useful evidence to juries (achieved by allowing impeachment in cases of more minor police wrongdoing). Is that a sensible result? If you were setting policy for your state, would you allow impeachment in all cases of *Miranda* violations, only in certain cases (perhaps like the Alaska rule), or never (as Justice Brennan advocated)?

In the next case, the Court articulated what is known as the "emergency" or "public safety" exception to the *Miranda* Rule. Students reading this case should consider two questions. First, is such an exception justified? Second, if so, do the facts presented constitute an "emergency" to which the exception should apply?

Supreme Court of the United States

New York v. Benjamin Quarles

Decided June 12, 1984 – 467 U.S. 649

Justice REHNQUIST delivered the opinion of the Court.

Respondent Benjamin Quarles was charged in the New York trial court with criminal possession of a weapon. The trial court suppressed the gun in question, and a statement made by respondent, because the statement was obtained by police before they read respondent his "*Miranda* rights." That ruling was affirmed on appeal through the New York Court of Appeals. We granted certiorari and we now reverse. We conclude that under the circumstances involved in this case, overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon.

On September 11, 1980, at approximately 12:30 a.m., Officer Frank Kraft and Officer Sal Scarring were on road patrol in Queens, N.Y., when a young woman approached their car. She told them that she had just been raped by a black male, approximately six feet tall, who was wearing a black jacket with the name "Big Ben" printed in yellow letters on the back. She told the officers that the man had just entered an A & P supermarket located nearby and that the man was carrying a gun.

The officers drove the woman to the supermarket, and Officer Kraft entered the store while Officer Scarring radioed for assistance. Officer Kraft quickly spotted respondent, who matched the description given by the woman, approaching a checkout counter. Apparently upon seeing the officer, respondent turned and ran toward the rear of the store, and Officer Kraft pursued him with a drawn gun. When respondent turned the corner at the end of an aisle, Officer Kraft lost sight of him for several seconds, and upon regaining sight of respondent, ordered him to stop and put his hands over his head.

Although more than three other officers had arrived on the scene by that time, Officer Kraft was the first to reach respondent. He frisked him and discovered that he was wearing a shoulder holster which was then empty. After handcuffing him, Officer Kraft asked him where the gun was. Respondent nodded in the direction of some empty cartons and responded, "the gun is over there." Officer Kraft thereafter retrieved a loaded .38-caliber revolver from one of the cartons, formally placed respondent under arrest, and read him his *Miranda* rights from a printed card. Respondent indicated that he would be willing to answer questions without an attorney present. Officer Kraft then asked respondent if he owned the gun and where he had purchased it. Respondent answered that he did own it and that he had purchased it in Miami, Fla.

In the subsequent prosecution of respondent for criminal possession of a weapon, the judge excluded the statement, "the gun is over there," and the gun because the officer had not given respondent the warnings required by our decision in *Miranda v. Arizona* before asking him where the gun was located. The judge excluded the other statements about respondent's ownership of the gun and the place of purchase, as evidence tainted by the prior *Miranda* violation. The Appellate Division of the Supreme Court of New York affirmed without opinion.

The Court of Appeals granted leave to appeal and affirmed by a 4-3 vote. It concluded that respondent was in "custody" within the meaning of *Miranda* during all questioning and rejected the State's argument that the exigencies of the situation justified Officer Kraft's failure to read respondent his *Miranda* rights until after he had located the gun. The court declined to recognize an exigency exception to the usual requirements of *Miranda* because it found no indication from Officer Kraft's testimony at the suppression hearing that his subjective motivation in asking the question was to protect his own safety or the safety of the public. For the reasons which follow, we believe that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.

In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist. Thus the only issue before us is whether Officer Kraft was justified in failing to make available to respondent the procedural safeguards associated with the privilege against compulsory self-incrimination since *Miranda*.

The New York Court of Appeals was undoubtedly correct in deciding that the facts of this case come within the ambit of the *Miranda* decision as we have subsequently interpreted it. We agree that respondent was in police custody because we have noted that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Here Quarles was surrounded by at least four police officers and was handcuffed when the questioning at issue took place. As the New York Court of Appeals observed, there was nothing to suggest that any of the officers were any longer concerned for their own physical safety. The New York Court of Appeals' majority declined to express an opinion as to whether there might be an exception to the *Miranda* rule if the police had been acting to protect the public, because the lower courts in New York had made no factual determination that the police had acted with that motive.

We hold that on these facts there is a "public safety" exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.

We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

In recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree we lessen the desirable clarity of that rule. At least in part in order to preserve its clarity, we have over the years refused to sanction attempts to expand our *Miranda* holding. As we have in other contexts, we recognize here the importance of a workable rule "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." But as we have pointed out, we believe that the exception which we recognize today lessens the necessity of that on-the-scene balancing process. The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.

The facts of this case clearly demonstrate that distinction and an officer's ability to recognize it. Officer Kraft asked only the question necessary to locate the missing gun before advising respondent of his rights. It was only after securing the loaded revolver and giving the warnings that he continued with investigatory questions about the ownership and place of purchase of the gun. The exception which we recognize today, far from complicating the thought processes and the on-the-scene judgments of police officers, will simply free them to follow their legitimate instincts when confronting situations presenting a danger to the

public safety.

We hold that the Court of Appeals in this case erred in excluding the statement, "the gun is over there," and the gun because of the officer's failure to read respondent his *Miranda* rights before attempting to locate the weapon. Accordingly we hold that it also erred in excluding the subsequent statements as illegal fruits of a *Miranda* violation. We therefore reverse and remand for further proceedings not inconsistent with this opinion.

Justice O'CONNOR, concurring in the judgment in part and dissenting in part.

Today, the Court concludes that overriding considerations of public safety justify the admission of evidence—oral statements and a gun—secured without the benefit of [*Miranda*] warnings. Were the Court writing from a clean slate, I could agree with its holding. But *Miranda* is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures. Accordingly, I would require suppression of the initial statement taken from respondent in this case. On the other hand, nothing in *Miranda* or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation, and I therefore agree with the Court that admission of the gun in evidence is proper.

The *Miranda* Court itself considered objections akin to those raised by the Court today. In dissent, Justice WHITE protested that the *Miranda* rules would "operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved." But the *Miranda* Court would not accept any suggestion that "society's need for interrogation [could] outweig[h] the privilege." To that Court, the privilege against self-incrimination was absolute and therefore could not be "abridged."

Since the time *Miranda* was decided, the Court has repeatedly refused to bend the literal terms of that decision. To be sure, the Court has been sensitive to the substantial burden the *Miranda* rules place on local law enforcement efforts, and consequently has refused to extend the decision or to increase its strictures on law enforcement agencies in almost any way. [W]herever an accused has been taken into "custody" and subjected to "interrogation" without warnings, the Court has consistently prohibited the use of his responses for prosecutorial purposes at trial. As a consequence, the "meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures."

In my view, a "public safety" exception unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*'s requirements more difficult to understand. In some cases, police will benefit because a reviewing court will find that an exigency excused their failure to administer the required warnings. But in other cases, police will suffer because, though they thought an exigency excused their noncompliance, a reviewing court will view the "objective" circumstances differently and require exclusion of admissions thereby obtained. The end result will be a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence. "While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court, ... that rigidity [has also been called a] strength of the decision. It [has] afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise.... [T]his core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely [ignored] by ... courts under the guise of [reinterpreting] *Miranda*...."

The justification the Court provides for upsetting the equilibrium that has finally been achieved—that police cannot and should not balance considerations of public safety against the individual's interest in avoiding compulsory testimonial self-incrimination—really misses the critical question to be decided. *Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State. *Miranda*, for better or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State. When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial.

The Court concedes, as it must, both that respondent was in "custody" and subject to "interrogation" and that his statement "the gun is over there" was compelled within the meaning of our precedent. In my view, since there is nothing about an exigency that makes custodial interrogation any less compelling, a principled application of *Miranda* requires that respondent's statement be suppressed.

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

The police in this case arrested a man suspected of possessing a firearm in violation of New York law. Once the suspect was in custody and found to be unarmed, the arresting officer initiated an interrogation. Without being advised of his right not to respond, the suspect incriminated himself by locating the gun. The majority concludes that the State may rely on this

incriminating statement to convict the suspect of possessing a weapon. I disagree. The arresting officers had no legitimate reason to interrogate the suspect without advising him of his rights to remain silent and to obtain assistance of counsel. By finding on these facts justification for unconsented interrogation, the majority abandons the clear guidelines enunciated in *Miranda v. Arizona* and condemns the American judiciary to a new era of post hoc inquiry into the propriety of custodial interrogations. More significantly and in direct conflict with this Court's longstanding interpretation of the Fifth Amendment, the majority has endorsed the introduction of coerced self-incriminating statements in criminal prosecutions. I dissent.

The majority's entire analysis rests on the factual assumption that the public was at risk during Quarles' interrogation. This assumption is completely in conflict with the facts as found by New York's highest court. Before the interrogation began, Quarles had been "reduced to a condition of physical powerlessness." Contrary to the majority's speculations, Quarles was not believed to have, nor did he in fact have, an accomplice to come to his rescue. When the questioning began, the arresting officers were sufficiently confident of their safety to put away their guns. As Officer Kraft acknowledged at the suppression hearing, "the situation was under control." Based on Officer Kraft's own testimony, the New York Court of Appeals found: "Nothing suggests that any of the officers was by that time concerned for his own physical safety." The Court of Appeals also determined that there was no evidence that the interrogation was prompted by the arresting officers' concern for the public's safety.

The majority attempts to slip away from these unambiguous findings of New York's highest court by proposing that danger be measured by objective facts rather than the subjective intentions of arresting officers. Though clever, this ploy was anticipated by the New York Court of Appeals: "[T]here is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety...."

The New York court's conclusion that neither Quarles nor his missing gun posed a threat to the public's safety is amply supported by the evidence presented at the suppression hearing. Again contrary to the majority's intimations, no customers or employees were wandering about the store in danger of coming across Quarles' discarded weapon. Although the supermarket was open to the public, Quarles' arrest took place during the middle of the night when the store was apparently deserted except for the clerks at the checkout counter. The police could easily have cordoned off the store and searched for the missing gun. Had they done so, they would have found the gun forthwith. The police were well aware that Quarles had discarded his weapon somewhere near the scene of the arrest. As the State acknowledged before the New York Court of Appeals: "After Officer Kraft had handcuffed and frisked the defendant in the supermarket, he knew with a high degree of certainty that the defendant's gun was within the immediate vicinity of the encounter. He undoubtedly would have searched for it in the carton a few feet away without the defendant having looked in that direction and saying that it was there."

In this case, there was convincing, indeed almost overwhelming, evidence to support the New York court's conclusion that Quarles' hidden weapon did not pose a risk either to the arresting officers or to the public. The majority ignores this evidence and sets aside the factual findings of the New York Court of Appeals. More cynical observers might well conclude that a state court's findings of fact "deserv[e] a 'high measure of deference,'" only when deference works against the interests of a criminal defendant.

The majority's treatment of the legal issues presented in this case is no less troubling than its abuse of the facts. Before today's opinion, the Court had twice concluded that, under *Miranda v. Arizona*, police officers conducting custodial interrogations must advise suspects of their rights before any questions concerning the whereabouts of incriminating weapons can be asked. Now the majority departs from these cases and rules that police may withhold *Miranda* warnings whenever custodial interrogations concern matters of public safety.

The majority contends that the law, as it currently stands, places police officers in a dilemma whenever they interrogate a suspect who appears to know of some threat to the public's safety. If the police interrogate the suspect without advising him of his rights, the suspect may reveal information that the authorities can use to defuse the threat, but the suspect's statements will be inadmissible at trial. If, on the other hand, the police advise the suspect of his rights, the suspect may be deterred from responding to the police's questions, and the risk to the public may continue unabated. According to the majority, the police must now choose between establishing the suspect's guilt and safeguarding the public from danger.

The majority proposes to eliminate this dilemma by creating an exception to *Miranda v. Arizona* for custodial interrogations concerning matters of public safety. Under the majority's exception, police would be permitted to interrogate suspects about such matters before the suspects have been advised of their constitutional rights. Without being "deterred" by the knowledge that they have a constitutional right not to respond, these suspects will be likely to answer the questions. Should the answers also be incriminating, the State would be free to introduce them as evidence in a criminal prosecution. Through this "narrow exception to the *Miranda* rule," the majority proposes to protect the public's safety without jeopardizing the prosecution of criminal defendants. I find in this reasoning an unwise and unprincipled departure from our Fifth Amendment precedents.

This case is illustrative of the chaos the "public-safety" exception will unleash. The circumstances of Quarles' arrest have never been in dispute. After the benefit of briefing and oral argument, the New York Court of Appeals, as previously noted, concluded that there was "no evidence in the record before us that there were exigent circumstances posing a risk to the public safety." Upon reviewing the same facts and hearing the same arguments, a majority of this Court has come to precisely the opposite conclusion: "So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety...." If after plenary review two appellate courts so fundamentally differ over the threat to public safety presented by the simple and uncontested facts of this case, one must seriously question how law enforcement officers will respond to the majority's new rule in the confusion and haste of the real world.

Though unfortunate, the difficulty of administering the "public-safety" exception is not the most profound flaw in the majority's decision. The majority has lost sight of the fact that *Miranda v. Arizona* and our earlier custodial-interrogation cases all implemented a constitutional privilege against self-incrimination. The rules established in these cases were designed to protect criminal defendants against prosecutions based on coerced self-incriminating statements. The majority today turns its back on these constitutional considerations, and invites the government to prosecute through the use of what necessarily are coerced statements.

The majority's error stems from a serious misunderstanding of *Miranda v. Arizona* and of the Fifth Amendment upon which that decision was based. The majority implies that *Miranda* consisted of no more than a judicial balancing act in which the benefits of "enlarged protection for the Fifth Amendment privilege" were weighed against "the cost to society in terms of fewer convictions of guilty suspects." Supposedly because the scales tipped in favor of the privilege against self-incrimination, the *Miranda* Court erected a prophylactic barrier around statements made during custodial interrogations. The majority misreads *Miranda*. Though the *Miranda* dissent prophesized dire consequences, the *Miranda* Court refused to allow such concerns to weaken the protections of the Constitution.

Whether society would be better off if the police warned suspects of their rights before beginning an interrogation or whether the advantages of giving such warnings would outweigh their costs did not inform the *Miranda* decision. On the contrary, the *Miranda* Court was concerned with the proscriptions of the Fifth Amendment, and, in particular, whether the Self-Incrimination Clause permits the government to prosecute individuals based on statements made in the course of custodial interrogations.

In fashioning its "public-safety" exception to *Miranda*, the majority makes no attempt to deal with the constitutional presumption established by that case. The majority does not argue that police questioning about issues of public safety is any less coercive than custodial interrogations into other matters. The majority's only contention is that police officers could more easily protect the public if *Miranda* did not apply to custodial interrogations concerning the public's safety. But *Miranda* was not a decision about public safety; it was a decision about coerced confessions. Without establishing that interrogations concerning the public's safety are less likely to be coercive than other interrogations, the majority cannot endorse the "public-safety" exception and remain faithful to the logic of *Miranda v. Arizona*.

The majority's avoidance of the issue of coercion may not have been inadvertent. It would strain credulity to contend that Officer Kraft's questioning of respondent Quarles was not coercive.

That the application of the "public-safety" exception in this case entailed coercion is no happenstance. The majority's ratio decidendi is that interrogating suspects about matters of public safety will be coercive. In its cost-benefit analysis, the Court's strongest argument in favor of a "public-safety" exception to *Miranda* is that the police would be better able to protect the public's safety if they were not always required to give suspects their *Miranda* warnings. The crux of this argument is that, by deliberately withholding *Miranda* warnings, the police can get information out of suspects who would refuse to respond to police questioning were they advised of their constitutional rights. The "public-safety" exception is efficacious precisely because it permits police officers to coerce criminal defendants into making involuntary statements.

Indeed, in the efficacy of the "public-safety" exception lies a fundamental and constitutional defect. Until today, this Court could truthfully state that the Fifth Amendment is given "broad scope" "[w]here there has been genuine compulsion of testimony." Coerced confessions were simply inadmissible in criminal prosecutions. The "public-safety" exception departs from this principle by expressly inviting police officers to coerce defendants into making incriminating statements, and then permitting prosecutors to introduce those statements at trial. Though the majority's opinion is cloaked in the beguiling language of utilitarianism, the Court has sanctioned sub silentio criminal prosecutions based on compelled self-incriminating statements. I find this result in direct conflict with the Fifth Amendment's dictate that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."

The irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate

suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.

The majority should not be permitted to elude the Amendment's absolute prohibition simply by calculating special costs that arise when the public's safety is at issue. Indeed, were constitutional adjudication always conducted in such an ad hoc manner, the Bill of Rights would be a most unreliable protector of individual liberties.

Notes, Comments, and Questions

In her opinion concurring in part, Justice O'Connor wrote that she would not have excluded Quarles's gun from evidence, even if his initial statement about the gun had been excluded as she thought *Miranda* required. Because the majority in this case found that a *Miranda* Rule exception applied, the Court did not decide whether a *Miranda* violation could lead to the exclusion of physical evidence found as a result of statements obtained after interrogation. We will review how the Court decided this issue later this semester when we turn out attention to the exclusionary rule.

In Justice Marshall's dissent, he writes that the majority has permitted the use of "coerced statements" against a criminal defendant. But if the statements were truly the result of coercion, then the Due Process Clause of the Fourteenth Amendment should bar the statements as involuntary. Indeed, the majority opinion states, "In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist." The disconnect between the dissent and majority opinions illustrates a fundamental disagreement about the *Miranda* doctrine. In the eyes of the dissent, statements obtained in violation of *Miranda* are "coerced," and their admission violates the Fifth Amendment. The majority, by contrast, reasons that *Miranda* merely created a "presumption" that such statements are involuntary, a presumption created by the Court for its convenience, as well as to promote adherence to constitutional commands. A statement that is presumed compelled can be admitted against a defendant in appropriate circumstances—assuming of course that no actual compulsion is found—without offending the Self-Incrimination Clause.

* * *

We have seen that the Court has resisted applying the *Miranda* Rule to situations where it could impose inconvenience that—at least in the eyes of the majority—is not worth the cost. For example, in *Illinois v. Perkins* (Chapter 25), the Court declined to require *Miranda* warnings during jailhouse questioning of suspects by undercover agents. And in *Berkemer v. McCarty* (Chapter 24), the Court declined to require officers to perform *Miranda* warnings during routine traffic stops. Similar logic would support a *Miranda* exception for routine questions asked during the booking of an arrested suspect. Asking the questions furthers important police goals, and most routine questions—such as asking someone's name and address—should only rarely elicit incriminating information.

If one accepts this logic and supports a "routine booking" exception, one must still decide what questions fall within the exception. The Court addressed that issue in the next case.

Supreme Court of the United States

Pennsylvania v. Inocencio Muniz

Decided June 18, 1990 – 496 U.S. 582

Justice BRENNAN delivered the opinion of the Court, except as to Part III-C.

We must decide in this case whether various incriminating utterances of a drunken-driving suspect, made while performing a series of sobriety tests, constitute testimonial responses to custodial interrogation for purposes of the Self-Incrimination Clause of the Fifth Amendment.

I

During the early morning hours of November 30, 1986, a patrol officer spotted respondent Inocencio Muniz and a passenger parked in a car on the shoulder of a highway. When the officer inquired whether Muniz needed assistance, Muniz replied that he had stopped the car so he could urinate. The officer smelled alcohol on Muniz's breath and observed that Muniz's eyes were glazed and bloodshot and his face was flushed. The officer then directed Muniz to remain parked until his condition improved, and Muniz gave assurances that he would do so. But as the officer returned to his vehicle, Muniz drove off. After the officer pursued Muniz down the highway and pulled him over, the officer asked Muniz to perform three standard field sobriety tests: a "horizontal gaze nystagmus" test, a "walk and turn" test, and a "one leg stand" test. Muniz performed these tests poorly, and he informed the officer that he had failed the tests because he had been drinking.

The patrol officer arrested Muniz and transported him to the West Shore facility of the Cumberland County Central Booking Center. Following its routine practice for receiving persons suspected of driving while intoxicated, the booking center videotaped the ensuing proceedings. Muniz was informed that his actions and voice were being recorded, but he was not at this time (nor had he been previously) advised of his rights under *Miranda v. Arizona*. Officer Hosterman first asked Muniz his name, address, height, weight, eye color, date of birth, and current age. He responded to each of these questions, stumbling over his address and age. The officer then asked Muniz, "Do you know what the date was of your sixth birthday?" After Muniz offered an inaudible reply, the officer repeated, "When you turned six years old, do you remember what the date was?" Muniz responded, "No, I don't."

Officer Hosterman next requested Muniz to perform each of the three sobriety tests that Muniz had been asked to perform earlier during the initial roadside stop. The videotape reveals that his eyes jerked noticeably during the gaze test, that he did not walk a very straight line, and that he could not balance himself on one leg for more than several seconds. During the latter two tests, he did not complete the requested verbal counts from 1 to 9 and from 1 to 30. Moreover, while performing these tests, Muniz "attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform."

Finally, Officer Deyo asked Muniz to submit to a breathalyzer test designed to measure the alcohol content of his expelled breath. Officer Deyo read to Muniz the Commonwealth's Implied Consent Law and explained that under the law his refusal to take the test would result in automatic suspension of his driver's license for one year. Muniz asked a number of questions about the law, commenting in the process about his state of inebriation. Muniz ultimately refused to take the breath test. At this point, Muniz was for the first time advised of his *Miranda* rights. Muniz then signed a statement waiving his rights and admitted in response to further questioning that he had been driving while intoxicated.

Both the video and audio portions of the videotape were admitted into evidence at Muniz' bench trial, along with the arresting officer's testimony that Muniz failed the roadside sobriety tests and made incriminating remarks at that time. Muniz was convicted of driving under the influence of alcohol. Muniz filed a motion for a new trial, contending that the court should have excluded the testimony relating to the field sobriety tests and the videotape taken at the booking center "because they were incriminating and completed prior to [Muniz's] receiving his *Miranda* warnings." The trial court denied the motion, holding that "'requesting a driver, suspected of driving under the influence of alcohol, to perform physical tests or take a breath analysis does not violate [his] privilege against self-incrimination because [the] evidence procured is of a physical nature rather than testimonial, and therefore no *Miranda* warnings are required.'"

On appeal, the Superior Court of Pennsylvania reversed. After the Pennsylvania Supreme Court denied the Commonwealth's application for review, we granted certiorari.

II

This case implicates both the "testimonial" and "compulsion" components of the privilege against self-incrimination in the context of pretrial questioning. Because Muniz was not advised of his *Miranda* rights until after the videotaped proceedings at the booking center were completed, any verbal statements that were both testimonial in nature and elicited during custodial interrogation should have been suppressed. We focus first on Muniz's responses to the initial informational questions, then on his questions and utterances while performing the physical dexterity and balancing tests, and finally on his questions and utterances surrounding the breathalyzer test.

III

In the initial phase of the recorded proceedings, Officer Hosterman asked Muniz his name, address, height, weight, eye color,

date of birth, current age, and the date of his sixth birthday. Both the delivery and content of Muniz's answers were incriminating. As the state court found, "Muniz's videotaped responses ... certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle." The Commonwealth argues, however, that admission of Muniz's answers to these questions does not contravene Fifth Amendment principles because Muniz's statement regarding his sixth birthday was not "testimonial" and his answers to the prior questions were not elicited by custodial interrogation. We consider these arguments in turn.

A

We agree with the Commonwealth's contention that Muniz's answers are not rendered inadmissible by *Miranda* merely because the slurred nature of his speech was incriminating. The physical inability to articulate words in a clear manner due to "the lack of muscular coordination of his tongue and mouth," is not itself a testimonial component of Muniz's responses to Officer Hosterman's introductory questions. [W]e [have] held that "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." [A] person suspected of driving while intoxicated [can] be forced to provide a blood sample, because that sample [is] "real or physical evidence" outside the scope of the privilege and the sample [is] obtained in a manner by which "[p]etitioner's testimonial capacities were in no way implicated."

We have since applied the distinction between "real or physical" and "testimonial" evidence in other contexts where the evidence could be produced only through some volitional act on the part of the suspect. [W]e agree with the Commonwealth that any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice does not, without more, compel him to provide a "testimonial" response for purposes of the privilege.

B

This does not end our inquiry, for Muniz's answer to the sixth birthday question was incriminating, not just because of his delivery, but also because of his answer's *content;* the trier of fact could infer from Muniz's answer (that he did not *know* the proper date) that his mental state was confused. The Commonwealth and the United States as *amicus curiae* argue that this incriminating inference does not trigger the protections of the Fifth Amendment privilege because the inference concerns "the physiological functioning of [Muniz's] brain," which is asserted to be every bit as "real or physical" as the physiological makeup of his blood and the timbre of his voice.

But this characterization addresses the wrong question; that the "fact" to be inferred might be said to concern the physical status of Muniz's brain merely describes the way in which the inference is incriminating. The correct question for present purposes is whether the incriminating inference of mental confusion is drawn from a testimonial act or from physical evidence. In *Schmerber* [*v. California*, 384 U.S. 757 (1966)], for example, we held that the police could compel a suspect to provide a blood sample in order to determine the physical makeup of his blood and thereby draw an inference about whether he was intoxicated. This compulsion was outside of the Fifth Amendment's protection, not simply because the evidence concerned the suspect's physical body, but rather because the evidence was *obtained* in a manner that did not entail any testimonial act on the part of the suspect. In contrast, had the police instead asked the suspect directly whether his blood contained a high concentration of alcohol, his affirmative response would have been testimonial even though it would have been used to draw the same inference concerning his physiology. In this case, the question is not whether a suspect's "impaired mental faculties" can fairly be characterized as an aspect of his physiology, but rather whether Muniz's response to the sixth birthday question that gave rise to the inference of such an impairment was testimonial in nature.

Th[e] definition of testimonial evidence reflects an awareness of the historical abuses against which the privilege against self-incrimination was aimed. "Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion." At its core, the privilege reflects our fierce "'unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt'" that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury.

We need not explore the outer boundaries of what is "testimonial" today, for our decision flows from the concept's core meaning.

Because the privilege was designed primarily to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality," it is evident that a suspect is "compelled … to be a witness against himself" at least whenever he must face the modern-day analog of the historic trilemma—either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda,* the choices are analogous and hence raise similar concerns. Whatever else it may include, therefore, the definition of "testimonial" evidence [] must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the "cruel trilemma." This conclusion is consistent with our recognition [] that "[t]he vast majority of verbal statements thus will be testimonial" because "[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the "trilemma" of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.

[T]he sixth birthday question in this case required a testimonial response. When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma. By hypothesis, the inherently coercive environment created by the custodial interrogation precluded the option of remaining silent. Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was [correct date]) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.

The state court held that the sixth birthday question constituted an unwarned interrogation for purposes of the privilege against self-incrimination and that Muniz's answer was incriminating. The Commonwealth does not question either conclusion. Therefore, because we conclude that Muniz's response to the sixth birthday question was testimonial, the response should have been suppressed.

C

The Commonwealth argues that the seven questions asked by Officer Hosterman just *prior* to the sixth birthday question—regarding Muniz's name, address, height, weight, eye color, date of birth, and current age—did not constitute custodial interrogation as we have defined the term in *Miranda* and subsequent cases. In *Miranda,* the Court referred to "interrogation" as actual "questioning initiated by law enforcement officers." We have since clarified that definition, finding that the "goals of the *Miranda* safeguards could be effectuated if those safeguards extended not only to express questioning, but also to 'its functional equivalent.'" [T]he Court [has] defined the phrase "functional equivalent" of express questioning to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." However, "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining" what the police reasonably should have known. Thus, custodial interrogation for purposes of *Miranda* includes both express questioning and words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to "have … the force of a question on the accused," and therefore be reasonably likely to elicit an incriminating response.

We disagree with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation as we define[] the term merely because the questions were not intended to elicit information for investigatory purposes. As explained above, the [*Rhode Island v.*] *Innis* test focuses primarily upon "the perspective of the suspect." We agree with *amicus* United States, however, that Muniz's answers to these first seven questions are nonetheless admissible because the questions fall within a "routine booking question" exception which exempts from *Miranda*'s coverage questions to secure the "'biographical data necessary to complete booking or pretrial services.'" The state court found that the first seven questions were "requested for record-keeping purposes only," and therefore the questions appear reasonably related to the police's administrative concerns. In this context, therefore, the first seven questions asked at the booking center fall outside the protections of *Miranda* and the answers thereto need not be suppressed.

IV

During the second phase of the videotaped proceedings, Officer Hosterman asked Muniz to perform the same three sobriety tests that he had earlier performed at roadside prior to his arrest: the "horizontal gaze nystagmus" test, the "walk and turn" test, and the "one leg stand" test. While Muniz was attempting to comprehend Officer Hosterman's instructions and then perform the requested sobriety tests, Muniz made several audible and incriminating statements. Muniz argued to the state court that both the videotaped performance of the physical tests themselves and the audiorecorded verbal statements were introduced in violation of *Miranda.*

The court refused to suppress the videotaped evidence of Muniz's paltry performance on the physical sobriety tests, reasoning that "'[r]equiring a driver to perform physical [sobriety] tests ... does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial.'" With respect to Muniz's verbal statements, however, the court concluded that "none of Muniz's utterances were spontaneous, voluntary verbalizations," and because they were "elicited before Muniz received his *Miranda* warnings, they should have been excluded as evidence."

We disagree. Officer Hosterman's dialogue with Muniz concerning the physical sobriety tests consisted primarily of carefully scripted instructions as to how the tests were to be performed. These instructions were not likely to be perceived as calling for any verbal response and therefore were not "words or actions" constituting custodial interrogation, with two narrow exceptions not relevant here. The dialogue also contained limited and carefully worded inquiries as to whether Muniz understood those instructions, but these focused inquiries were necessarily "attendant to" the police procedure held by the court to be legitimate. Hence, Muniz's incriminating utterances during this phase of the videotaped proceedings were "voluntary" in the sense that they were not elicited in response to custodial interrogation.

Similarly, we conclude that *Miranda* does not require suppression of the statements Muniz made when asked to submit to a breathalyzer examination. Officer Deyo read Muniz a prepared script explaining how the test worked, the nature of Pennsylvania's Implied Consent Law, and the legal consequences that would ensue should he refuse. Officer Deyo then asked Muniz whether he understood the nature of the test and the law and whether he would like to submit to the test. Muniz asked Officer Deyo several questions concerning the legal consequences of refusal, which Deyo answered directly, and Muniz then commented upon his state of inebriation. After offering to take the test only after waiting a couple of hours or drinking some water, Muniz ultimately refused.

We believe that Muniz's statements were not prompted by an interrogation within the meaning of *Miranda,* and therefore the absence of *Miranda* warnings does not require suppression of these statements at trial. As did Officer Hosterman when administering the three physical sobriety tests, Officer Deyo carefully limited her role to providing Muniz with relevant information about the breathalyzer test and the Implied Consent Law. She questioned Muniz only as to whether he understood her instructions and wished to submit to the test. These limited and focused inquiries were necessarily "attendant to" the legitimate police procedure and were not likely to be perceived as calling for any incriminating response.

V

We agree with the state court's conclusion that *Miranda* requires suppression of Muniz's response to the question regarding the date of his sixth birthday, but we do not agree that the entire audio portion of the videotape must be suppressed. Accordingly, the court's judgment reversing Muniz's conviction is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice BLACKMUN, and Justice STEVENS join, concurring in part, concurring in the result in part, and dissenting in part.

I join Parts I, II, III-A, and IV of the Court's opinion. In addition, although I agree with the conclusion in Part III-C that the seven "booking" questions should not be suppressed, I do so for a reason different from that of Justice BRENNAN. I dissent from the Court's conclusion that Muniz's response to the "sixth birthday question" should have been suppressed.

The Court holds that the sixth birthday question Muniz was asked required a testimonial response, and that its admission at trial therefore violated Muniz's privilege against compulsory self-incrimination.

As an assumption about human behavior, this statement is wrong. Muniz would no more have felt compelled to fabricate a false date than one who cannot read the letters on an eye chart feels compelled to fabricate false letters; nor does a wrong guess call into question a speaker's veracity. The Court's statement is also a flawed predicate on which to base its conclusion that Muniz's

answer to this question was “testimonial” for purposes of the Fifth Amendment.

The sixth birthday question here was an effort on the part of the police to check how well Muniz was able to do a simple mathematical exercise. Indeed, had the question related only to the date of his birth, it presumably would have come under the “booking exception” to *Miranda v. Arizona*. The Court holds in this very case that Muniz may be required to perform a “horizontal gaze nystagmus” test, the “walk and turn” test, and the “one leg stand” test, all of which are designed to test a suspect’s physical coordination. If the police may require Muniz to use his body in order to demonstrate the level of his physical coordination, there is no reason why they should not be able to require him to speak or write in order to determine his mental coordination. That was all that was sought here. Since it was permissible for the police to extract and examine a sample of Schmerber’s blood to determine how much that part of his system had been affected by alcohol, I see no reason why they may not examine the functioning of Muniz’s mental processes for the same purpose.

Surely if it were relevant, a suspect might be asked to take an eye examination in the course of which he might have to admit that he could not read the letters on the third line of the chart. At worst, he might utter a mistaken guess. Muniz likewise might have attempted to guess the correct response to the sixth birthday question instead of attempting to calculate the date or answer “I don’t know.” But the potential for giving a bad guess does not subject the suspect to the truth-falsity-silence predicament that renders a response testimonial and, therefore, within the scope of the Fifth Amendment privilege.

For substantially the same reasons, Muniz’s responses to the videotaped “booking” questions were not testimonial and do not warrant application of the privilege. Thus, it is unnecessary to determine whether the questions fall within the “routine booking question” exception to *Miranda* Justice BRENNAN recognizes.

I would reverse in its entirety the judgment of the Superior Court of Pennsylvania. But given the fact that five members of the Court agree that Muniz’s response to the sixth birthday question should have been suppressed, I agree that the judgment of the Superior Court should be vacated so that, on remand, the court may consider whether admission of the response at trial was harmless error.

Notes, Comments, and Questions

The *Muniz* majority referred to the “Star Chamber,” an English court that apparently took its name from images of stars decorating the ceiling of the room in which it met. Its history is complicated. For purposes of this course, it will be sufficient for students to know that the term “Star Chamber”—when used by American judges—generally refers to a court with unfair procedures that can be compared to those of the Inquisition. In particular, in America the court’s name is strongly associated with compulsory self-incrimination. For a detailed discussion of the origins of the privilege against self-incrimination in England, see John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047 (1994).

This chapter concludes our main unit on the *Miranda* Rule, to which we will return briefly when studying the exclusionary rule. In our next two chapters, we will examine the constraints on interrogations imposed by the Court pursuant to the Assistance of Counsel Clause of the Sixth Amendment.

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3.9: Chapter 30 - The Sixth Amendment- Massiah Doctrine and Waiver of Rights

INTERROGATIONS

Chapter 30

The Sixth Amendment: *Massiah* Doctrine & Waiver of Rights

In *Massiah v. United States*, the Court held that the petitioner was denied the protections of the Sixth Amendment's guarantee of assistance of counsel when prosecutors used his own words against him at trial, words which federal agents had deliberately elicited from him in the absence of his counsel after he had been indicted. Further, we read for our last chapter that indictment is not the only way that the right to counsel can "attach"—other formal proceedings will do. The *Massiah* Court did not define what it meant for government agents to "deliberately elicit" incriminating statements. We turn to that question in this chapter.

After reviewing the leading cases on deliberate elicitation, we will turn to the rules governing waiver of rights under the Sixth Amendment Assistance of Counsel Clause.

Supreme Court of the United States

United States v. Billy Gale Henry

Decided June 16, 1980 – 447 U.S. 264

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to consider whether respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by respondent to his cellmate, an undisclosed Government informant, after indictment and while in custody.

I

The Janaf Branch of the United Virginia Bank/Seaboard National in Norfolk, Va., was robbed in August 1972. Witnesses saw two men wearing masks and carrying guns enter the bank while a third man waited in the car. No witnesses were able to identify respondent Henry as one of the participants. About an hour after the robbery, the getaway car was discovered. Inside was found a rent receipt signed by one "Allen R. Norris" and a lease, also signed by Norris, for a house in Norfolk. Two men, who were subsequently convicted of participating in the robbery, were arrested at the rented house. Discovered with them were the proceeds of the robbery and the guns and masks used by the gunman.

Government agents traced the rent receipt to Henry; on the basis of this information, Henry was arrested in Atlanta, Ga., in November 1972. Two weeks later he was indicted for armed robbery. He was held pending trial in the Norfolk city jail. Counsel was appointed on November 27.

On November 21, 1972, shortly after Henry was incarcerated, Government agents working on the Janaf robbery contacted one Nichols, an inmate at the Norfolk city jail, who for some time prior to this meeting had been engaged to provide confidential information to the Federal Bureau of Investigation as a paid informant. Nichols was then serving a sentence on local forgery charges. The record does not disclose whether the agent contacted Nichols specifically to acquire information about Henry or the Janaf robbery.

Nichols informed the agent that he was housed in the same cellblock with several federal prisoners awaiting trial, including Henry. The agent told him to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery. In early December, after Nichols had been released from jail, the agent again

contacted Nichols, who reported that he and Henry had engaged in conversation and that Henry had told him about the robbery of the Janaf bank. Nichols was paid for furnishing the information.

When Henry was tried in March 1973, an agent of the Federal Bureau of Investigation testified concerning the events surrounding the discovery of the rental slip and the evidence uncovered at the rented house. Other witnesses also connected Henry to the rented house, including the rental agent who positively identified Henry as the "Allen R. Norris" who had rented the house and had taken the rental receipt described earlier. A neighbor testified that prior to the robbery she saw Henry at the rented house with John Luck, one of the two men who had by the time of Henry's trial been convicted for the robbery. In addition, palm prints found on the lease agreement matched those of Henry.

Nichols testified at trial that he had "an opportunity to have some conversations with Mr. Henry while he was in the jail," and that Henry told him that on several occasions he had gone to the Janaf Branch to see which employees opened the vault. Nichols also testified that Henry described to him the details of the robbery and stated that the only evidence connecting him to the robbery was the rental receipt. The jury was not informed that Nichols was a paid Government informant.

On the basis of this testimony, Henry was convicted of bank robbery and sentenced to a term of imprisonment of 25 years. On appeal he raised no Sixth Amendment claims. His conviction was affirmed and his petition to this Court for a writ of certiorari was denied.

On August 28, 1975, Henry moved to vacate his sentence. At this stage, he stated that he had just learned that Nichols was a paid Government informant and alleged that he had been intentionally placed in the same cell with Nichols so that Nichols could secure information about the robbery. Thus, Henry contended that the introduction of Nichols' testimony violated his Sixth Amendment right to the assistance of counsel. The District Court denied the motion without a hearing. The Court of Appeals, however, reversed and remanded for an evidentiary inquiry into "whether the witness [Nichols] was acting as a government agent during his interviews with Henry."

On remand, the District Court requested affidavits from the Government agents. An affidavit was submitted describing the agent's relationship with Nichols and relating the following conversation:

"I recall telling Nichols at this time to be alert to any statements made by these individuals [the federal prisoners] regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry or these individuals about the charges against them, however, if they engaged him in conversation or talked in front of him, he was requested to pay attention to their statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay attention to the information furnished by Henry."

The agent's affidavit also stated that he never requested anyone affiliated with the Norfolk city jail to place Nichols in the same cell with Henry.

The District Court again denied Henry's motion, concluding that Nichols' testimony at trial did not violate Henry's Sixth Amendment right to counsel. The Court of Appeals reversed and remanded, holding that the actions of the Government impaired the Sixth Amendment rights of the defendant under *Massiah v. United States*. The court noted that Nichols had engaged in conversation with Henry and concluded that if by association, by general conversation, or both, Nichols had developed a relationship of trust and confidence with Henry such that Henry revealed incriminating information, this constituted interference with the right to the assistance of counsel under the Sixth Amendment.

II

This Court has scrutinized postindictment confrontations between Government agents and the accused to determine whether they are "critical stages" of the prosecution at which the Sixth Amendment right to the assistance of counsel attaches. The present case involves incriminating statements made by the accused to an undisclosed and undercover Government informant while in custody and after indictment. The Government characterizes Henry's incriminating statements as voluntary and not the result of any affirmative conduct on the part of Government agents to elicit evidence. From this, the Government argues that Henry's rights were not violated, even assuming the Sixth Amendment applies to such surreptitious confrontations; in short, it is contended that the Government has not interfered with Henry's right to counsel.

This Court first applied the Sixth Amendment to postindictment communications between the accused and agents of the Government in *Massiah v. United States*. The question here is whether under the facts of this case a Government agent

"deliberately elicited" incriminating statements from Henry within the meaning of *Massiah*. Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

The Court of Appeals viewed the record as showing that Nichols deliberately used his position to secure incriminating information from Henry when counsel was not present and held that conduct attributable to the Government. Nichols had been a paid Government informant for more than a year; moreover, the FBI agent was aware that Nichols had access to Henry and would be able to engage him in conversations without arousing Henry's suspicion. The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information. This combination of circumstances is sufficient to support the Court of Appeals' determination. Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result.

The Government argues that the federal agents instructed Nichols not to question Henry about the robbery. Yet according to his own testimony, Nichols was not a passive listener; rather, he had "some conversations with Mr. Henry" while he was in jail and Henry's incriminatory statements were "the product of this conversation." While affirmative interrogation, absent waiver, would certainly satisfy *Massiah*, we are not persuaded, as the Government contends that *Brewer v. Williams* modified *Massiah*'s "deliberately elicited" test. In *Massiah*, no inquiry was made as to whether Massiah or his codefendant first raised the subject of the crime under investigation.

It is quite a different matter when the Government uses undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed. But the Fourth and Fifth Amendment claims [possible] in those [situations] are not relevant to the inquiry under the Sixth Amendment here—whether the Government has interfered with the right to counsel of the accused by "deliberately eliciting" incriminating statements. Our holding today does not modify [Fourth or Fifth Amendment jurisprudence on this issue].

It is undisputed that Henry was unaware of Nichols' role as a Government informant. The government argues that this Court should apply a less rigorous standard under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers. That line of argument, however, seeks to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel. An accused speaking to a known Government agent is typically aware that his statements may be used against him. The adversary positions at that stage are well established; the parties are then "arms' length" adversaries.

When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the same cannot be said. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents. Indeed, the *Massiah* Court noted that if the Sixth Amendment "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." The Court pointedly observed that Massiah was more seriously imposed upon because he did not know that his codefendant was a Government agent.

Moreover, the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government. In that setting, Henry, being unaware that Nichols was a Government agent expressly commissioned to secure evidence, cannot be held to have waived his right to the assistance of counsel.

Finally Henry's incarceration at the time he was engaged in conversation by Nichols is also a relevant factor.[1] [T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents. The Court of Appeals determined that on this record the incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct and apparent status as a person sharing a common plight. That Nichols had managed to gain the confidence of Henry, as the Court of Appeals determined, is confirmed by Henry's request that Nichols assist him in his escape plans when Nichols was released from confinement.

Under the strictures of the Court's holdings on the exclusion of evidence, we conclude that the Court of Appeals did not err in holding that Henry's statements to Nichols should not have been admitted at trial. By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo's words, "the constable ... blundered"; rather, it is one where the "constable" planned an impermissible interference with the right to the assistance of counsel. The judgment of the Court of Appeals for the Fourth Circuit is [a]ffirmed.

Mr. Justice POWELL, concurring.

The rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated. But *Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action. Thus, the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. Similarly, the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions constituted deliberate and "surreptitious interrogatio[n]" of the defendant. If they did not, then there would be no interference with the relationship between client and counsel.

On balance [] I accept the view of the Court of Appeals and of the Court that the record adequately demonstrates the existence of a *Massiah* violation. I could not join the Court's opinion if it held that the mere presence or incidental conversation of an informant in a jail cell would violate *Massiah*. To demonstrate an infringement of the Sixth Amendment, a defendant must show that the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation.

Because I understand that the decision today rests on a conclusion that this informant deliberately elicited incriminating information by such conduct, I join the opinion of the Court.

Mr. Justice BLACKMUN, with whom Mr. Justice WHITE joins, dissenting.

In this case the Court, I fear, cuts loose from the moorings of *Massiah v. United States* and overlooks or misapplies significant facts to reach a result that is not required by the Sixth Amendment, by established precedent, or by sound policy. Because I view the principles of *Massiah* and the facts of this case differently than the Court does, I dissent.

Massiah mandates exclusion only if a federal agent "deliberately elicited" statements from the accused in the absence of counsel. The word "deliberately" denotes intent. *Massiah* ties this intent to the act of elicitation, that is, to conduct that draws forth a response. Thus *Massiah*, by its own terms, covers only action undertaken with the specific intent to evoke an inculpatory disclosure.

Faced with Agent Coughlin's unequivocal expression of an intent *not* to elicit statements from respondent Henry, but merely passively to receive them, the Court, in its decision to affirm the judgment of the Court of Appeals, has no choice but to depart from the natural meaning of the *Massiah* formulation. [W]hile claiming to retain the "deliberately elicited" test, the Court really forges a new test that saps the word "deliberately" of all significance. The Court's extension of *Massiah* would cover even a "negligent" triggering of events resulting in reception of disclosures. This approach, in my view, is unsupported and unwise.

The unifying theme of *Massiah* cases [] is the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with the specific intent of extracting information in the absence of counsel. Thus, the Court's "likely to induce" test fundamentally restructures *Massiah*. Even if the agent engages in no "overreaching," and believes his actions to be wholly innocent and passive, evidence he comes by must be excluded if a court, with the convenient benefit of 20/20 hindsight, finds it likely that the agent's actions would induce the statements.

For several reasons, I believe that the Court's revamping of *Massiah* abrogates sound judicial policy. First, its test will significantly broaden Sixth Amendment exclusion; yet, as THE CHIEF JUSTICE has stressed before, the "high price society pays for such a drastic remedy" as exclusion of indisputably reliable evidence in criminal trials cannot be denied. Second, I think the Court's approach fails to appreciate fully and to accommodate adequately the "value" and the "unfortunate necessity of undercover work." Third, I find it significant that the proffered statements are unquestionably voluntary. Fourth, the Court condemns and punishes police conduct that I do not find culpable. Fifth, at least absent an active, orchestrated ruse, I have great difficulty perceiving how canons of fairness are violated when the Government uses statements flowing from a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."

Finally, I note the limits, placed in other Sixth Amendment cases, of providing counsel to counterbalance prosecutorial expertise and to aid defendants faced with complex and unfamiliar proceedings. While not out of line with the Court's prior right-to-counsel cases, *Massiah* certainly is the decision in which Sixth Amendment protections have been extended to their outermost point. I simply do not perceive any good reason to give *Massiah* the expansion it receives in this case.

In my view, the Court not only missteps in forging a new *Massiah* test; it proceeds to misapply the very test it has created. The new test requires a showing that the agent created a situation "likely to induce" the production of incriminatory remarks, and that the informant in fact "prompted" the defendant. Even accepting the most capacious reading of both this language and the facts, I believe that neither prong of the Court's test is satisfied.

In holding that Coughlin's actions were likely to induce Henry's statements, the Court relies on three facts: a contingent-fee arrangement; Henry's assumption that Nichols was just a cellmate; and Henry's incarceration.

The Court states: "The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information." The District Court, however, made no such finding, and I am unconvinced that the evidence of record establishes such an understanding.

The Court also emphasizes that Henry was "unaware that Nichols was a Government agent." One might properly assign this factor some importance, were it not for *Brewer v. Williams* (Chapter 29). In that case, the Court explicitly held that the fact "[t]hat the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is *constitutionally irrelevant*." The Court's teeter-tottering with this factor in *Massiah* analysis can only induce confusion.

It merits emphasis that the court's resurrection of the unawareness factor is indispensable to its holding. For, in *Brewer*, substantial contact and conversation with a confined defendant preceded delivery of the "Christian burial speech." Yet the Court clearly deemed the speech critical in finding a *Massiah* violation; it thus made clear that mere "association" and "general conversation" did not suffice to bring *Massiah* into play. Since nothing more transpired here, principled application of *Brewer* mandates reversal of the judgment in this case.

Finally, the Court notes that Henry was incarcerated when he made his statements to Nichols. The Court's emphasis of the "subtle influences" exerted by custody, however, is itself too subtle for me. This is not a case of a custodial encounter with police, in which the Government's display of power might overcome the free will of the accused. The relationship here was "social" and relaxed. Henry did not suspect that Nichols was connected with the FBI. Moreover, even assuming that "subtle influences" might encourage a detainee to talk about his crime, there are certainly counter-balances of at least equal weight. Since, in jail, "official surveillance has traditionally been the order of the day," and a jailmate has obvious incentives to assist authorities, one may expect a detainee to act with corresponding circumspection.

All Members of the Court agree that Henry's statements were properly admitted if Nichols did not "prompt" him. The record, however, gives no indication that Nichols "stimulated" Henry's remarks with "affirmative steps to secure incriminating information." Certainly the known facts reveal nothing more than "a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations." Indeed, to the extent the record says anything at all, it supports the inference that it was Henry, not Nichols, who "engaged" the other "in some conversations," and who was the moving force behind any mention of the crime. I cannot believe that *Massiah* requires exclusion when a cellmate previously unknown to the defendant and asked only to keep his ears open says: "It's a nice day," and the defendant responds: "It would be nicer if I hadn't robbed that bank." The Court of Appeals, however, found it necessary to swallow that bitter pill in order to decide this case the way it did, and this Court does not show that anything more transpired.

In sum, I think this is an unfortunate decision, which disregards precedent and stretches to the breaking point a virtually silent record. Whatever the bounds of *Massiah*, that case does not justify exclusion of the proof challenged here.

Mr. Justice REHNQUIST, dissenting.

The Court today concludes that the Government through the use of an informant "deliberately elicited" information from respondent after formal criminal proceedings had begun, and thus the statements made by respondent to the informant are inadmissible because counsel was not present. The exclusion of respondent's statements has no relationship whatsoever to the reliability of the evidence, and it rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right. The Court's ruling is based on *Massiah v. United States*, which held that a postindictment confrontation between the accused and his accomplice, who had turned State's evidence and was acting under the direction of the Government, was a "critical" stage of the criminal proceedings at which the Sixth Amendment right to counsel attached. While the decision today sets forth the factors that are "important" in determining whether there has been a *Massiah* violation, I think that *Massiah* constitutes such a substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its language, if not its actual holding, should be re-examined.

* * *

In *Kuhlmann v. Wilson*, the Court considered police activity that occurred before *United States v. Henry* was decided but nonetheless might seem—depending on one's views of the facts—as though it were directed by officers guided by *Henry*'s holding. Although the facts of the two cases are similar, the *Kuhlmann* majority found an important distinction that justified the opposite result.

Supreme Court of the United States

R.H. Kuhlmann v. Joseph Allan Wilson

Decided June 26, 1986 – 477 U.S. 436

Justice POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III in which THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O'CONNOR join.

This case requires us to define the circumstances under which federal courts should entertain a state prisoner's petition for writ of habeas corpus that raises claims rejected on a prior petition for the same relief.

I

In the early morning of July 4, 1970, respondent and two confederates robbed the Star Taxicab Garage in the Bronx, New York, and fatally shot the night dispatcher. Shortly before, employees of the garage had observed respondent, a former employee there, on the premises conversing with two other men. They also witnessed respondent fleeing after the robbery, carrying loose money in his arms. After eluding the police for four days, respondent turned himself in. Respondent admitted that he had been present when the crimes took place, claimed that he had witnessed the robbery, gave the police a description of the robbers, but denied knowing them. Respondent also denied any involvement in the robbery or murder, claiming that he had fled because he was afraid of being blamed for the crimes.

After his arraignment, respondent was confined in the Bronx House of Detention, where he was placed in a cell with a prisoner named Benny Lee. Unknown to respondent, Lee had agreed to act as a police informant. Respondent made incriminating statements that Lee reported to the police. Prior to trial, respondent moved to suppress the statements on the ground that they were obtained in violation of his right to counsel. The trial court held an evidentiary hearing on the suppression motion, which revealed that the statements were made under the following circumstances.

Before respondent arrived in the jail, Lee had entered into an arrangement with Detective Cullen, according to which Lee agreed to listen to respondent's conversations and report his remarks to Cullen. Since the police had positive evidence of respondent's participation, the purpose of placing Lee in the cell was to determine the identities of respondent's confederates. Cullen instructed Lee not to ask respondent any questions, but simply to "keep his ears open" for the names of the other perpetrators. Respondent first spoke to Lee about the crimes after he looked out the cellblock window at the Star Taxicab Garage, where the crimes had occurred. Respondent said, "someone's messing with me," and began talking to Lee about the robbery, narrating the same story that he had given the police at the time of his arrest. Lee advised respondent that this explanation "didn't sound too good," but respondent did not alter his story. Over the next few days, however, respondent changed details of his original account. Respondent then received a visit from his brother, who mentioned that members of his family were upset because they believed that respondent had murdered the dispatcher. After the visit, respondent again described the crimes to Lee. Respondent now admitted that he and two other men, whom he never identified, had planned and carried out the robbery, and had murdered the dispatcher. Lee informed Cullen of respondent's statements and furnished Cullen with notes that he had written surreptitiously while sharing the cell with respondent.

After hearing the testimony of Cullen and Lee, the trial court found that Cullen had instructed Lee "to ask no questions of [respondent] about the crime but merely to listen as to what [respondent] might say in his presence." The court determined that Lee obeyed these instructions, that he "at no time asked any questions with respect to the crime," and that he "only listened to [respondent] and made notes regarding what [respondent] had to say." The trial court also found that respondent's statements to Lee were "spontaneous" and "unsolicited." Under state precedent, a defendant's volunteered statements to a police agent were admissible in evidence because the police were not required to prevent talkative defendants from making incriminating statements. The trial court accordingly denied the suppression motion.

The jury convicted respondent of common-law murder and felonious possession of a weapon. On May 18, 1972, the trial court sentenced him to a term of 20 years to life on the murder count efand to a concurrent term of up to 7 years on the weapons count. The Appellate Division affirmed without opinion, and the New York Court of Appeals denied respondent leave to appeal.

On December 7, 1973, respondent filed a petition for federal habeas corpus relief. Respondent argued, among other things, that his statements to Lee were obtained pursuant to police investigative methods that violated his constitutional rights. After considering *Massiah v. United States*, the District Court for the Southern District of New York denied the writ on January 7, 1977. The record demonstrated "no interrogation whatsoever" by Lee and "only spontaneous statements" from respondent. In the

District Court's view, these "fact[s] preclude[d] any Sixth Amendment violation." A divided panel of the Court of Appeals for the Second Circuit affirmed.

Following this Court's decision in *United States v. Henry,* respondent decided to relitigate his Sixth Amendment claim. On September 11, 1981, he filed in state trial court a motion to vacate his conviction. The judge denied the motion, on the grounds that *Henry* was factually distinguishable from this case, and that under state precedent *Henry* was not to be given retroactive effect. The Appellate Division denied respondent leave to appeal.

On July 6, 1982, respondent returned to the District Court for the Southern District of New York on a habeas petition, again arguing that admission in evidence of his incriminating statements to Lee violated his Sixth Amendment rights. Respondent contended that the decision in *Henry* constituted a new rule of law that should be applied retroactively to this case. The District Court found it unnecessary to consider retroactivity because it decided that *Henry* did not undermine the Court of Appeals' prior disposition of respondent's Sixth Amendment claim. A different, and again divided, panel of the Court of Appeals reversed.

We granted certiorari to consider the Court of Appeals' decision that the "ends of justice" required consideration of this successive habeas corpus petition and that court's application of our decision in *Henry* to the facts of this case. We now reverse.

II and III

[In Parts II and III, Justice POWELL, joined by THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O'CONNOR wrote "that the Court of Appeals erred in concluding that the 'ends of justice' would be served by consideration of respondent's successive petition. The court conceded that the evidence of respondent's guilt 'was nearly overwhelming.'" The constitutional claim argued by respondent does not itself raise any question as to his guilt or innocence. The District Court and the Court of Appeals should have dismissed this successive petition under on the ground that the prior judgment denying relief on this identical claim was final." Because this portion of the opinion did not receive majority support, the remainder of the opinion addresses the merits of the *Massiah* claim.]

IV

Even if the Court of Appeals had correctly decided to entertain this successive habeas petition, we conclude that it erred in holding that respondent was entitled to relief under *United States v. Henry*. As the District Court observed, *Henry* left open the question whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was "placed in close proximity but [made] no effort to stimulate conversations about the crime charged." [T]his question must, as the District Court properly decided, be answered negatively.

[T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

It is thus apparent that the Court of Appeals erred in concluding that respondent's right to counsel was violated under the circumstances of this case. Its error did not stem from any disagreement with the District Court over appropriate resolution of the question reserved in *Henry,* but rather from its implicit conclusion that this case did not present that open question. That conclusion was based on a fundamental mistake, namely, the Court of Appeals' failure to accord to the state trial court's factual findings the [appropriate] presumption of correctness.

The state court found that Officer Cullen had instructed Lee only to listen to respondent for the purpose of determining the identities of the other participants in the robbery and murder. The police already had solid evidence of respondent's participation. The court further found that Lee followed those instructions, that he "at no time asked any questions" of respondent concerning the pending charges, and that he "only listened" to respondent's "spontaneous" and "unsolicited" statements. The only remark made by Lee that has any support in this record was his comment that respondent's initial version of his participation in the crimes "didn't sound too good." Without holding that any of the state court's findings were not entitled to the presumption of correctness, the Court of Appeals focused on that one remark and gave a description of Lee's interaction with respondent that is completely at odds with the facts found by the trial court. In the Court of Appeals' view, "[s]ubtly and slowly, but surely, Lee's ongoing verbal intercourse with [respondent] served to exacerbate [respondent's] already troubled state of mind." After thus

revising some of the trial court's findings, and ignoring other more relevant findings, the Court of Appeals concluded that the police "deliberately elicited" respondent's incriminating statements. This conclusion conflicts with the decision of every other state and federal judge who reviewed this record, and is clear error.

V

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Chief Justice BURGER, concurring.

I agree fully with the Court's opinion and judgment. This case is clearly distinguishable from United States v. Henry. There is a vast difference between placing an "ear" in the suspect's cell and placing a voice in the cell to encourage conversation for the "ear" to record.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

The Court holds that the Court of Appeals erred with respect to the merits of respondent's habeas petition. According to the Court, the Court of Appeals failed to accord [the appropriate] presumption of correctness to the state trial court's findings that respondent's cellmate, Lee, "at no time asked any questions" of respondent concerning the pending charges, and that Lee only listened to respondent's "spontaneous" and "unsolicited" statements. As a result, the Court concludes, the Court of Appeals failed to recognize that this case presents the question, reserved in *Henry,* whether the Sixth Amendment forbids the admission into evidence of an accused's statements to a jailhouse informant who was "placed in close proximity but [made] no effort to stimulate conversations about the crime charged." I disagree with the Court's characterization of the Court of Appeals' treatment of the state court's findings and, consequently, I disagree with the Court that the instant case presents the "listening post" question.

In *Henry,* we found that the Federal Government had "deliberately elicited" incriminating statements from Henry based on the following circumstances. In the instant case, as in *Henry,* the accused was incarcerated and therefore was "susceptible to the ploys of undercover Government agents." Like Nichols, Lee was a secret informant, usually received consideration for the services he rendered the police, and therefore had an incentive to produce the information which he knew the police hoped to obtain. Just as Nichols had done, Lee obeyed instructions not to question respondent and to report to the police any statements made by the respondent in Lee's presence about the crime in question. And, like Nichols, Lee encouraged respondent to talk about his crime by conversing with him on the subject over the course of several days and by telling respondent that his exculpatory story would not convince anyone without more work. However, unlike the situation in *Henry,* a disturbing visit from respondent's brother, rather than a conversation with the informant, seems to have been the immediate catalyst for respondent's confession to Lee. While it might appear from this sequence of events that Lee's comment regarding respondent's story and his general willingness to converse with respondent about the crime were not the *immediate* causes of respondent's admission, I think that the deliberate-elicitation standard requires consideration of the entire course of government behavior.

The State intentionally created a situation in which it was foreseeable that respondent would make incriminating statements without the assistance of counsel—it assigned respondent to a cell overlooking the scene of the crime and designated a secret informant to be respondent's cellmate. The informant, while avoiding direct questions, nonetheless developed a relationship of cellmate camaraderie with respondent and encouraged him to talk about his crime. While the *coup de grace* was delivered by respondent's brother, the groundwork for respondent's confession was laid by the State. Clearly the State's actions had a sufficient nexus with respondent's admission of guilt to constitute deliberate elicitation within the meaning of *Henry.* I would affirm the judgment of the Court of Appeals.

Notes, Comments, and Questions

Together, *Kuhlmann* and *Henry* provide useful guidance to law enforcement officers wondering how they may secretly obtain information from a suspect whose right to counsel has attached. The facts of *Henry* constitute deliberate elicitation and accordingly a Sixth Amendment violation. By contrast, the informant in *Kuhlmann* acted more like a listening post and was just careful enough to honor the rule of *Massiah*. One can imagine the difficulty in determining exactly how active the undercover agent was in eliciting a confession, should this later be disputed at a hearing. The careful reader will note that the rules are different under *Miranda* prior to the attachment of the right to counsel.

Waiver of Rights under the Assistance of Counsel Clause

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court set forth a rule governing waiver of rights under the Sixth Amendment's Assistance of Counsel Clause similar to that established under the *Miranda* Rule. The *Jackson* Court recalled that in *Edwards v. Arizona* (Chapter 27), the Court had "rejected the notion that, after a suspect's request for counsel, advice of rights and acquiescence in police-initiated questioning could establish a valid waiver."

Turning to the Assistance of Counsel Clause case before it, the Court held: "We find no warrant for a different view under a Sixth Amendment analysis. Indeed, our rejection of the comparable argument in *Edwards* was based, in part, on our review of earlier Sixth Amendment cases. Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis."

Two decades later, the Court considered whether *Michigan v. Jackson* should remain good law or should instead be altered—or overruled entirely.

Supreme Court of the United States

Jesse Jay Montejo v. Louisiana

Decided May 26, 2009 – 556 U.S. 778

Justice SCALIA delivered the opinion of the Court.

We consider in this case the scope and continued viability of the rule announced by this Court in *Michigan v. Jackson*, forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding.

I

Petitioner Jesse Montejo was arrested on September 6, 2002, in connection with the robbery and murder of Lewis Ferrari, who had been found dead in his own home one day earlier. Suspicion quickly focused on Jerry Moore, a disgruntled former employee of Ferrari's dry cleaning business. Police sought to question Montejo, who was a known associate of Moore.

Montejo waived his rights under *Miranda v. Arizona* and was interrogated at the sheriff's office by police detectives through the late afternoon and evening of September 6 and the early morning of September 7. During the interrogation, Montejo repeatedly changed his account of the crime, at first claiming that he had only driven Moore to the victim's home, and ultimately admitting that he had shot and killed Ferrari in the course of a botched burglary. These police interrogations were videotaped.

On September 10, Montejo was brought before a judge for what is known in Louisiana as a "72-hour hearing"—a preliminary hearing required under state law. Although the proceedings were not transcribed, the minute record indicates what transpired: "The defendant being charged with First Degree Murder, Court ordered N[o] Bond set in this matter. Further, Court ordered the Office of Indigent Defender be appointed to represent the defendant."

Later that same day, two police detectives visited Montejo back at the prison and requested that he accompany them on an excursion to locate the murder weapon (which Montejo had earlier indicated he had thrown into a lake). After some back-and-forth, the substance of which remains in dispute, Montejo was again read his *Miranda* rights and agreed to go along; during the excursion, he wrote an inculpatory letter of apology to the victim's widow. Only upon their return did Montejo finally meet his court-appointed attorney, who was quite upset that the detectives had interrogated his client in his absence.

At trial, the letter of apology was admitted over defense objection. The jury convicted Montejo of first-degree murder, and he was sentenced to death.

The Louisiana Supreme Court affirmed the conviction and sentence. As relevant here, the court rejected Montejo's argument that under the rule of *Jackson*, the letter should have been suppressed. *Jackson* held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." We granted certiorari.

II

Montejo and his *amici* raise a number of pragmatic objections to the Louisiana Supreme Court's interpretation of *Jackson*. We agree that the approach taken below would lead either to an unworkable standard, or to arbitrary and anomalous distinctions between defendants in different States. Neither would be acceptable.

Under the rule adopted by the Louisiana Supreme Court, a criminal defendant must request counsel, or otherwise "assert" his Sixth Amendment right at the preliminary hearing, before the *Jackson* protections are triggered. If he does so, the police may not initiate further interrogation in the absence of counsel. But if the court on its own appoints counsel, with the defendant taking no affirmative action to invoke his right to counsel, then police are free to initiate further interrogations provided that they first obtain an otherwise valid waiver by the defendant of his right to have counsel present.

This rule would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made, which usually occurs after the court has informed him that he will receive counsel if he asks for it. That is how the system works in Michigan, for example, whose scheme produced the factual background for this Court's decision in *Michigan v. Jackson*. Jackson, like all other represented indigent defendants in the State, had requested counsel in accordance with the applicable state law.

But many States follow other practices. In some two dozen, the appointment of counsel is automatic upon a finding of indigency; and in a number of others, appointment can be made either upon the defendant's request or *sua sponte* by the court. Nothing in our *Jackson* opinion indicates whether we were then aware that not all States require that a defendant affirmatively request counsel before one is appointed; and of course we had no occasion there to decide how the rule we announced would apply to these other States.

The Louisiana Supreme Court's answer to that unresolved question is troublesome. The central distinction it draws—between defendants who "assert" their right to counsel and those who do not—is exceedingly hazy when applied to States that appoint counsel absent request from the defendant. How to categorize a defendant who merely asks, prior to appointment, whether he will be appointed counsel? Or who inquires, after the fact, whether he has been? What treatment for one who thanks the court after the appointment is made? And if the court asks a defendant whether he would object to appointment, will a quick shake of his head count as an assertion of his right?

To the extent that the Louisiana Supreme Court's rule also permits a defendant to trigger *Jackson* through the "acceptance" of counsel, that notion is even more mysterious: How does one affirmatively accept counsel appointed by court order? An indigent defendant has no right to choose his counsel so it is hard to imagine what his "acceptance" would look like, beyond the passive silence that Montejo exhibited.

III

But if the Louisiana Supreme Court's application of *Jackson* is unsound as a practical matter, then Montejo's solution is untenable as a theoretical and doctrinal matter. Under his approach, once a defendant is *represented* by counsel, police may not initiate any further interrogation. Such a rule would be entirely untethered from the original rationale of *Jackson*.

A

It is worth emphasizing first what is *not* in dispute or at stake here. Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. Interrogation by the State is such a stage.

Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment.

The *only* question raised by this case, and the only one addressed by the *Jackson* rule, is whether courts must *presume* that such a waiver is invalid under certain circumstances. We created such a presumption in *Jackson* by analogy to a similar prophylactic rule established to protect the Fifth Amendment-based *Miranda* right to have counsel present at any custodial interrogation. *Edwards*

v. Arizona decided that once "an accused has invoked his right to have counsel present during custodial interrogation … [he] is not subject to further interrogation by the authorities until counsel has been made available," unless he initiates the contact.

The *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." It does this by presuming his postassertion statements to be involuntary, "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." This prophylactic rule thus "protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence."

Jackson represented a "wholesale importation of the *Edwards* rule into the Sixth Amendment." The *Jackson* Court decided that a request for counsel at an arraignment should be treated as an invocation of the Sixth Amendment right to counsel "at every critical stage of the prosecution," despite doubt that defendants "actually inten[d] their request for counsel to encompass representation during any further questioning" because doubts must be "resolved in favor of protecting the constitutional claim." Citing *Edwards,* the Court held that any subsequent waiver would thus be "insufficient to justify police-initiated interrogation." In other words, we presume such waivers involuntary "based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily" in subsequent interactions with police.

B

With this understanding of what *Jackson* stands for and whence it came, it should be clear that Montejo's interpretation of that decision—that no *represented* defendant can ever be approached by the State and asked to consent to interrogation—is off the mark. When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary. There is no "*initial* election" to exercise the right that must be preserved through a prophylactic rule against later waivers. No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. *Edwards* and *Jackson* are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.

In practice, Montejo's rule would prevent police-initiated interrogation entirely once the Sixth Amendment right attaches, at least in those States that appoint counsel promptly without request from the defendant.

IV

So on the one hand, requiring an initial "invocation" of the right to counsel in order to trigger the *Jackson* presumption is consistent with the theory of that decision, but (as Montejo and his *amici* argue) would be unworkable in more than half the States of the Union. On the other hand, eliminating the invocation requirement would render the rule easy to apply but depart fundamentally from the *Jackson* rationale.

We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved "unworkable" is a traditional ground for overruling it.

Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned. The first two cut in favor of abandoning *Jackson:* The opinion is only two decades old, and eliminating it would not upset expectations.

Which brings us to the strength of *Jackson*'s reasoning. When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's benefits against its costs. "The value of any prophylactic rule … must be assessed not only on the basis of what is gained, but also on the basis of what is lost." We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering "society's compelling interest in finding, convicting, and punishing those who violate the law").

What does the *Jackson* rule actually achieve by way of preventing unconstitutional conduct? Recall that the purpose of the rule is to preclude the State from badgering defendants into waiving their previously asserted rights. The effect of this badgering might be to coerce a waiver, which would render the subsequent interrogation a violation of the Sixth Amendment. Even though involuntary waivers are invalid even apart from *Jackson,* mistakes are of course possible when courts conduct case-by-case

voluntariness review. A bright-line rule like that adopted in *Jackson* ensures that no fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial.

But without *Jackson,* how many would be? The answer is few if any. The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney."

These three layers of prophylaxis are sufficient. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then *Jackson* is simply superfluous.

It is true, as Montejo points out in his supplemental brief, that the doctrine established by *Miranda* and *Edwards* is designed to protect Fifth Amendment, not Sixth Amendment, rights. But that is irrelevant. What matters is that these cases, like *Jackson,* protect the right to have counsel during custodial interrogation—which right happens to be guaranteed (once the adversary judicial process has begun) by *two* sources of law. Since the right under both sources is waived using the same procedure, doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver.

Montejo also correctly observes that the *Miranda-Edwards* regime is narrower than *Jackson* in one respect: The former applies only in the context of custodial interrogation. If the defendant is not in custody then those decisions do not apply; nor do they govern other, noninterrogative types of interactions between the defendant and the State (like pretrial lineups). However, those uncovered situations are the *least* likely to pose a risk of coerced waivers. When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering. And noninterrogative interactions with the State do not involve the "inherently compelling pressures" that one might reasonably fear could lead to involuntary waivers.

Jackson was policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule. *Miranda* and the cases that elaborate upon it already guarantee not simply noncoercion in the traditional sense, but what Justice Harlan referred to as "voluntariness with a vengeance." There is no need to take *Jackson*'s further step of requiring voluntariness on stilts.

On the other side of the equation are the costs of adding the bright-line *Jackson* rule on top of *Edwards* and other extant protections. The principal cost of applying any exclusionary rule "is, of course, letting guilty and possibly dangerous criminals go free ...." *Jackson* not only "operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless," but also deters law enforcement officers from even trying to obtain voluntary confessions. The "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." Without these confessions, crimes go unsolved and criminals unpunished. These are not negligible costs, and in our view the *Jackson* Court gave them too short shrift.

In sum, when the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not "pay its way." *Michigan v. Jackson* should be and now is overruled.

V

Although our holding means that the Louisiana Supreme Court correctly rejected Montejo's claim under *Jackson,* we think that Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*. If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it. Even if Montejo subsequently agreed to waive his rights, that waiver would have been invalid had it followed an "unequivocal election of the right."

Montejo understandably did not pursue an *Edwards* objection, because *Jackson* served as the Sixth Amendment analogy to *Edwards* and offered broader protections. Our decision today, overruling *Jackson,* changes the legal landscape and does so in part based on the protections already provided by *Edwards*. Thus we think that a remand is appropriate so that Montejo can pursue this alternative avenue for relief. Montejo may also seek on remand to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, *e.g.,* his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer. These matters have heightened importance in light of our opinion today.

We do not venture to resolve these issues ourselves, not only because we are a court of final review, "not of first view," but also because the relevant facts remain unclear. Montejo and the police gave inconsistent testimony about exactly what took place on the afternoon of September 10, 2002, and the Louisiana Supreme Court did not make an explicit credibility determination. Moreover, Montejo's testimony came not at the suppression hearing, but rather only at trial, and we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence. These matters are best left for resolution on remand.

This case is an exemplar of Justice Jackson's oft quoted warning that this Court "is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." We today remove *Michigan v. Jackson*'s fourth story of prophylaxis.

The judgment of the Louisiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice STEVENS, with whom Justice SOUTER and Justice GINSBURG join, and with whom Justice BREYER joins [except for a footnote not included in this book], dissenting.

Even if *Jackson* had never been decided, it would be clear that Montejo's Sixth Amendment rights were violated. Today's decision eliminates the rule that "any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid" once a defendant has invoked his right to counsel. Nevertheless, under the undisputed facts of this case, there is no sound basis for concluding that Montejo made a knowing and valid waiver of his Sixth Amendment right to counsel before acquiescing in police interrogation following his 72-hour hearing. Because police questioned Montejo without notice to, and outside the presence of, his lawyer, the interrogation violated Montejo's right to counsel even under pre-*Jackson* precedent.

Our pre-*Jackson* case law makes clear that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." The Sixth Amendment entitles indicted defendants to have counsel notified of and present during critical confrontations with the State throughout the pretrial process. Given the realities of modern criminal prosecution, the critical proceedings at which counsel's assistance is required more and more often occur outside the courtroom in pretrial proceedings "where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

The Court avoids confronting the serious Sixth Amendment concerns raised by the police interrogation in this case by assuming that Montejo validly waived his Sixth Amendment rights before submitting to interrogation. It does so by summarily concluding that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver"; thus, because Montejo was given *Miranda* warnings prior to interrogation, his waiver was presumptively valid. Ironically, while the Court faults *Jackson* for blurring the line between this Court's Fifth and Sixth Amendment jurisprudence, it commits the same error by assuming that the *Miranda* warnings given in this case, designed purely to safeguard the Fifth Amendment right against self-incrimination, were somehow adequate to protect Montejo's more robust Sixth Amendment right to counsel.

A defendant's decision to forgo counsel's assistance and speak openly with police is a momentous one. Given the high stakes of making such a choice and the potential value of counsel's advice and mediation at that critical stage of the criminal proceedings, it is imperative that a defendant possess "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" before his waiver is deemed valid. Because the administration of *Miranda* warnings was insufficient to ensure Montejo understood the Sixth Amendment right he was being asked to surrender, the record in this case provides no basis for concluding that Montejo validly waived his right to counsel, even in the absence of *Jackson*'s enhanced protections.

The Court's decision to overrule *Jackson* is unwarranted. Not only does it rest on a flawed doctrinal premise, but the dubious benefits it hopes to achieve are far outweighed by the damage it does to the rule of law and the integrity of the Sixth Amendment right to counsel. Moreover, even apart from the protections afforded by *Jackson,* the police interrogation in this case violated Jesse Montejo's Sixth Amendment right to counsel. I respectfully dissent.

Notes, Comments, and Questions

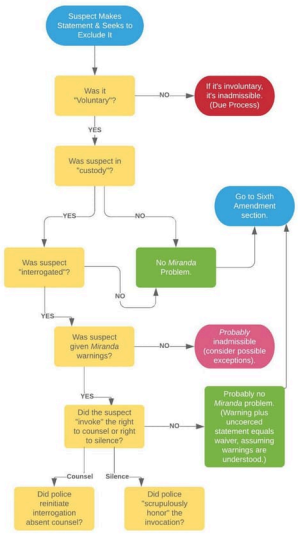
The different results in *Montejo* and *Edwards* illustrate that different rules apply depending on who is in custody. *Montejo* overruled *Michigan v. Jackson*—which governed Sixth Amendment waivers—but did not overrule *Edwards v. Arizona*—which still governs *Miranda* Rule waivers after a suspect invokes the right to counsel. Accordingly, if a suspect who has been indicted invokes his right to counsel during custodial interrogation, police must cease the interrogation and cannot return later to seek a waiver outside the presence of counsel. If that suspect is released, however, *Miranda* will no longer apply because the suspect is not "in custody." Under *Montejo*, police would be free to visit the suspect at home in hope of obtaining a valid waiver.

Students should note that *Montejo* did not overrule any of the Sixth Amendment cases concerning informants whom suspects do not realize are working for police, such as *Massiah*, *Henry*, and *Kuhlmann*. Once the Sixth Amendment right to counsel attaches, defendants are entitled to counsel during interrogation, and an undercover agent cannot obtain a valid waiver.

This chapter concludes our unit on interrogation. In our next chapter, we begin our examination of the exclusionary rule, by which the Court prevents prosecutors from using certain unlawfully-obtained evidence against criminal defendants.

Before turning to the next chapter, students may wish to review their knowledge of interrogations with a flowchart exercise, which begins on the next page.

Interrogation Flowchart Exercise



Flowcharts can help students visualize what they have learned. The goal is not to memorize the example chart presented here but instead to create a new chart that helps one to connect material from throughout the book. Your authors recommend that when students make their own charts, they add additional detail, such as case names or chapter numbers. For example, in the box asking whether a statement was "voluntary," a student might refer to cases from Chapter 22, such as *Brown v. Mississippi*, and especially *Arizona v. Fulminante*, which is a particularly helpful case because its facts are so close to the line separating a voluntary confession from an inadmissible, involuntary confession.

This chart focuses on the *Miranda* Rule. A separate chart might depict Sixth Amendment law set forth in *Massiah* and related cases.

These charts have two primary purposes. One is that when the charts are finished, they can serve as study aids. The other is that the creation of the charts—even if students never review them after finishing them—forces students to consider material more carefully than they otherwise might, which helps with learning and with retention of information. Also, fellow students can help spot misunderstandings that, were they not in a chart, would remain uncorrected. Study group members might wish to bring charts to share with classmates.

Interrogation Review

The Fifth and Sixth Amendments: Constitutional Regulation of Interrogation

Before moving to the next chapter, students may wish to review what we have learned about how police interrogation practices are regulated by constitutional law.

Instructions: For each problem, indicate which if any doctrines likely prohibit the conduct described. The answer choices are: (1) *Miranda* Rule, (2) *Massiah* doctrine, (3) voluntariness requirement, (4) multiple doctrines (indicate which ones), and (5) none (*i.e.*, the suspect has no good arguments based on interrogation law presented so far in this book). Jot down your reasoning briefly. If you are not sure, note why.

Each problem is independent of all other ones.

1) Police suspect someone of dealing drugs but lack good evidence. Officers hide a microphone in the pocket of an undercover agent disguised as a drug buyer. The suspect welcomes the undercover agent into the suspect's home. However, when the undercover agent asks about drugs, the suspect says, "You must be confused. I don't have anything to do with drugs." Frustrated, the agent brandishes a pistol and shouts, "Tell me the truth or I'll shoot." The suspect says, "Fine, fine. I sell weed. How much do you need?"

2) A suspect has been indicted for tax evasion. Unable to make bail, the suspect returns to jail. Police plant an undercover agent in the suspect's cell, disguised as a fellow inmate. The agent asks the suspect about tax evasion and learns important details about the suspect's crimes.

3) A suspect has been indicted for embezzlement. Released on bail, the suspect goes home. Police send an undercover agent to the suspect's home. (The agent is a co-conspirator who, without the suspect's knowledge, has decided to cooperate with prosecutors.) The agent records the suspect describing the embezzlement scheme.

4) A suspect has been indicted for cocaine distribution. Released on bail, the suspect goes to a favorite public park and begins calling friends, sharing the good news about the bail hearing. Police have hidden a microphone on the underside of the suspect's favorite park bench. Using that device, police overhear the suspect tell friends about continuing illegal activity.

5) A suspect is arrested for robbery. While driving the suspect to the police station, officers converse with one another. One officer says, "Can you believe this guy? I can't believe I'm stuck in a car with someone who robbed a gas station mini mart, a boy scout troop, and a church. What a piece of human garbage!" Impulsively, the suspect responds, "Listen, I'm not perfect, but I definitely didn't rob any boy scouts."

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4: THE EXCLUSIONARY RULE

4.1: Chapter 31 - Introduction to the Exclusionary Rule
4.2: Chapter 32 - When Does the Exclusionary Rule Apply?
4.3: Chapter 33 - Exclusionary Rule- Standing and Exceptions
4.4: Chapter 34 - Exclusionary Rule- Application to the Miranda Rule
4.5: Chapter 35 - The Basics of Suppression Hearings and Money Damages

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4.1: Chapter 31 - Introduction to the Exclusionary Rule

THE EXCLUSIONARY RULE

Chapter 31

Introduction to the Exclusionary Rule

In the reading assignment for the first chapter, students were encouraged to consider two questions when reading cases: "First, were someone's rights (usually constitutional rights) violated? Second, if so, so what?" We have thus far focused mostly on the first question, examining how the Court has construed the rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments. Yet the second question has arisen from time to time as the Justices debated whether certain behavior by state agents justified the exclusion of evidence. For example, the public safety exception to the *Miranda* Rule (Chapter 28) rests upon a judgment by the Court that police efforts to manage an ongoing "emergency"—or, to be less dramatic, a plausible urgent threat to public safety—are not the sort of activity that should hinder prosecution. Similarly, the opinions in *Brewer v. Williams* (Chapter 29) clashed over the propriety of excluding evidence against an accused murderer that police obtained through questionable interrogation techniques. Further, lurking behind the facts and legal analysis of nearly every case included in this book so far has been a defendant's desire to prevent evidence from being offered by prosecutors. Recall, for example, *Terry v. Ohio* (Chapter 20), in which the Court held that police may conduct certain searches and seizures without probable cause. John Terry did not bring his case to the Supreme Court because of his interest in Fourth Amendment jurisprudence; instead, he hoped that the Court might somehow prevent the state of Ohio from sending him to prison for carrying the concealed weapon that Officer McFadden found when frisking Terry in Zucker's store that Cleveland afternoon.

Terry's desired outcome—the exclusion of evidence—is the same as most of the parties we have seen complaining about state action of one kind or another. Yes, there are exceptions, such as *Muehler v. Mena* (Chapter 8), a lawsuit brought by a woman not found to have committed any crime who objected to how police treated her while executing a search warrant. She wanted money, not a ruling about evidence. We will turn later to the doctrine governing when money damages are available as a remedy for constitutional harms.

For now, and for the bulk of this unit, we turn to the "exclusionary rule," a term that covers various doctrines through which the Court has prohibited certain uses of unlawfully-obtained evidence.

Underlying all debate on the exclusionary rule, one finds two facts. Although not always explicitly acknowledged, these facts pervade the Justices' reasoning in exclusionary rule cases. First, when courts prevent prosecutors from using relevant, reliable evidence against criminal defendants, courts impede the fight against crime. One can debate the extent of the impediment—critics of the exclusionary rule tend to imagine higher hurdles than those described by supporters of the doctrine. Yet no honest defender of the exclusionary rule can deny that, in at least some cases, guilty defendants—sometimes guilty of terrible crimes—go free because of the Court's criminal procedure jurisprudence. In the words of Justice Cardozo during his time on the Court of Appeals of New York, "The criminal is to go free because the constable has blundered."

Second, remedies other than the exclusionary rule have not been effective in preventing police from violating the rights announced in Supreme Court opinions—that is, the rights described in books like this one. Other remedies exist, including money damages, internal police department discipline, and oversight by elected officials. Again, one can debate the extent of the problem. Opponents of the exclusionary rule tend to see less police misconduct than do the rule's supporters, and exclusionary rule opponents tend to have greater faith in the professionalism and goodwill of police department leaders and the politicians to whom they report. Yet police departments—from top leaders to officers on the street—worry about losing evidence to the exclusionary rule and govern their behavior, at least in part, to avoid that judicial remedy.

In short, the exclusionary rule promotes police conformity with Supreme Court criminal procedure decisions, and it does so at the cost of evidence otherwise available to convict accused criminals. As Judge Friendly put it, "The basis for excluding real evidence obtained by an unconstitutional search is not at all that use of the evidence may result in unreliable factfinding. The evidence is likely to be the most reliable that could possibly be obtained; exclusion rather than admission creates the danger of a verdict erroneous on the true facts. The sole reason for exclusion is that experience has demonstrated this to be the only effective

method for deterring the police from violating the Constitution."[1]

Some might quibble with Judge Friendly's statement that the "sole reason" for the exclusionary rule is to deter police misconduct. For example, perhaps apart from deterrence, exclusion is justified because courts will lose respect from the people if they allow agents of the state to prosecute the accused using evidence obtained illegally. That said, deterrence is the primary justification offered by the Court, especially in recent decades. Students should consider which justifications, if any, they find persuasive.

Supreme Court of the United States

Fremont Weeks v. United States

Decided February 24, 1914 – 232 U.S. 383

Mr. Justice Day delivered the opinion of the [unanimous] court:

An indictment was returned against the plaintiff in error, defendant below, and herein so designated, in the district court of the United States for the Western District of Missouri, containing nine counts. The seventh count, upon which a conviction was had, charged the use of the mails for the purpose of transporting certain coupons or tickets representing chances or shares in a lottery or gift enterprise, in violation of § 213 of the Criminal Code. Sentence of fine and imprisonment was imposed. This writ of error is to review that judgment.

The defendant was arrested by a police officer, so far as the record shows, without warrant, at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day police officers returned with the marshal, who thought he might find additional evidence, and, being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant's room and carried away certain letters and envelops found in the drawer of a chiffonier. Neither the marshal nor the police officer had a search warrant.

[The defendant filed a petition requesting return of his "private papers, books, and other property" and stating that the use of his personal items at trial would violate his Fourth and Fifth Amendment rights.]

Upon consideration of the petition the court entered in the cause an order directing the return of such property as was not pertinent to the charge against the defendant, but denied the petition as to pertinent matter, reserving the right to pass upon the pertinency at a later time. In obedience to the order the district attorney returned part of the property taken, and retained the remainder, concluding a list of the latter with the statement that, "all of which last above described property is to be used in evidence in the trial of the above-entitled cause, and pertains to the alleged sale of lottery tickets of the company above named."

After the jury had been sworn and before any evidence had been given, the defendant again urged his petition for the return of his property, which was denied by the court. Upon the introduction of such papers during the trial, the defendant objected on the ground that the papers had been obtained without a search warrant, and by breaking open his home, in violation of the 4th and 5th Amendments to the Constitution of the United States, which objection was overruled by the court.

The defendant assigns error, among other things, in the court's refusal to grant his petition for the return of his property, and in permitting the papers to be used at the trial.

It is thus apparent that the question presented involves the determination of the duty of the court with reference to the motion made by the defendant for the return of certain letters, as well as other papers, taken from his room by the United States marshal, who, without authority of process, if any such could have been legally issued, visited the room of the defendant for the declared purpose of obtaining additional testimony to support the charge against the accused, and, having gained admission to the house, took from the drawer of a chiffonier there found certain letters written to the defendant, tending to show his guilt. These letters were placed in the control of the district attorney, and were subsequently produced by him and offered in evidence against the accused at the trial. The defendant contends that such appropriation of his private correspondence was in violation of rights secured to him by the 4th and 5th Amendments to the Constitution of the United States. We shall deal with the 4th Amendment.

[The Court recounted the origin and history of the Fourth Amendment.]

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people,

their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well or other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

The court before which the application was made in this case recognized the illegal character of the seizure, and ordered the return of property not in its judgment competent to be offered at the trial, but refused the application of the accused to turn over the letters, which were afterwards put in evidence on behalf of the government. While there is no opinion in the case, the court in this proceeding doubtless relied upon what is now contended by the government to be the correct rule of law under such circumstances, that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use in evidence. Such proposition, the government asserts, is conclusively established by certain decisions of this court.

The right of the court to deal with papers and documents in the possession of the district attorney and other officers of the court, and subject to its authority, was recognized in *Wise v. Henkel*. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts.

We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court; under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies.

It results that the judgment of the court below must be reversed, and the case remanded for further proceedings in accordance with this opinion. Reversed.

Notes, Comments, and Questions

A few years after deciding *Weeks*, the Court confronted an attempt by federal officials to avoid the new exclusionary rule. In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), federal agents raided an office unlawfully and seized books and

records. After being ordered to return the illegally-gotten items, the government retained photographs and copies of some of the documents. Government lawyers then sought to subpoena the original documents (once again in the hands of their owners) on the basis of information learned while the documents were in the possession of federal agents. The Court reacted as follows:

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

The rule stated in *Silverthorne Lumber* has sometimes been called the "fruit of the poisonous tree" doctrine. The analogy is that if the evidence or knowledge obtained through the original constitutional violation is a poisonous tree, then evidence obtained as a result of that wrong is a poisonous fruit which must also be excluded from evidence. The case of *Kyllo v. United States* (Chapter 3) provides an example. If, as the Court found, the thermal imaging of Kyllo's house was an unlawful search, then a search warrant obtained by officers who recited information learned during the illegal imaging could not justify the subsequent police entry into the house. The marijuana seized from Kyllo's house was poisonous fruit of the thermal imaging.

In the next case, the Court considered whether to apply the rule of *Weeks* to state courts. The Court had already decided that the Fourth Amendment's protections against unreasonable searches and seizures were "incorporated" against the states through the Fourteenth Amendment. The issue was whether the exclusionary rule would also be imposed on the states.

Supreme Court of the United States

Dollree Mapp v. Ohio

Decided June 19, 1961 – 367 U.S. 643

Mr. Justice CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code. As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home ...."

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for

possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the 'methods' employed to obtain the [evidence] were such as to 'offend "a sense of justice,"'" but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant."

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf v. People of State of Colorado*, 338 U.S. 25 (1949), in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." On this appeal, it is urged once again that we review that holding.

I

[T]he Court in [*Weeks v. United States*] clearly stated that use of [] seized evidence involved "a denial of the constitutional rights of the accused." Thus, in the year 1914, in the *Weeks* case, this Court "for the first time" held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions ... should find no sanction in the judgments of the courts ...," and that such evidence "shall not be used at all."

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.

II

In 1949, 35 years after *Weeks* was announced, this Court, in *Wolf v. People of State of Colorado*, again for the first time, discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

"[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

Nevertheless, after declaring that the "security of one's privacy against arbitrary intrusion by the police" is "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause" and announcing that it "stoutly adhere[d]" to the *Weeks* decision, the Court decided that the *Weeks* exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." The Court's reasons ... were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which *Wolf* was based.

The Court in *Wolf* first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule of *Weeks* was "particularly impressive"; and, in this connection that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy ... by overriding the [States'] relevant rules of evidence." While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions ...." In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have been afforded "the right to privacy." The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment of the protection of other remedies

has, moreover, been recognized by this Court since *Wolf*.

Likewise, time has set its face against what *Wolf* called the "weighty testimony" of *People v. Defore*, 150 N.E. 585 (N.Y. 1926). There Justice (then Judge) Cardozo, rejecting adoption of the *Weeks* exclusionary rule in New York, had said that "[t]he Federal rule as it stands is either too strict or too lax." However, the force of that reasoning has been largely vitiated by later decisions of this Court. These include the recent discarding of the "silver platter" doctrine which allowed federal judicial use of evidence seized in violation of the Constitution by state agents; the relaxation of the formerly strict requirements as to standing to challenge the use of evidence thus seized, so that now the procedure of exclusion, "ultimately referable to constitutional safeguards," is available to anyone even "legitimately on [the] premises" unlawfully searched; and finally, the formulation of a method to prevent state use of evidence unconstitutionally seized by federal agents. Because there can be no fixed formula, we are admittedly met with "recurring questions of the reasonableness of searches," but less is not to be expected when dealing with a Constitution, and, at any rate, "[r]easonableness is in the first instance for the [trial court] to determine."

It, therefore, plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

III

Some five years after *Wolf*, in answer to a plea made here Term after Term that we overturn its doctrine on applicability of the *Weeks* exclusionary rule, this Court indicated that such should not be done until the States had "adequate opportunity to adopt or reject the [*Weeks*] rule."

Today we once again examine *Wolf*'s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

IV

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* "stoutly adhered" to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. And nothing could be more certain that that when a coerced confession is involved,

"the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effect, documents, etc.? We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] ... only after years of struggle." They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.

V

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated.

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. "However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted.

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." In some cases this will undoubtedly be the result. But [] "there is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, 277 U.S.438, 485 (1928): "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. The Court noted that

"The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. ... The movement towards the rule of exclusion has been halting but seemingly inexorable."

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

Mr. Justice BLACK, concurring.

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

The courts of the country are entitled to know with as much certainty as possible what scope they cover. The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the *Boyd* doctrine as controlling in this state case and to join the Court's judgment and opinion which are in accordance with that constitutional doctrine.

Mr. Justice DOUGLAS, concurring.

We held in *Wolf v. People of State of Colorado* that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the *Weeks* case was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But with all respect it was not the voice of reason or principle. As stated in the *Weeks* case, if evidence seized in violation of the Fourth Amendment can be used against an accused, "his right to be secure against such searches and seizures, is of no value, and ... might as well be stricken from the Constitution."

When we allowed States to give constitutional sanction to the "shabby business" of unlawful entry into a home, we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the police system, including prosecution of the police officer for a crime. Yet, "[s]elf-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if exclusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meagre the relief even if the citizen prevails. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the States, *Wolf v. People of State of Colorado* in practical effect reduced the guarantee against unreasonable searches and seizures to "a dead letter."

Memorandum of Mr. Justice STEWART.

Agreeing fully with Part I of Mr. Justice HARLAN'S dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice HARLAN, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

Mr. Justice HARLAN, whom Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER join, dissenting.

In overruling the *Wolf* case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new rule which now replaces it.

From the Court's statement of the case one would gather that the central, if not controlling, issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution, an issue which would of course face us with the need for re-examining *Wolf*. However, such is not the situation. For, although that question was indeed raised here and below among appellant's subordinate points, the new and pivotal issue brought to the Court by this appeal is whether § 2905.34 of the Ohio Revised Code making criminal the mere knowing possession or control of obscene material, and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment. That was the principal issue which was decided by the Ohio Supreme Court, which was tendered by appellant's Jurisdictional Statement, and which was briefed and argued in this Court.

In this posture of things, I think it fair to say that five members of this Court have simply "reached out" to overrule *Wolf*. With all respect for the views of the majority, and recognizing that *stare decisis* carries different weight in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining *Wolf*.

The action of the Court finds no support in the rule that decision of Constitutional issues should be avoided wherever possible. For in overruling *Wolf* the Court, instead of passing upon the validity of Ohio's § 2905.34, has simply chosen between two Constitutional questions. Moreover, I submit that it has chosen the more difficult and less appropriate of the two questions. The Ohio statute which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control (with exceptions not here applicable) and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene, surely presents a Constitutional question which is both simpler and less far-reaching than the question which the Court decides today. It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied.

Since the demands of the case before us do not require us to reach the question of the validity of *Wolf*, I think this case furnishes a singularly inappropriate occasion for reconsideration of that decision, if reconsideration is indeed warranted. Even the most cursory examination will reveal that the doctrine of the *Wolf* case has been of continuing importance in the administration of state criminal law. Indeed, certainly as regards its "nonexclusionary" aspect, *Wolf* did no more than articulate the then existing assumption among the States that the federal cases enforcing the exclusionary rule "do not bind [the States], for they construe provisions of the federal Constitution, the Fourth and Fifth Amendments, not applicable to the states."

The occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially. The unwisdom of overruling *Wolf* without full-dress argument is aggravated by the circumstance that that decision is a comparatively recent one (1949) to which three members of the present majority have at one time or other expressly subscribed, one to be sure with explicit misgivings. I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.

Thus, if the Court were bent on reconsidering *Wolf*, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set down for reargument, in view of the inadequate briefing and argument we have received on the *Wolf* point. To all intents and purposes the Court's present action amounts to a summary reversal of *Wolf*, without argument.

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions. Having been unable, however, to persuade any of the majority to a different procedural course, I now turn to the merits of the present decision.

Essential to the majority's argument against *Wolf* is the proposition that the rule of *Weeks v. United States*, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts.

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of all illegal search and seizure is a "part and parcel" of the Fourth Amendment; (2) *Wolf* held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment; and (3) it is therefore "logically and constitutionally necessary" that the *Weeks* exclusionary rule should also be enforced against the States.

This reasoning ultimately rests on the unsound premise that because *Wolf* carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment, it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty," and as such are enforceable against the States. For me, this does not follow at all.

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law

enforcement vary widely from State of State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the *Weeks* rule is pressing because other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too rough-and-ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the *Weeks* rule for a time may, because of unsatisfactory experience with it, decide to revert to a non-exclusionary rule. And so on. From the standpoint of Constitutional permissibility in pointing a State in one direction or another, I do not see at all why "time has set its face against" the considerations which led Mr. Justice Cardozo, then chief judge of the New York Court of Appeals, to reject the *Weeks* exclusionary rule. For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done.

In conclusion, it should be noted that the majority opinion in this case is in fact an opinion only for the judgment overruling *Wolf*, and not for the basic rationale by which four members of the majority have reached that result. For my Brother BLACK is unwilling to subscribe to their view that the *Weeks* exclusionary rule derives from the Fourth Amendment itself, but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.

Notes, Comments, and Questions

Dollree Mapp, who objected so vigorously to the search of her home in 1957, lived until 2014.[2] Her obituary reported that after being convicted of drug possession in New York in 1971, "she pursued a series of appeals, claiming that the search warrant used in her arrest had been wrongly issued and that the police had targeted her because of her role in *Mapp v. Ohio*."

The Justices debated two main questions in *Mapp v. Ohio*: First, would imposing the exclusionary rule on the states be good policy? Second, does the Court have authority under the Constitution to impose it?

Scholars writing under the banner of "originalism" have argued that the Court lacked authority to hold as it did in *Mapp*. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. Rev. 803, 806, 850-53 (2009) ("under our theory, the Supreme Court could appropriately discard a substantial portion of current constitutional criminal procedure, such as the exclusionary rule"); Stephen G. Calabresi, "Introduction," in *Originalism: A Quarter-Century of Debate* (Stephen G. Calabresi, ed. 2007), at 1, 39-40 (listing, among "good consequences that would flow from adopting originalism," that "[w]e would be better off if criminals never got out of jail because of the idiocy of the exclusionary rule"); *but see* Akhil Reed Amar, "Panel on Originalism and Precedent," in *id.*, at 210-11 ("And yet none of the supposedly originalist justices on the Supreme Court reject the exclusionary rule. Even Justices Scalia and Thomas exclude evidence pretty regularly, and do not ever quite tell us why they do so when it means abandoning the original meaning of the Fourth Amendment.").

In a provocative essay, Judge Guido Calabresi argues that the exclusionary rule has perverse effects, including encouraging false testimony by police. In particular, he suggests that because finding a constitutional violation—such as an illegal search—often requires a judge to free a dangerous criminal, judges err on the side of finding no violation. "Judges—politicians' claims to the contrary notwithstanding—are not in the business of letting people out on technicalities. If anything, judges are in the business of keeping people who are guilty *in* on technicalities. ... [Judges do] not like the idea of dangerous criminals being released into society. This means that in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable. That case then becomes precedent for the next case."[3] After acknowledging that alternative methods of "controlling the police in this area simply do not work," Judge Calabresi proposes an odd scheme by which convicted defendants could win reduced sentences by proving after trial that the prosecution used illegally-obtained evidence to convict them.[4]

Professor Yale Kamisar presented a more straightforward defense of the exclusionary rule, arguing that the rule's survival should not depend on an "empirical evaluation of its efficacy in deterring police misconduct."[5] Instead, the "imperative of judicial

integrity,"[6] requires the exclusion of evidence obtained in violation of the constitution.

Professor Kamisar next recounted an anecdote that helped him to appreciate the importance of *Mapp*, which he recalled as having "caused much grumbling in police ranks" in Minnesota.[7] In response to the grumbling, the state's attorney general reminded police officers that "the language of the Fourth Amendment is identical to the [search and seizure provision] of the Minnesota State Constitution" and that in terms of substantive law—that is, what police are and are not allowed to do—"*Mapp* did not alter one word of either the state or national constitutions," nor had it reduced lawful "police powers one iota."[8] Professor Kamisar reported also that after the attorney general's speech, "proponents of the exclusionary rule quoted [his] remarks and made explicit what those remarks implied: If the police feared that evidence they were gathering in the customary manner *would now be excluded* by the courts, the police must have been violating the guarantee against unreasonable search and seizure *all along*."

Professor Kamisar then recounted how a police officer reacted to the insinuation of longstanding officer misbehavior:

"No officer lied upon the witness stand. If you were asked how you got your evidence you told the truth. You had broken down a door or pried a window open ... often we picked locks. ... The Supreme Court of Minnesota sustained this time after time. ... [The] judiciary okayed it; they knew what the facts were."[9]

In other words, Professor Kamisar wrote, the "police departments ... reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure *had just been written*."[10]

Noting that police in other jurisdictions reacted in the same way he had observed in Minnesota, Professor Kamisar quoted the chief of the Los Angeles Police Department, who "warned that his department's 'ability to prevent the commission of crime has been greatly diminished' because henceforth his officers would be unable to take 'affirmative action' unless and until they possessed 'sufficient information to constitute probable cause.'"[11] Similarly, the commissioner of police in New York City reported that in the wake of *Mapp*, "[r]etraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function." These sessions covered information not taught to the officers when they first joined the force; the NYPD "was immediately caught up in the entire problem of reevaluating our procedures ... and modifying, amending and creating new policies and new instructions for the implementation of *Mapp*."[12]

If one takes the contemporary statements of police department leaders at face value, *Mapp* inspired far greater attention to search and seizure law than had previously existed in police departments across the United States.

In our next chapter, we review more recent case law. The Court has limited the application of the exclusionary rule to cases involving particularly egregious official misconduct. This causes less evidence—and fewer cases—to be lost because of judicial intervention. It also, however, decreases the deterrent effect of the rule.

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4.2: Chapter 32 - When Does the Exclusionary Rule Apply?

THE EXCLUSIONARY RULE

Chapter 32

When Does the Exclusionary Rule Apply?

The exclusionary rule has lasted more than a century in federal court and more than half a century in the courts of the states. Time has not dulled the controversy created by the rule. Although recent Supreme Court opinions devote relatively little time to debating the constitutional underpinnings of the rule, the Justices continue to argue over the rule's utility. In particular, twenty-first century exclusionary rule cases have contested the costs (measured in the loss of relevant, reliable evidence) and benefits (measured in deterrence of official misconduct, particularly the kind that violates constitutional rights). Recent cases have narrowed the scope of the rule—applying it to less misconduct than was covered in the decades after *Mapp v. Ohio*—but have not abolished it. Defendants retain powerful incentives to seek the exclusion of evidence, especially in cases of brazen police misconduct and when there are clear violations of well-established rights.

In our next case, the Court considered whether violations of the knock-and-announce rule—covered in Chapter 7—justify the exclusion of evidence found during a police search.

Supreme Court of the United States

Booker T. Hudson, Jr. v. Michigan

Decided June 15, 2006 – 547 U.S. 586

Justice SCALIA delivered the opinion of the Court.

We decide whether violation of the "knock-and-announce" rule requires the suppression of all evidence found in the search.

I

Police obtained a warrant authorizing a search for drugs and firearms at the home of petitioner Booker Hudson. They discovered both. Large quantities of drugs were found, including cocaine rocks in Hudson's pocket. A loaded gun was lodged between the cushion and armrest of the chair in which he was sitting. Hudson was charged under Michigan law with unlawful drug and firearm possession.

This case is before us only because of the method of entry into the house. When the police arrived to execute the warrant, they announced their presence, but waited only a short time—perhaps "three to five seconds"—before turning the knob of the unlocked front door and entering Hudson's home. Hudson moved to suppress all the inculpatory evidence, arguing that the premature entry violated his Fourth Amendment rights.

The Michigan trial court granted his motion. On interlocutory review, the Michigan Court of Appeals reversed, relying on Michigan Supreme Court cases holding that suppression is inappropriate when entry is made pursuant to warrant but without proper "'knock and announce.'" The Michigan Supreme Court denied leave to appeal. Hudson was convicted of drug possession. He renewed his Fourth Amendment claim on appeal, but the Court of Appeals rejected it and affirmed the conviction. The Michigan Supreme Court again declined review. We granted certiorari.

II

[It was undisputed that the entry was a knock-and-announce violation.]

III

A

In *Weeks v. United States,* we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment. We began applying the same rule to the States, through the Fourteenth Amendment, in *Mapp v. Ohio*.

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio[us] against expanding" it and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." We have rejected "[i]ndiscriminate application" of the rule and have held it to be applicable only "where its remedial objectives are thought most efficaciously served"—that is, "where its deterrence benefits outweigh its 'substantial social costs.'"

"[W]hether the exclusionary sanction is appropriately imposed in a particular case … is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" In other words, exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression. In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not,* the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have "never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.'" Rather, but-for cause, or "causation in the logical sense alone," can be too attenuated to justify exclusion.

Attenuation can occur, of course, when the causal connection is remote. Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve."

For this reason, cases excluding the fruits of unlawful warrantless searches say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement. Until a valid warrant has issued, citizens are entitled to shield "their persons, houses, papers, and effects" from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.

One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who "'did not know of the process, of which, if he had notice, it is to be presumed that he would obey it ….'" The knock-and-announce rule gives individuals "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police. "The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." In other words, it assures the opportunity to collect oneself before answering the door.

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

B

Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except "where its deterrence benefits outweigh its 'substantial social costs.'" The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures

to observe the rule, and claims that any asserted *Richards [v. Wisconsin* (Chapter 7)] justification for a no-knock entry had inadequate support. The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that "[t]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded." Unlike the warrant or *Miranda* requirements, compliance with which is readily determined (either there was or was not a warrant; either the *Miranda* warning was given, or it was not), what constituted a "reasonable wait time" in a particular case, (or, for that matter, how many seconds the police in fact waited), or whether there was "reasonable suspicion" of the sort that would invoke the *Richards* exceptions, is difficult for the trial court to determine and even more difficult for an appellate court to review.

Another consequence of the incongruent remedy Hudson proposes would be police officers' refraining from timely entry after knocking and announcing. As we have observed, the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others. We deemed these consequences severe enough to produce our unanimous agreement that a mere "reasonable suspicion" that knocking and announcing "under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime," will cause the requirement to yield.

Next to these "substantial social costs" we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. (It is not, of course, a sufficient condition: "[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.") To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even "reasonable suspicion" of their existence, *suspend the knock-and-announce requirement anyway.* Massive deterrence is hardly required.

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

For the foregoing reasons we affirm the judgment of the Michigan Court of Appeals.

Justice KENNEDY, concurring in part and concurring in the judgment.

Two points should be underscored with respect to today's decision. First, the knock-and-announce requirement protects rights and expectations linked to ancient principles in our constitutional order. The Court's decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law's concern. Second, the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.

As to the basic right in question, privacy and security in the home are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginnings of the Republic. This common understanding ensures respect for the law and allegiance to our institutions, and it is an instrument for transmitting our Constitution to later generations undiminished in meaning and force. It bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security must not be subject to erosion by indifference or contempt.

Our system, as the Court explains, has developed procedures for training police officers and imposing discipline for failures to act competently and lawfully. If those measures prove ineffective, they can be fortified with more detailed regulations or legislation. Supplementing these safeguards are civil remedies that provide restitution for discrete harms. These remedies apply to all violations, including, of course, exceptional cases in which unannounced entries cause severe fright and humiliation.

Today's decision does not address any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern. Even then, however, the Court would have to acknowledge that extending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of causation that limits our discretion in applying the exclusionary rule. That type of extension also would have

significant practical implications, adding to the list of issues requiring resolution at the criminal trial questions such as whether police officers entered a home after waiting 10 seconds or 20.

In this case the relevant evidence was discovered not because of a failure to knock and announce, but because of a subsequent search pursuant to a lawful warrant. The Court in my view is correct to hold that suppression was not required.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

In *Wilson v. Arkansas* (Chapter 7), a unanimous Court held that the Fourth Amendment normally requires law enforcement officers to knock and announce their presence before entering a dwelling. Today's opinion holds that evidence seized from a home following a violation of this requirement need not be suppressed.

As a result, the Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent. At least I can find no such support in the many Fourth Amendment cases the Court has decided in the near century since it first set forth the exclusionary principle in *Weeks v. United States*.

Today's opinion is thus doubly troubling. It represents a significant departure from the Court's precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection.

It is not surprising [] that after looking at virtually every pertinent Supreme Court case decided since *Weeks,* I can find no precedent that might offer the majority support for its contrary conclusion. The Court has, of course, recognized that not every Fourth Amendment violation necessarily triggers the exclusionary rule. But the class of Fourth Amendment violations that do not result in suppression of the evidence seized, however, is limited.

The Court has declined to apply the exclusionary rule only:

(1) where there is a specific reason to believe that application of the rule would "not result in appreciable deterrence," or

(2) where admissibility in proceedings other than criminal trials was at issue.

Neither of these two exceptions applies here. The second does not apply because this case is an ordinary criminal trial. The first does not apply because (1) officers who violate the rule are not acting "as a reasonable officer would and should act in similar circumstances," (2) this case does not involve government employees other than police, and (3), most importantly, the key rationale for any exception, "lack of deterrence," is missing. That critical latter rationale, which underlies *every* exception, does not apply here, as there is no reason to think that, in the case of knock-and-announce violations by the police, "the exclusion of evidence at trial would not sufficiently deter future errors," or "'further the ends of the exclusionary rule in any appreciable way.'"

I am aware of no other basis for an exception. The Court has decided more than 300 Fourth Amendment cases since *Weeks*. The Court has found constitutional violations in nearly a third of them. The nature of the constitutional violation varies. In most instances officers lacked a warrant; in others, officers possessed a warrant based on false affidavits; in still others, the officers executed the search in an unconstitutional manner. But in every case involving evidence seized during an illegal search of a home (federally since *Weeks,* nationally since *Mapp*), the Court, with the exceptions mentioned, has either explicitly or implicitly upheld (or required) the suppression of the evidence at trial. In not one of those cases did the Court "questio[n], in the absence of a more efficacious sanction, the continued application of the [exclusionary] rule to suppress evidence from the State's case" in a criminal trial.

I can find nothing persuasive in the majority's opinion that could justify its refusal to apply the rule. It certainly is not a justification for an exception here (as the majority finds) to find odd instances in *other* areas of law that do not automatically demand suppression. Nor can it justify an exception to say that *some* police may knock at the door anyway (to avoid being mistaken for a burglar), for other police (believing quick entry is the most secure, effective entry) will not voluntarily do so.

Neither can the majority justify its failure to respect the need for deterrence, as set forth consistently in the Court's prior case law, through its claim of "'substantial social costs'"—at least if it means that those "'social costs'" are somehow special here. The only costs it mentions are those that typically accompany *any* use of the Fourth Amendment's exclusionary principle. In fact, the "no-knock" warrants that are provided by many States, by diminishing uncertainty, may make application of the knock-and-announce principle less "'cost[ly]'" on the whole than application of comparable Fourth Amendment principles, such as determining whether a particular warrantless search was justified by exigency. The majority's "substantial social costs" argument is an argument against the Fourth Amendment's exclusionary principle itself. And it is an argument that this Court, until now, has consistently

rejected.

* * *

The Court in *Hudson v. Michigan* reasoned that the police would have found the evidence anyway (even without the Fourth Amendment violation), and Justice Kennedy concurred that there was no evidence of widespread knock-and-announce violations across the land. Although the decision answered only a fairly narrow question—the availability of the exclusionary rule in knock-and-announce cases—its reasoning foreshadowed a further reduction of the scope of the exclusionary rule.

The next case answers the question of whether ordinary negligence by police—if it results in a violation of constitutional rights—is sufficient to trigger the exclusionary rule, or if instead more culpable misconduct is required.

Supreme Court of the United States

Bennie Dean Herring v. United States

Decided Jan. 14, 2009 – 555 U.S. 135

Chief Justice ROBERTS delivered the opinion of the Court.

The Fourth Amendment forbids "unreasonable searches and seizures," and this usually requires the police to have probable cause or a warrant before making an arrest. What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution.

Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.

I

On July 7, 2004, Investigator Mark Anderson learned that Bennie Dean Herring had driven to the Coffee County Sheriff's Department to retrieve something from his impounded truck. Herring was no stranger to law enforcement, and Anderson asked the county's warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring's arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County's computer database, Morgan replied that there was an active arrest warrant for Herring's failure to appear on a felony charge. Pope relayed the information to Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him. A search incident to the arrest revealed methamphetamine in Herring's pocket, and a pistol (which as a felon he could not possess) in his vehicle.

There had, however, been a mistake about the warrant. The Dale County sheriff's computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the court clerk's office or a judge's chambers calls Morgan, who enters the information in the sheriff's computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mixup, and Pope contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already been arrested and found with the gun and drugs, just a few hundred yards from the sheriff's office.

Herring was indicted in the District Court for the Middle District of Alabama for illegally possessing the gun and drugs. He moved to suppress the evidence on the ground that his initial arrest had been illegal because the warrant had been rescinded. The Magistrate Judge recommended denying the motion because the arresting officers had acted in a good-faith belief that the warrant was still outstanding. Thus, even if there were a Fourth Amendment violation, there was "no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes." The District Court adopted the Magistrate Judge's recommendation, and the Court of Appeals for the Eleventh Circuit affirmed.

Other courts have required exclusion of evidence obtained through similar police errors so we granted Herring's petition for certiorari to resolve the conflict. We now affirm the Eleventh Circuit's judgment.

II

When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation. The very phrase "probable cause" confirms that the Fourth Amendment does not demand all possible precision. And whether the error can be traced to a mistake by a state actor or some other source may bear on the analysis. For purposes of deciding this case, however, we accept the parties' assumption that there was a Fourth Amendment violation. The issue is whether the exclusionary rule should be applied.

A

In analyzing the applicability of the [exclusionary] rule, we must consider the actions of all the police officers involved. The Coffee County officers did nothing improper. Indeed, the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant.

The Eleventh Circuit concluded, however, that somebody in Dale County should have updated the computer database to reflect the recall of the arrest warrant. The court also concluded that this error was negligent, but did not find it to be reckless or deliberate. That fact is crucial to our holding that this error is not enough by itself to require "the extreme sanction of exclusion."

B

The fact that a Fourth Amendment violation occurred—*i.e.,* that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. Indeed, exclusion "has always been our last resort, not our first impulse," and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it "'result[s] in appreciable deterrence.'" We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.

In addition, the benefits of deterrence must outweigh the costs. "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that "offends basic concepts of the criminal justice system." "[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application."

We [have] held that a mistake made by a judicial employee could not give rise to exclusion for three reasons: The exclusionary rule was crafted to curb police rather than judicial misconduct; court employees were unlikely to try to subvert the Fourth Amendment; and "most important, there [was] no basis for believing that application of the exclusionary rule in [those] circumstances" would have any significant effect in deterring the errors.

The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. "[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule. Similarly, in *Krull* we elaborated that "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'"[1]

Anticipating the good-faith exception to the exclusionary rule, Judge Friendly wrote that "[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice … outlawing evidence obtained by flagrant or deliberate violation of rights."

Indeed, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.

[T]his case concern[s] false information provided by police. [] [T]he miscommunications occurred [] after the warrant had been issued and recalled—but that fact should not require excluding the evidence obtained.

The pertinent analysis of deterrence and culpability is objective, not an "inquiry into the subjective awareness of arresting officers." We have already held that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal" in light of "all of the circumstances." These circumstances frequently include a particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience but not his subjective intent.

We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation. Petitioner's fears that our decision will cause police departments to deliberately keep their officers ignorant are thus unfounded.

Petitioner's claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." In such a case, the criminal should not "go free because the constable has blundered." The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

Petitioner Bennie Dean Herring was arrested, and subjected to a search incident to his arrest, although no warrant was outstanding against him, and the police lacked probable cause to believe he was engaged in criminal activity. The arrest and ensuing search therefore violated Herring's Fourth Amendment right "to be secure ... against unreasonable searches and seizures." The Court of Appeals so determined, and the Government does not contend otherwise. The exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search. The rule thus strongly encourages police compliance with the Fourth Amendment in the future. The Court, however, holds the rule inapplicable because careless recordkeeping by the police—not flagrant or deliberate misconduct—accounts for Herring's arrest.

I would not so constrict the domain of the exclusionary rule and would hold the rule dispositive of this case: "[I]f courts are to have any power to discourage [police] error of [the kind here at issue], it must be through the application of the exclusionary rule." The unlawful search in this case was contested in court because the police found methamphetamine in Herring's pocket and a pistol in his truck. But the "most serious impact" of the Court's holding will be on innocent persons "wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base."

The sole question presented [] is whether evidence the police obtained through the unlawful search should have been suppressed. In my view, the Court's opinion underestimates the need for a forceful exclusionary rule and the gravity of recordkeeping errors in law enforcement.

The Court states that the exclusionary rule is not a defendant's right; rather, it is simply a remedy applicable only when suppression would result in appreciable deterrence that outweighs the cost to the justice system.

The Court's discussion invokes a view of the exclusionary rule famously held by renowned jurists Henry J. Friendly and Benjamin Nathan Cardozo. Over 80 years ago, Cardozo, then seated on the New York Court of Appeals, commented critically on the federal exclusionary rule, which had not yet been applied to the States. He suggested that in at least some cases the rule exacted too high a price from the criminal justice system. In words often quoted, Cardozo questioned whether the criminal should "go free because the constable has blundered."

Judge Friendly later elaborated on Cardozo's query. "The sole reason for exclusion," Friendly wrote, "is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution." He thought it

excessive, in light of the rule's aim to deter police conduct, to require exclusion when the constable had merely "blundered"—when a police officer committed a technical error in an on-the-spot judgment, or made a "slight and unintentional miscalculation." [] Judge Friendly suggested that deterrence of police improprieties could be "sufficiently accomplished" by confining the rule to "evidence obtained by flagrant or deliberate violation of rights."

Others have described "a more majestic conception" of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental "right of the people to be secure in their persons, houses, papers, and effects," the Amendment "is a constraint on the power of the sovereign, not merely on some of its agents." I share that vision of the Amendment.

The exclusionary rule is "a remedy necessary to ensure that" the Fourth Amendment's prohibitions "are observed in fact." The rule's service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.

Beyond doubt, a main objective of the rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." But the rule also serves other important purposes: It "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."

The exclusionary rule, it bears emphasis, is often the only remedy effective to redress a Fourth Amendment violation. Civil liability will not lie for "the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice." Criminal prosecutions or administrative sanctions against the offending officers and injunctive relief against widespread violations are an even farther cry.

The Court maintains that Herring's case is one in which the exclusionary rule could have scant deterrent effect and therefore would not "pay its way." I disagree.

The exclusionary rule, the Court suggests, is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless. The suggestion runs counter to a foundational premise of tort law—that liability for negligence, *i.e.,* lack of due care, creates an incentive to act with greater care.

That the mistake here involved the failure to make a computer entry hardly means that application of the exclusionary rule would have minimal value. "Just as the risk of *respondeat superior* liability encourages employers to supervise ... their employees' conduct [more carefully], so the risk of exclusion of evidence encourages policymakers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems."

Consider the potential impact of a decision applying the exclusionary rule in this case. As earlier observed, the record indicates that there is no electronic connection between the warrant database of the Dale County Sheriff's Department and that of the County Circuit Clerk's office, which is located in the basement of the same building. When a warrant is recalled, one of the "many different people that have access to th[e] warrants," must find the hard copy of the warrant in the "two or three different places" where the Department houses warrants, return it to the Clerk's office, and manually update the Department's database. The record reflects no routine practice of checking the database for accuracy, and the failure to remove the entry for Herring's warrant was not discovered until Investigator Anderson sought to pursue Herring five months later. Is it not altogether obvious that the Department could take further precautions to ensure the integrity of its database? The Sheriff's Department "is in a position to remedy the situation and might well do so if the exclusionary rule is there to remove the incentive to do otherwise."

Is the potential deterrence here worth the costs it imposes? In light of the paramount importance of accurate recordkeeping in law enforcement, I would answer yes, and next explain why, as I see it, Herring's motion presents a particularly strong case for suppression.

Electronic databases form the nervous system of contemporary criminal justice operations. In recent years, their breadth and influence have dramatically expanded. Police today can access databases that include not only the updated National Crime Information Center (NCIC), but also terrorist watchlists, the Federal Government's employee eligibility system, and various commercial databases. Moreover, States are actively expanding information sharing between jurisdictions. As a result, law enforcement has an increasing supply of information within its easy electronic reach.

The risk of error stemming from these databases is not slim. Herring's *amici* warn that law enforcement databases are insufficiently monitored and often out of date. Government reports describe, for example, flaws in NCIC databases, terrorist watchlist databases, and databases associated with the Federal Government's employment eligibility verification system.

Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty. “The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base” is evocative of the use of general warrants that so outraged the authors of our Bill of Rights.

Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule. The rule “is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.” In keeping with the rule’s “core concerns,” suppression should have attended the unconstitutional search in this case.

For the reasons stated, I would reverse the judgment of the Eleventh Circuit.

Justice BREYER, with whom Justice SOUTER joins, dissenting.

I agree with Justice GINSBURG and join her dissent. I write separately to note one additional supporting factor that I believe important. In *Arizona v. Evans,* we held that recordkeeping errors made by a court clerk do not trigger the exclusionary rule, so long as the police reasonably relied upon the court clerk’s recordkeeping. The rationale for our decision was premised on a distinction between judicial errors and police errors.

Distinguishing between police recordkeeping errors and judicial ones not only is consistent with our precedent, but also is far easier for courts to administer than the Court’s case-by-case, multifactored inquiry into the degree of police culpability. I therefore would apply the exclusionary rule when police personnel are responsible for a recordkeeping error that results in a Fourth Amendment violation.

Notes, Comments, and Questions

Many criminal procedure issues are litigated concurrently in multiple forums. For example, when deciding *Miranda v. Arizona*, the Court also resolved additional cases presenting the same question about custodial interrogation. Because most cases never reach the Supreme Court, it is common for two cases to present the same issue, for the Court to take only one of them, and for the Court’s decision of that case to resolve the other case. For example, imagine that on the same day that police scanned the home of Danny Lee Kyllo, other officers conducting an unrelated investigation scanned a different home, and the resident of that home sought exclusion of items found during an ensuing search. If the Court decided *Kyllo v. United States* (Chapter 3) while the second case was pending, the defendant in the second case could rely upon the holding of *Kyllo*. In other words, the Court’s decision that thermal imaging of a home is a “search” would apply to all pending cases in which the issue was presented, and the judge in the second case would know that the second defendant’s home had been “searched” for Fourth Amendment purposes.

In *Davis v. United States*, the Court considered how the exclusionary rule should apply to situations like our hypothetical second thermal imaging case. Could the second defendant exclude evidence, just as Kyllo did? Or would the second case somehow be treated differently?

Supreme Court of the United States

Willie Gene Davis v. United States

Decided June 16, 2011 – 564 U.S. 229

Justice ALITO delivered the opinion of the Court.

The Fourth Amendment protects the right to be free from “unreasonable searches and seizures,” but it is silent about how this right is to be enforced. To supplement the bare text, this Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation. The question here is whether to apply this sanction when the police conduct a search in compliance with binding precedent that is later overruled. Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

I

The question presented arises in this case as a result of a shift in our Fourth Amendment jurisprudence on searches of automobiles incident to arrests of recent occupants.

A

[The Court recounted its jurisprudence regarding searches of automobiles incident to lawful arrests. The search in this case occurred before the Court overruled *New York v. Belton* in *Arizona v. Gant* (Chapter 10). The rule set forth in *Gant* states that "an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains 'evidence relevant to the crime of arrest.'"]

B

The search at issue in this case took place a full two years before this Court announced its new rule in *Gant*. On an April evening in 2007, police officers in Greenville, Alabama, conducted a routine traffic stop that eventually resulted in the arrests of driver Stella Owens (for driving while intoxicated) and passenger Willie Davis (for giving a false name to police). The police handcuffed both Owens and Davis, and they placed the arrestees in the back of separate patrol cars. The police then searched the passenger compartment of Owens's vehicle and found a revolver inside Davis's jacket pocket.

Davis was indicted in the Middle District of Alabama on one count of possession of a firearm by a convicted felon. In his motion to suppress the revolver, Davis acknowledged that the officers' search fully complied with "existing Eleventh Circuit precedent." Like most courts, the Eleventh Circuit had long read *Belton* to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrests of recent occupants. Davis recognized that the District Court was obligated to follow this precedent, but he raised a Fourth Amendment challenge to preserve "the issue for review" on appeal. The District Court denied the motion, and Davis was convicted on the firearms charge.

While Davis's appeal was pending, this Court decided *Gant*. The Eleventh Circuit, in the opinion below, applied *Gant*'s new rule and held that the vehicle search incident to Davis's arrest "violated [his] Fourth Amendment rights." As for whether this constitutional violation warranted suppression, the Eleventh Circuit viewed that as a separate issue that turned on "the potential of exclusion to deter wrongful police conduct." The court concluded that "penalizing the [arresting] officer" for following binding appellate precedent would do nothing to "dete[r] ... Fourth Amendment violations." It therefore declined to apply the exclusionary rule and affirmed Davis's conviction. We granted certiorari.

II

[T]he exclusionary rule [] is a "prudential" doctrine created by this Court to "compel respect for the constitutional guaranty." Exclusion is "not a personal constitutional right," nor is it designed to "redress the injury" occasioned by an unconstitutional search. The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations. Our cases have thus limited the rule's operation to situations in which this purpose is "thought most efficaciously served." Where suppression fails to yield "appreciable deterrence," exclusion is "clearly ... unwarranted."

Real deterrent value is a "necessary condition for exclusion," but it is not "a sufficient" one. The analysis must also account for the "substantial social costs" generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Admittedly, there was a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine. "Expansive dicta" in several decisions suggested that the rule was a self-executing mandate implicit in the Fourth Amendment itself. As late as [] 1971[,] the Court "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule." In time, however, we came to acknowledge the exclusionary rule for what it undoubtedly is—a "judicially created remedy" of this Court's own making. We abandoned the old, "reflexive" application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits. [W]e also recalibrated our cost-benefit analysis in exclusion cases to focus

the inquiry on the "flagrancy of the police misconduct" at issue.

[T]he deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way."

III

The question in this case is whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent. At the time of the search at issue here, we had not yet decided *Arizona v. Gant*, and the Eleventh Circuit had interpreted our decision in *New York v. Belton* to establish a bright-line rule authorizing the search of a vehicle's passenger compartment incident to a recent occupant's arrest. Although the search turned out to be unconstitutional under *Gant,* all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.

Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis's claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield "meaningfu[l]" deterrence, and culpable enough to be "worth the price paid by the justice system." The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence. Nor does this case involve any "recurring or systemic negligence" on the part of law enforcement. The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case.

Indeed, in 27 years of practice under [the] good-faith exception, we have "never applied" the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct. If the police in this case had reasonably relied on a warrant in conducting their search, or on an erroneous warrant record in a government database, the exclusionary rule would not apply. And if Congress or the Alabama Legislature had enacted a statute codifying the precise holding of the Eleventh Circuit's decision, we would swiftly conclude that "'[p]enalizing the officer for the legislature's error ... cannot logically contribute to the deterrence of Fourth Amendment violations.'" The same should be true of Davis's attempt here to "'[p]enaliz[e] the officer for the [appellate judges'] error.'"

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn "what is required of them" under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "'ac[t] as a reasonable officer would and should act'" under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from "'do[ing] his duty.'"

That is not the kind of deterrence the exclusionary rule seeks to foster. We have stated before, and we reaffirm today, that the harsh sanction of exclusion "should not be applied to deter objectively reasonable law enforcement activity." Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.

B

Davis [] contends that applying the good-faith exception to searches conducted in reliance on binding precedent will stunt the development of Fourth Amendment law. With no possibility of suppression, criminal defendants will have no incentive, Davis maintains, to request that courts overrule precedent.

This argument is difficult to reconcile with our modern understanding of the role of the exclusionary rule. We have never held that facilitating the overruling of precedent is a relevant consideration in an exclusionary-rule case. Rather, we have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement.

We have also repeatedly rejected efforts to expand the focus of the exclusionary rule beyond deterrence of culpable police conduct.

Davis argues that Fourth Amendment precedents of *this* Court will be effectively insulated from challenge under a good-faith exception for reliance on appellate precedent. But this argument is overblown. For one thing, it is important to keep in mind that this argument applies to an exceedingly small set of cases. Decisions overruling this Court's Fourth Amendment precedents are rare. Indeed, it has been more than 40 years since the Court last handed down a decision of the type to which Davis refers. And even in those cases, Davis points out that no fewer than eight separate doctrines may preclude a defendant who successfully challenges an existing precedent from getting any relief. Moreover, as a practical matter, defense counsel in many cases will test this Court's Fourth Amendment precedents in the same way that *Belton* was tested in *Gant*—by arguing that the precedent is distinguishable.

At most, Davis's argument might suggest that—to prevent Fourth Amendment law from becoming ossified—the petitioner in a case that results in the overruling of one of this Court's Fourth Amendment precedents should be given the benefit of the victory by permitting the suppression of evidence in that one case. Such a result would undoubtedly be a windfall to this one random litigant. But the exclusionary rule is "not a personal constitutional right." It is a "judicially created" sanction specifically designed as a "windfall" remedy to deter future Fourth Amendment violations. The good-faith exception is a judicially created exception to this judicially created rule. Therefore, in a future case, we could, if necessary, recognize a limited exception to the good-faith exception for a defendant who obtains a judgment over-ruling one of our Fourth Amendment precedents.

But this is not such a case. Davis did not secure a decision overturning a Supreme Court precedent; the police in his case reasonably relied on binding Circuit precedent. That sort of blameless police conduct, we hold, comes within the good-faith exception and is not properly subject to the exclusionary rule.

It is one thing for the criminal "to go free because the constable has blundered." It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs. We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. The judgment of the Court of Appeals for the Eleventh Circuit is *[a]ffirmed*.

Justice SOTOMAYOR, concurring in the judgment.

Under our precedents, the primary purpose of the exclusionary rule is "to deter future Fourth Amendment violations." Accordingly, we have held, application of the exclusionary rule is unwarranted when it "'does not result in appreciable deterrence.'" In the circumstances of this case, where "binding appellate precedent specifically *authorize[d]* a particular police practice," in accord with the holdings of nearly every other court in the country—application of the exclusionary rule cannot reasonably be expected to yield appreciable deterrence. I am thus compelled to conclude that the exclusionary rule does not apply in this case and to agree with the Court's disposition.

This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled. As we previously recognized in deciding whether to apply a Fourth Amendment holding retroactively, when police decide to conduct a search or seizure in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations.

As stated, whether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled. The Court's answer to the former question in this case thus does not resolve the latter one.

Justice BREYER, with whom Justice GINSBURG joins, dissenting.

In 2009, in *Arizona v. Gant*, this Court held that a police search of an automobile without a warrant violates the Fourth Amendment if the police have previously removed the automobile's occupants and placed them securely in a squad car. The present case involves these same circumstances, and it was pending on appeal when this Court decided *Gant*. Because *Gant* represents a "shift" in the Court's Fourth Amendment jurisprudence, we must decide [] how *Gant*'s new rule applies here.

While conceding that, like the search in *Gant,* this search violated the Fourth Amendment, it holds that, unlike Gant, this defendant is not entitled to a remedy. That is because the Court finds a new "good faith" exception which prevents application of the normal remedy for a Fourth Amendment violation, namely, suppression of the illegally seized evidence. Leaving Davis with a right but not a remedy, the Court "keep[s] the word of promise to our ear" but "break[s] it to our hope."

At this point I can no longer agree with the Court. A new "good faith" exception and this Court's retroactivity decisions are incompatible. For one thing, the Court's distinction between (1) retroactive application of a new rule and (2) availability of a remedy

is highly artificial and runs counter to precedent. To determine that a new rule is retroactive *is* to determine that, at least in the normal case, there is a remedy. As we have previously said, the "source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law"; hence, "[w]hat we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." The Court's "good faith" exception (unlike, say, inevitable discovery, a remedial doctrine that applies only upon occasion) creates "a categorical bar to obtaining redress" in *every* case pending when a precedent is overturned.

The Court says that its exception applies where there is "objectively reasonable" police "reliance on binding appellate precedent." But to apply the term "binding appellate precedent" often requires resolution of complex questions of degree. Davis conceded that he faced binding anti-*Gant* precedent in the Eleventh Circuit. But future litigants will be less forthcoming. Indeed, those litigants will now have to create distinctions to show that previous Circuit precedent was not "binding" lest they find relief foreclosed even if they win their constitutional claim.

At the same time, Fourth Amendment precedents frequently require courts to "slosh" their "way through the factbound morass of 'reasonableness.'" Suppose an officer's conduct is consistent with the language of a Fourth Amendment rule that a court of appeals announced in a case with clearly distinguishable facts? Suppose the case creating the relevant precedent did not directly announce any general rule but involved highly analogous facts? What about a rule that all other jurisdictions, but not the defendant's jurisdiction, had previously accepted? What rules can be developed for determining when, where, and how these different kinds of precedents do, or do not, count as relevant "binding precedent"?

Another such problem concerns fairness. Today's holding [] "violates basic norms of constitutional adjudication." It treats the defendant in a case announcing a new rule one way while treating similarly situated defendants whose cases are pending on appeal in a different way.

Of course, the Court may, as it suggests, avoid this unfairness by refusing to apply the exclusionary rule even to the defendant in the very case in which it announces a "new rule." But that approach would make matters worse. What would then happen in the lower courts? How would courts of appeals, for example, come to reconsider their prior decisions when other circuits' cases lead them to believe those decisions may be wrong? Why would a defendant seek to overturn any such decision? After all, if the (incorrect) circuit precedent is clear, then even if the defendant wins (on the constitutional question), he loses (on relief). To what extent then could this Court rely upon lower courts to work out Fourth Amendment differences among themselves—through circuit reconsideration of a precedent that other circuits have criticized?

Perhaps more important, the Court's rationale for creating its new "good faith" exception threatens to undermine well-settled Fourth Amendment law. The Court correctly says that pre-*Gant* Eleventh Circuit precedent had held that a *Gant*-type search was constitutional; hence the police conduct in this case, consistent with that precedent, was "innocent." But the Court then finds this fact sufficient to create a new "good faith" exception to the exclusionary rule. It reasons that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations." Those benefits are sufficient to justify exclusion where "police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." But those benefits do not justify exclusion where, as here, the police act with "simple, isolated negligence" or an "objectively reasonable good-faith belief that their conduct is lawful."

If the Court means what it says, what will happen to the exclusionary rule, a rule that the Court adopted nearly a century ago for federal courts and made applicable to state courts a half century ago through the Fourteenth Amendment? The Court has thought of that rule not as punishment for the individual officer or as reparation for the individual defendant but more generally as an effective way to secure enforcement of the Fourth Amendment's commands. This Court has deviated from the "suppression" norm in the name of "good faith" only a handful of times and in limited, atypical circumstances: where a magistrate has erroneously issued a warrant; where a database has erroneously informed police that they have a warrant; and where an unconstitutional statute purported to authorize the search.

The fact that such exceptions are few and far between is understandable. Defendants frequently move to suppress evidence on Fourth Amendment grounds. In many, perhaps most, of these instances the police, uncertain of how the Fourth Amendment applied to the particular factual circumstances they faced, will have acted in objective good faith. Yet, in a significant percentage of these instances, courts will find that the police were wrong. And, unless the police conduct falls into one of the exceptions previously noted, courts have required the suppression of the evidence seized.

But an officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous "binding precedent." Nor is an officer more culpable where circuit precedent is simply suggestive rather than "binding," where it only describes how to

treat roughly analogous instances, or where it just does not exist. Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception will swallow the exclusionary rule. Indeed, our broad dicta in *Herring*—dicta the Court repeats and expands upon today—may already be leading lower courts in this direction. Today's decision will doubtless accelerate this trend.

Any such change (which may already be underway) would affect not "an exceedingly small set of cases," but a very large number of cases, potentially many thousands each year. And since the exclusionary rule is often the only sanction available for a Fourth Amendment violation, the Fourth Amendment would no longer protect ordinary Americans from "unreasonable searches and seizures." It would become a watered-down Fourth Amendment, offering its protection against only those searches and seizures that are *egregiously* unreasonable.

In sum, I fear that the Court's opinion will undermine the exclusionary rule.

For these reasons, with respect, I dissent.

* * *

For our next chapter, we will study who has "standing" to invoke the exclusionary rule, as well as exceptions the Court has established to limit the rule's application.

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4.3: Chapter 33 - Exclusionary Rule- Standing and Exceptions

THE EXCLUSIONARY RULE

Chapter 33

Exclusionary Rule: Standing and Exceptions

The Court has used broad language to describe the exclusionary rule. In *Weeks v. United States*, after describing police misconduct, the Court wrote, “If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.” In *Mapp v. Ohio*, the Court wrote, “We hold that all evidence obtained by searches and seizures in violation of the Constitution is … inadmissible in a state court.”

It turns out, however, that the Court has not applied the exclusionary rule to “all evidence obtained … in violation of the Constitution.” Instead, the Court has limited the availability of the remedy in multiple ways. In this chapter, we will consider who has “standing” to invoke the rule, as well as situations in which the Court has established exceptions to the rule’s applicability.

Who Can Invoke the Exclusionary Rule?

In a series of cases, the Court has considered who has the ability to use the exclusionary rule. It has been argued that any defendant should be able to exclude evidence obtained in violation of some person’s constitutional right. Rather than allow such broad access to the remedy of exclusion, the Court has required greater connection between the wrongful state action and the person invoking the rule. Although the ability to invoke the rule is often called “standing,” the Justices have occasionally objected to that term of art. Regardless of what word is used to describe the legal status at issue, the question is who can exclude evidence under the rule.

Supreme Court of the United States

Rakas v. Illinois

Decided Dec. 5, 1978 – 439 U.S. 128

Mr. Justice REHNQUIST delivered the opinion of the Court.

Petitioners were convicted of armed robbery in the Circuit Court of Kankakee County, Ill., and their convictions were affirmed on appeal. At their trial, the prosecution offered into evidence a sawed-off rifle and rifle shells that had been seized by police during a search of an automobile in which petitioners had been passengers. Neither petitioner is the owner of the automobile and neither has ever asserted that he owned the rifle or shells seized. The Illinois Appellate Court held that petitioners lacked standing to object to the allegedly unlawful search and seizure and denied their motion to suppress the evidence. We granted certiorari in light of the obvious importance of the issues raised to the administration of criminal justice and now affirm.

I

Because we are not here concerned with the issue of probable cause, a brief description of the events leading to the search of the automobile will suffice. A police officer on a routine patrol received a radio call notifying him of a robbery of a clothing store in Bourbonnais, Ill., and describing the getaway car. Shortly thereafter, the officer spotted an automobile which he thought might

be the getaway car. After following the car for some time and after the arrival of assistance, he and several other officers stopped the vehicle. The occupants of the automobile, petitioners and two female companions, were ordered out of the car and, after the occupants had left the car, two officers searched the interior of the vehicle. They discovered a box of rifle shells in the glove compartment, which had been locked, and a sawed-off rifle under the front passenger seat. After discovering the rifle and the shells, the officers took petitioners to the station and placed them under arrest.

Before trial petitioners moved to suppress the rifle and shells seized from the car on the ground that the search violated the Fourth and Fourteenth Amendments. They conceded that they did not own the automobile and were simply passengers; the owner of the car had been the driver of the vehicle at the time of the search. Nor did they assert that they owned the rifle or the shells seized. The prosecutor challenged petitioners' standing to object to the lawfulness of the search of the car because neither the car, the shells nor the rifle belonged to them. The trial court agreed that petitioners lacked standing and denied the motion to suppress the evidence. On appeal after petitioners' conviction, the Appellate Court of Illinois, Third Judicial District, affirmed the trial court's denial of petitioners' motion to suppress.

II

Petitioners first urge us to relax or broaden the rule of standing so that any criminal defendant at whom a search was "directed" would have standing to contest the legality of that search and object to the admission at trial of evidence obtained as a result of the search. Alternatively, petitioners argue that they have standing to object to the search because they were "legitimately on [the] premises" at the time of the search.

The concept of standing [in Fourth Amendment cases] focuses on whether the person seeking to challenge the legality of a search as a basis for suppressing evidence was himself the "victim" of the search or seizure. Adoption of the so-called "target" theory advanced by petitioners would in effect permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial. [W]e are not at all sure that the determination of a motion to suppress is materially aided by labeling the inquiry as one of standing, rather than simply recognizing it as one involving the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge.

A

We decline to extend the rule of standing in Fourth Amendment cases in the manner suggested by petitioners. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.

When we are urged to grant standing to a criminal defendant to assert a violation, not of his own constitutional rights but of someone else's, we cannot but give weight to practical difficulties. Conferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials.

Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure, misgivings as to the benefit of enlarging the chapter of persons who may invoke that rule are properly considered when deciding whether to expand standing.

B

Had we accepted petitioners' request to allow persons other than those whose own Fourth Amendment rights were violated by a challenged search and seizure to suppress evidence obtained in the course of such police activity, it would be appropriate to retain [] use of standing in Fourth Amendment analysis. Under petitioners' target theory, a court could determine that a defendant had standing to invoke the exclusionary rule without having to inquire into the substantive question of whether the challenged search or seizure violated the Fourth Amendment rights of that particular defendant. However, having rejected petitioners' target theory, [] the question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of

standing, distinct from the merits of a defendant's Fourth Amendment claim. We can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the type of standing requirement [] reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of "standing," will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.

It should be emphasized that nothing we say here casts the least doubt on cases which recognize that, as a general proposition, the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged "injury in fact," and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties. But this Court's long history of insistence that Fourth Amendment rights are personal in nature has already answered many of these traditional standing inquiries, and we think that definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.

Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

D

[P]etitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And [] the fact that they were "legitimately on [the] premises" in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched. [H]ere petitioners' claim is one which would fail even in an analogous situation in a dwelling place, since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy.

III

The Illinois courts were therefore correct in concluding that it was unnecessary to decide whether the search of the car might have violated the rights secured to someone else by the Fourth and Fourteenth Amendments to the United States Constitution. Since it did not violate any rights of these petitioners, their judgment of conviction is [a]ffirmed.

Notes, Comments, and Questions

In *Byrd v. United States*, 138 S. Ct. 1518 (2018), the Court addressed whether rental car drivers who are not on a rental agreement (for example, someone given the keys by the person who is authorized to drive) have standing to object to a search of the car. The Court distinguished *Rakas* by emphasizing the reasonable expectation of privacy test. In *Byrd*, the unauthorized driver was the only person in the car and had a reasonable expectation of privacy in the contents of the car sufficient to have standing.

In *Minnesota v. Olson*, 495 U.S. 91 (1990), the Court considered the "warrantless, nonconsensual entry into a house where respondent Robert Olson was an overnight guest." The question was whether the entry, along with Olson's subsequent arrest, violated Olson's Fourth Amendment rights. The Court decided yes and allowed Olson to exclude evidence found during the illegal search and seizure. Rejecting the state's argument that Olson had no reasonable expectation of privacy because the searched location was not his "home," the Court concluded "that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." The Court noted that one's expectation of privacy while staying as an overnight guest must equal, if not exceed, that enjoyed by a person using a telephone booth. *See Katz v. United States* (Chapter 2).

Several years later, the Court applied the rule of *Olson* to a very different sort of guest.

Supreme Court of the United States

Minnesota v. Wayne Thomas Carter

Decided Dec. 1, 1998 – 525 U.S. 83

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondents and the lessee of an apartment were sitting in one of its rooms, bagging cocaine. While so engaged they were observed by a police officer, who looked through a drawn window blind. The Supreme Court of Minnesota held that the officer's viewing was a search that violated respondents' Fourth Amendment rights. We hold that no such violation occurred.

James Thielen, a police officer in the Twin Cities' suburb of Eagan, Minnesota, went to an apartment building to investigate a tip from a confidential informant. The informant said that he had walked by the window of a ground-floor apartment and had seen people putting a white powder into bags. The officer looked in the same window through a gap in the closed blind and observed the bagging operation for several minutes. He then notified headquarters, which began preparing affidavits for a search warrant while he returned to the apartment building. When two men left the building in a previously identified Cadillac, the police stopped the car. Inside were respondents Carter and Johns. As the police opened the door of the car to let Johns out, they observed a black, zippered pouch and a handgun, later determined to be loaded, on the vehicle's floor. Carter and Johns were arrested, and a later police search of the vehicle the next day discovered pagers, a scale, and 47 grams of cocaine in plastic sandwich bags.

After seizing the car, the police returned to Apartment 103 and arrested the occupant, Kimberly Thompson, who is not a party to this appeal. A search of the apartment pursuant to a warrant revealed cocaine residue on the kitchen table and plastic baggies similar to those found in the Cadillac. Thielen identified Carter, Johns, and Thompson as the three people he had observed placing the powder into baggies. The police later learned that while Thompson was the lessee of the apartment, Carter and Johns lived in Chicago and had come to the apartment for the sole purpose of packaging the cocaine. Carter and Johns had never been to the apartment before and were only in the apartment for approximately 2 ½ hours. In return for the use of the apartment, Carter and Johns had given Thompson one-eighth of an ounce of the cocaine.

Carter and Johns were charged with conspiracy to commit a controlled substance crime in the first degree and aiding and abetting in a controlled substance crime in the first degree. They moved to suppress all evidence obtained from the apartment and the Cadillac, as well as to suppress several postarrest incriminating statements they had made. They argued that Thielen's initial observation of their drug packaging activities was an unreasonable search in violation of the Fourth Amendment and that all evidence obtained as a result of this unreasonable search was inadmissible as fruit of the poisonous tree. After a trial, Carter and Johns were each convicted of both offenses. The Minnesota Court of Appeals held that respondent Carter did not have "standing" to object to Thielen's actions.

A divided Minnesota Supreme Court reversed, holding that respondents had "standing" to claim the protection of the Fourth Amendment because they had "'a legitimate expectation of privacy in the invaded place.'" We granted certiorari and now reverse.

The Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of "standing" doctrine, an analysis that this Court expressly rejected 20 years ago in *Rakas*.

The text of the [Fourth] Amendment suggests that its protections extend only to people in "their" houses. But we have held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else.

In *Jones v. United States,* 362 U.S. 257 (1960), the defendant seeking to exclude evidence resulting from a search of an apartment had been given the use of the apartment by a friend. He had clothing in the apartment, had slept there "'maybe a night,'" and at the time was the sole occupant of the apartment. But while the holding of *Jones*—that a search of the apartment violated the defendant's Fourth Amendment rights—is still valid, its statement that "anyone legitimately on the premises where a search occurs may challenge its legality" was expressly repudiated in *Rakas*. Thus, an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not.

Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with Thompson, or that there was any other purpose to their visit. While the apartment was a dwelling place for Thompson, it was for these respondents simply a place to do business.

[T]he purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not

violate their Fourth Amendment rights.

Because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer's observation constituted a "search." The judgments of the Supreme Court of Minnesota are accordingly reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

Notes, Comments, and Questions

Would a guest who was present for dinner or an afternoon barbecue have standing? Why or why not? That individual would have more connection to the home than in *Carter* but less than *Minnesota v. Olson*.

In *Brendlin v. California*, 551 U.S. 249 (2007), the Court applied the holdings of *Olson* and *Carter* to the case of a passenger riding in a car stopped by police. Prior precedent made clear that a driver whose car is subjected to a traffic stop is "seized within the meaning of the Fourth Amendment" and could challenge the admissibility of evidence found during an unlawful stop. The question was whether a passenger in the same car could also exclude evidence. Quoting language from *United States v. Mendenhall* (Chapter 19) stating that "a seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,'" the *Brendlin* Court found that a vehicle "stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver," and it rejected "any notion that a [reasonable] passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission."

The Court held that passengers could invoke the exclusionary rule with respect to evidence found during unlawful vehicle stops, noting that the opposite result would encourage bad police behavior. "The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of 'roving patrols' that would still violate the driver's Fourth Amendment right."

Because Brendlin argued that his rights were violated by the unlawful *stop* of the car—as opposed to by the *search* of the car—his claim was not barred by the rule of *Rakas v. Illinois*.

Exceptions to the Exclusionary Rule

Even if a criminal defendant has standing to invoke the exclusionary rule, not all evidence found as a result of police violating the defendant's constitutional rights will be excluded. The following cases build upon the limitations to the exclusionary rule described in the previous chapter. In *Murray v. United States*, the Court applies what is known as the "independent source doctrine."

Supreme Court of the United States

Michael F. Murray v. United States

Decided June 27, 1988 – 487 U.S. 533

Justice SCALIA delivered the opinion of the Court.

In *Segura v. United States*, 468 U.S. 796 (1984), we held that police officers' illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly unconnected with the initial entry. In [this] case[] we are faced with the question whether, again assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed.

I

[The case] arises out of the conviction of petitioner Michael F. Murray, petitioner James D. Carter, and others for conspiracy to possess and distribute illegal drugs. Insofar as relevant for our purposes, the facts are as follows: Based on information received from informants, federal law enforcement agents had been surveilling petitioner Murray and several of his co-conspirators. At about 1:45 p.m. on April 6, 1983, they observed Murray drive a truck and Carter drive a green camper, into a warehouse in South Boston. When the petitioners drove the vehicles out about 20 minutes later, the surveilling agents saw within the warehouse two individuals and a tractor-trailer rig bearing a long, dark container. Murray and Carter later turned over the truck and camper to other drivers, who were in turn followed and ultimately arrested, and the vehicles lawfully seized. Both vehicles were found to

contain marijuana.

After receiving this information, several of the agents converged on the South Boston warehouse and forced entry. They found the warehouse unoccupied, but observed in plain view numerous burlap-wrapped bales that were later found to contain marijuana. They left without disturbing the bales, kept the warehouse under surveillance, and did not reenter it until they had a search warrant. In applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry. When the warrant was issued—at 10:40 p.m., approximately eight hours after the initial entry—the agents immediately reentered the warehouse and seized 270 bales of marijuana and notebooks listing customers for whom the bales were destined.

Before trial, petitioners moved to suppress the evidence found in the warehouse. The District Court denied the motion, rejecting petitioners' arguments that the warrant was invalid because the agents did not inform the Magistrate about their prior warrantless entry, and that the warrant was tainted by that entry. The First Circuit affirmed, assuming for purposes of its decision that the first entry into the warehouse was unlawful. [This Court granted certiorari.]

II

The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search and of testimony concerning knowledge acquired during an unlawful search. Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint."

Almost simultaneously with our development of the exclusionary rule, in the first quarter of this century, we also announced what has come to be known as the "independent source" doctrine. That doctrine, which has been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations, has recently been described as follows:

"[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse,* position that they would have been in if no police error or misconduct had occurred. ... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation."

The dispute here is over the scope of this doctrine. Petitioners contend that it applies only to evidence obtained for the first time during an independent lawful search. The Government argues that it applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. We think the Government's view has better support in both precedent and policy.

Our cases have used the concept of "independent source" in a more general and a more specific sense. The more general sense identifies *all* evidence acquired in a fashion untainted by the illegal evidence-gathering activity. Thus, where an unlawful entry has given investigators knowledge of facts *x* and *y,* but fact *z* has been learned by other means, fact *z* can be said to be admissible because derived from an "independent source."

The original use of the term, however, and its more important use for purposes of these cases, was more specific. It was originally applied in the exclusionary rule context, by Justice Holmes, with reference to that particular category of evidence acquired by an untainted search *which is identical to the evidence unlawfully acquired*—that is, in the example just given, to knowledge of facts *x* and *y* derived from an independent source:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others."

Petitioners' asserted policy basis for excluding evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source, is that a contrary rule will remove all deterrence to, and indeed positively encourage, unlawful police searches. As petitioners see the incentives, law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the evidence despite the unlawful entry. We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and

unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate.

It is possible to read petitioners' briefs as asserting the more narrow position that the "independent source" doctrine does apply to independent acquisition of evidence previously derived *indirectly* from the unlawful search, but does not apply to what they call "primary evidence," that is, evidence acquired during the course of the search itself. In addition to finding no support in our precedent, this strange distinction would produce results bearing no relation to the policies of the exclusionary rule. It would mean, for example, that the government's knowledge of the existence and condition of a dead body, knowledge lawfully acquired through independent sources, would have to be excluded if government agents had previously observed the body during an unlawful search of the defendant's apartment; but not if they had observed a notation that the body was buried in a certain location, producing consequential discovery of the corpse.

III

To apply what we have said to the present cases: Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one.

The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

The District Court found that the agents did not reveal their warrantless entry to the Magistrate, and that they did not include in their application for a warrant any recitation of their observations in the warehouse. It did not, however, explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse. The Government concedes this in its brief. To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Accordingly, we vacate the judgment and remand these cases to the Court of Appeals with instructions that it remand to the District Court for determination whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described.

Justice MARSHALL, with whom Justice STEVENS and Justice O'CONNOR join, dissenting.

[The dissent found it implausible "that the subsequent search [of the warehouse] was, in fact, independent of the illegal search" and argued that the majority "makes the application of the independent source exception turn entirely on an evaluation of the officers' intent." The dissent continued, "It normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant, regardless of the results of the illegal search." "[W]hen the very law enforcement officers who participate in an illegal search immediately thereafter obtain a warrant to search the same premises, I believe the evidence discovered during the initial illegal entry must be suppressed."]

Notes, Comments, and Questions

In *Nix v. Williams*, 467 U.S. 431 (1984), the Court considered once again the conviction of Robert Williams for the murder of 10-year-old Pamela Powers, who disappeared from a YMCA building in Des Moines, Iowa on Christmas Eve in 1968. The case returned to the Court because after the decision in *Brewer v. Williams* (Chapter 29), Iowa prosecutors retried Williams. In the second trial, prosecutors did not offer evidence of the statements Williams made during his car ride, the ones elicited by the "Christian Burial Speech." They did, however, offer physical evidence found as a result of Williams's statements, including the body of Powers.

Building on the independent source exception described in *Murray*, the *Nix* Court created what has become known as the "inevitable discovery" exception to the exclusionary rule. When considering whether to adopt the new exception—which had already been approved by several lower courts—the Supreme Court first reviewed the justification for the exclusionary rule:

"The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired."

The Court then revisited the grounds supporting the independent source doctrine and applied them to the slightly different situation presented in *Nix*.

"The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule."

After Powers disappeared from the YMCA, police found some of her clothing near a rest stop in Grinell, Iowa. Next, police "initiated a large-scale search. Two hundred volunteers divided into teams began the search 21 miles east of Grinnell, covering an area several miles to the north and south of Interstate 80. They moved westward from Poweshiek County, in which Grinnell was located, into Jasper County. Searchers were instructed to check all roads, abandoned farm buildings, ditches, culverts, and any other place in which the body of a small child could be hidden." Before the volunteers found the body, Williams led police to the hiding spot.

The Court applied the new inevitable discovery rule as follows:

"On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found."

In dissent, Justices Brennan and Marshall did not object to the new doctrine in principle. They argued that for the inevitable discovery exception to apply, the prosecution should be required to prove by "clear and convincing evidence" that the requirements had been met. The majority held that "preponderance of the evidence" was sufficient.

Our next case, *Brown v. Illinois*, applies what is known as the "attenuation doctrine." The concept is somewhat like that of proximate cause in tort law. Students who have forgotten that doctrine may wish to reread *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

In *Brown*, the Court relied heavily on *Wong Sun v. United States*, 371 U.S. 471 (1963), which explored the attenuation doctrine in detail. Students who find *Brown* confusing may wish to read *Wong Sun*, particularly the Court's recitation of the facts. *See* 371 U.S. at 473-77.

To summarize briefly, *Wong Sun* involved police interrogation of four individuals: Hom Way; James Wah Toy ("Toy") (who may or may not have been "Blackie Toy," a person sought by police); Johny Yee ("Yee"); and Wong Sun (also known as "Sea Dog"). Hom Way was the initial suspect. He was caught with drugs and implicated "Blackie Toy." Hom Way was not a party to the *Wong Sun* case and did not testify. Toy was the victim of an illegal search and illegal arrest. He made a statement to police upon arrest that implicated Johny Yee. After his arraignment and release, Toy made a subsequent statement at the police station. Police found heroin at Yee's home, and he implicated Wong Sun. Wong Sun was the victim of an illegal arrest and made a subsequent statement at the police station, after his arraignment and release.

The Court addressed the potential exclusion of (1) Toy's statement at home; (2) the drugs found at Yee's house; (3) Toy's statement at the police station; and (4) Wong Sun's statement at the police station. With respect to Toy's trial, it excluded (or avoided

addressing the admissibility of) all the evidence. With respect to Wong Sun's trial, however, the drugs found at Yee's house were admissible; Wong Sun had no standing to object to the search of Yee's home or the seizure of Yee's drugs. The Court then considered Wong Sun's statement at the police station. The Court held that the statement was admissible because of attenuation.

Supreme Court of the United States

Richard Brown v. Illinois

Decided June 26, 1975 – 422 U.S. 590

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case lies at the crossroads of the Fourth and the Fifth Amendments. Petitioner was arrested without probable cause and without a warrant. He was given, in full, the warnings prescribed by *Miranda v. Arizona*. Thereafter, while in custody, he made two inculpatory statements. The issue is whether evidence of those statements was properly admitted, or should have been excluded, in petitioner's subsequent trial for murder in state court. Expressed another way, the issue is whether the statements were to be excluded as the fruit of the illegal arrest, or were admissible because the giving of the *Miranda* warnings sufficiently attenuated the taint of the arrest.

I

As petitioner Richard Brown was climbing the last of the stairs leading to the rear entrance of his Chicago apartment in the early evening of May 13, 1968, he happened to glance at the window near the door. He saw, pointed at him through the window, a revolver held by a stranger who was inside the apartment. The man said: "Don't move, you are under arrest." Another man, also with a gun, came up behind Brown and repeated the statement that he was under arrest. It was about 7:45 p.m. The two men turned out to be Detectives William Nolan and William Lenz of the Chicago police force. It is not clear from the record exactly when they advised Brown of their identity, but it is not disputed that they broke into his apartment, searched it, and then arrested Brown, all without probable cause and without any warrant, when he arrived. They later testified that they made the arrest for the purpose of questioning Brown as part of their investigation of the murder of a man named Roger Corpus.

Corpus was murdered one week earlier, on May 6, with a .38-caliber revolver in his Chicago West Side second-floor apartment. Shortly thereafter, Detective Lenz obtained petitioners' name, among others, from Corpus' brother. Petitioner and the others were identified as acquaintances of the victim, not as suspects.

[The Court described how police initially entered Brown's home and arrested him.]

As both officers held him at gunpoint, the three entered the apartment. Brown was ordered to stand against the wall and was searched. No weapon was found. He was asked his name. When he denied being Richard Brown, Detective Lenz showed him the photograph, informed him that he was under arrest for the murder of Roger Corpus, handcuffed him, and escorted him to the squad car.

The two detectives took petitioner to the Maxwell Street police station. During the 20-minute drive Nolan again asked Brown, who then was sitting with him in the back seat of the car, whether his name was Richard Brown and whether he owned a 1966 Oldsmobile. Brown alternately evaded these questions or answered them falsely. Upon arrival at the station house Brown was placed in the [] interrogation room. The room was bare, except for a table and four chairs. He was left alone, apparently without handcuffs, for some minutes while the officers obtained the file on the Corpus homicide. They returned with the file, sat down at the table, one across from Brown and the other to his left, and spread the file on the table in front of him.

The officers warned Brown of his rights under *Miranda*. They then informed him that they knew of an incident that had occurred in a poolroom on May 5, when Brown, angry at having been cheated at dice, fired a shot from a revolver into the ceiling. Brown answered: "Oh, you know about that." Lenz informed him that a bullet had been obtained from the ceiling of the poolroom and had been taken to the crime laboratory to be compared with bullets taken from Corpus' body. Brown responded: "Oh, you know that, too." At this point—it was about 8:45 p.m.—Lenz asked Brown whether he wanted to talk about the Corpus homicide. Petitioner answered that he did. For the next 20 to 25 minutes Brown answered questions put to him by Nolan, as Lenz typed.

This questioning produced a two-page statement in which Brown acknowledged that he and a man named Jimmy Claggett visited Corpus on the evening of May 5; that the three for some time sat drinking and smoking marihuana; that Claggett ordered him at gunpoint to bind Corpus' hands and feet with cord from the headphone of a stereo set; and that Claggett, using a .38-caliber

revolver sold to him by Brown, shot Corpus three times through a pillow. The statement was signed by Brown.

About 9:30 p.m. the two detectives and Brown left the station house to look for Claggett in an area of Chicago Brown knew him to frequent. They made a tour of that area but did not locate their quarry. They then went to police headquarters where they endeavored, without success, to obtain a photograph of Claggett. They resumed their search—it was now about 11 p.m.—and they finally observed Claggett crossing at an intersection. Lenz and Nolan arrested him. All four, the two detectives and the two arrested men, returned to the Maxwell Street station about 12:15 a.m.

Brown was again placed in the interrogation room. He was given coffee and was left alone, for the most part, until 2 a.m. when Assistant State's Attorney Crilly arrived.

Crilly, too, informed Brown of his *Miranda* rights. After a half hour's conversation, a court reporter appeared. Once again the *Miranda* warnings were given: "I read him the card." Crilly told him that he "was sure he would be charged with murder." Brown gave a second statement, providing a factual account of the murder substantially in accord with his first statement, but containing factual inaccuracies with respect to his personal background. When the statement was completed, at about 3 a.m., Brown refused to sign it. An hour later he made a phone call to his mother. At 9:30 that morning, about 14 hours after his arrest, he was taken before a magistrate.

On June 20 Brown and Claggett were jointly indicted by a Cook County grand jury for Corpus' murder. Prior to trial, petitioner moved to suppress the two statements he had made. He alleged that his arrest and detention had been illegal and that the statements were taken from him in violation of his constitutional rights. After a hearing, the motion was denied.

The case proceeded to trial. The State introduced evidence of both statements. Detective Nolan testified as to the contents of the first but the writing itself was not placed in evidence. The second statement was introduced and was read to the jury in full.

The jury found petitioner guilty of murder. He was sentenced to imprisonment for not less than 15 years nor more than 30 years.

On appeal, the Supreme Court of Illinois affirmed the judgment of conviction. Because of our concern about the implication of our holding in *Wong Sun v. United States*, 371 U.S. 471 (1963), to the facts of Brown's case, we granted certiorari.

II

In *Wong Sun*, the Court pronounced the principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded. In that case, federal agents elicited an oral statement from defendant Toy after forcing entry at 6 a.m. into his laundry, at the back of which he had his living quarters. The agents had followed Toy down the hall to the bedroom and there had placed him under arrest. The Court of Appeals found that there was no probable cause for the arrest. This Court concluded that that finding was "amply justified by the facts clearly shown on this record." Toy's statement, which bore upon his participation in the sale of narcotics, led the agents to question another person, Johnny Yee, who actually possessed narcotics. Yee stated that heroin had been brought to him earlier by Toy and another Chinese known to him only as "Sea Dog." Under questioning, Toy said that "Sea Dog" was Wong Sun. Toy led agents to a multifamily dwelling where, he said, Wong Sun lived. Gaining admittance to the building through a bell and buzzer, the agents climbed the stairs and entered the apartment. One went into the back room and brought Wong Sun out in handcuffs. After arraignment, Wong Sun was released on his own recognizance. Several days later, he returned voluntarily to give an unsigned confession.

This Court ruled that Toy's declarations and the contraband taken from Yee were the fruits of the agents' illegal action and should not have been admitted as evidence against Toy. It held that the statement did not result from "an intervening independent act of a free will," and that it was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion." With respect to Wong Sun's confession, however, the Court held that in the light of his lawful arraignment and release on his own recognizance, and of his return voluntarily several days later to make the statement, the connection between his unlawful arrest and the statement "had 'become so attenuated as to dissipate the taint.'" The Court said:

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

The exclusionary rule thus was applied in *Wong Sun* primarily to protect Fourth Amendment rights. Protection of the Fifth Amendment right against self-incrimination was not the Court's paramount concern there. To the extent that the question whether

Toy's statement was voluntary was considered, it was only to judge whether it "was sufficiently an act of free will to purge the primary taint of the unlawful invasion."

The Court in *Wong Sun*, as is customary, emphasized that application of the exclusionary rule on Toy's behalf protected Fourth Amendment guarantees in two respects: "in terms of deterring lawless conduct by federal officers," and by "closing the doors of the federal courts to any use of evidence unconstitutionally obtained." These considerations of deterrence and of judicial integrity, by now, have become rather commonplace in the Court's cases. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." But "[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons."

III

The Illinois courts refrained from resolving the question, as apt here as it was in *Wong Sun*, whether Brown's statements were obtained by exploitation of the illegality of his arrest. They assumed that the *Miranda* warnings, by themselves, assured that the statements (verbal acts, as contrasted with physical evidence) were of sufficient free will as to purge the primary taint of the unlawful arrest. *Wong Sun*, of course, preceded *Miranda*.

This Court has described the *Miranda* warnings as a "prophylactic rule" and as a "procedural safeguard" employed to protect Fifth Amendment rights against "the compulsion inherent in custodial surroundings." The function of the warnings relates to the Fifth Amendment's guarantee against coerced self-incrimination, and the exclusion of a statement made in the absence of the warnings, it is said, serves to deter the taking of an incriminating statement without first informing the individual of his Fifth Amendment rights.

Although, almost 90 years ago, the Court observed that the Fifth Amendment is in "intimate relation" with the Fourth, the *Miranda* warnings thus far have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights. Frequently, as here, rights under the two Amendments may appear to coalesce since "the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment." The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without *Miranda* warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. *Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.

Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain between the illegal arrest and the statements made subsequent thereto to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." *Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.

While we therefore reject the *per se* rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative per se or "but for" rule. The petitioner himself professes not to demand so much. The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession

is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution.

IV

Although the Illinois courts failed to undertake the inquiry mandated by *Wong Sun* to evaluate the circumstances of this case in the light of the policy served by the exclusionary rule, the trial resulted in a record of amply sufficient detail and depth from which the determination may be made. We therefore decline the suggestion of the United States to remand the case for further factual findings. We conclude that the State failed to sustain the burden of showing that the evidence in question was admissible under *Wong Sun*.

Brown's first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever. In its essentials, his situation is remarkably like that of James Wah Toy in *Wong Sun*. We could hold Brown's first statement admissible only if we overrule *Wong Sun*. We decline to do so. And the second statement was clearly the result and the fruit of the first.

The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was affected gives the appearance of having been calculated to cause surprise, fright, and confusion.

We emphasize that our holding is a limited one. We decide only that the Illinois courts were in error in assuming that the *Miranda* warnings, by themselves, under *Wong Sun* always purge the taint of an illegal arrest.

The judgment of the Supreme Court of Illinois is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

* * *

In our next case, *Utah v. Strieff*, Justices in both the majority and in dissent both argued that *Brown v. Illinois* supported their preferred result.

Supreme Court of the United States

Utah v. Edward Joseph Strieff

Decided June 20, 2016 – 136 S. Ct. 2056

Justice THOMAS delivered the opinion of the Court.

To enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures," this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

I

In December 2006, someone called the South Salt Lake City police's drug-tip line to report "narcotics activity" at a particular residence. Narcotics detective Douglas Fackrell investigated the tip. Over the course of about a week, Officer Fackrell conducted

intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.

One of those visitors was respondent Edward Strieff. Officer Fackrell observed Strieff exit the house and walk toward a nearby convenience store. In the store's parking lot, Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence.

As part of the stop, Officer Fackrell requested Strieff's identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.

The State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. [T]he prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the evidence. The court found that the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible. First, the court considered the presence of a valid arrest warrant to be an "'extraordinary intervening circumstance.'" Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court's denial of the suppression motion. The Utah Court of Appeals affirmed. The Utah Supreme Court reversed. We granted certiorari to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant.

II

A

We have [] recognized several exceptions to the [exclusionary] rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."

B

Turning to the application of the attenuation doctrine to this case, we first address a threshold question: whether this doctrine applies at all [] where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant.

It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person. The three factors articulated in *Brown v. Illinois* guide our analysis. First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider "the presence of intervening circumstances." Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct." In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant's existence alone would make the initial stop constitutional

even if Officer Fackrell was unaware of its existence.

The first factor, temporal proximity between the initially unlawful stop and the search, favors suppressing the evidence. Our precedents have declined to find that this factor favors attenuation unless "substantial time" elapses between an unlawful act and when the evidence is obtained. Here, however, Officer Fackrell discovered drug contraband on Strieff's person only minutes after the illegal stop. [S]uch a short time interval counsels in favor of suppression.

In contrast, the second factor, the presence of intervening circumstances, strongly favors the State. [T]he warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety.

Finally, the third factor, "the purpose and flagrancy of the official misconduct" also strongly favors the State. The exclusionary rule exists to deter police misconduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell's stated purpose was to "find out what was going on [in] the house." Nothing prevented him from approaching Strieff simply to ask. But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.

While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a "negligibly burdensome precautio[n]" for officer safety. And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.

Justice SOTOMAYOR, with whom Justice GINSBURG joins as to Parts I, II, and III, dissenting.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.

II

It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer.

After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. When "lawless police conduct" uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence. For example, if an officer breaks into a home and finds a forged check lying around, that check may not be used to prosecute the homeowner for bank fraud. We would describe the check as "'fruit of the poisonous tree.'" Fruit that must be cast aside includes not only evidence directly found by an illegal search but also evidence "come at by exploitation of that illegality."

This "exclusionary rule" removes an incentive for officers to search us without proper justification. It also keeps courts from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." When courts admit only lawfully obtained evidence, they encourage "those who formulate law enforcement polices, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." But when courts admit illegally obtained evidence as well, they reward "manifest neglect if not an open defiance of the prohibitions of the Constitution."

[] *Wong Sun* explains why Strieff's drugs must be excluded. We reasoned that a Fourth Amendment violation may not color every investigation that follows but it certainly stains the actions of officers who exploit the infraction. We distinguished evidence obtained by innocuous means from evidence obtained by exploiting misconduct after considering a variety of factors: whether a long time passed, whether there were "intervening circumstances," and whether the purpose or flagrancy of the misconduct was "calculated" to procure the evidence. *Brown*.

These factors confirm that the officer in this case discovered Strieff's drugs by exploiting his own illegal conduct. The officer did not ask Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him. The officer illegally stopped Strieff and immediately ran a warrant check. The officer's discovery of a warrant was not some intervening surprise that he could not have anticipated. Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a "backlog of outstanding warrants" so large that it faced the "potential for civil liability." The officer's violation was also calculated to procure evidence. His sole reason for stopping Strieff, he acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited.

The warrant check, in other words, was not an "intervening circumstance" separating the stop from the search for drugs. It was part and parcel of the officer's illegal "expedition for evidence in the hope that something might turn up." Under our precedents, because the officer found Strieff's drugs by exploiting his own constitutional violation, the drugs should be excluded.

III

The Court sees things differently. To the Court, the fact that a warrant gives an officer cause to arrest a person severs the connection between illegal policing and the resulting discovery of evidence. This is a remarkable proposition: The mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch.

But the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better. Even officers prone to negligence can learn from courts that exclude illegally obtained evidence. Indeed, they are perhaps the most in need of the education, whether by the judge's opinion, the prosecutor's future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an "incentive to err on the side of constitutional behavior."

Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. Even these sources may not track the "staggering" numbers of warrants, "'drawers and drawers'" full, that many cities issue for traffic violations and ordinance infractions. The county in this case has had a "backlog" of such warrants. The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them.

Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers "made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as

unpaid tickets." In the St. Louis metropolitan area, officers "routinely" stop people—on the street, at bus stops, or even in court—for no reason other than "an officer's desire to check whether the subject had a municipal arrest warrant pending." In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them. The Justice Department analyzed these warrant-checked stops and reported that "approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion."

I do not doubt that most officers act in "good faith" and do not set out to break the law. That does not mean these stops are "isolated instance[s] of negligence," however. Many are the product of institutionalized training procedures. The majority does not suggest what makes this case "isolated" from these and countless other examples. Nor does it offer guidance for how a defendant can prove that his arrest was the result of "widespread" misconduct. Surely it should not take a federal investigation of Salt Lake County before the Court would protect someone in Strieff's position.

IV

Writing only for myself, and drawing on my professional experiences, I would add that unlawful "stops" have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. That justification must provide specific reasons why the officer suspected you were breaking the law but it may factor in your ethnicity, where you live, what you were wearing, and how you behaved. The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous.

The indignity of the stop is not limited to an officer telling you that you look like a criminal. The officer may next ask for your "consent" to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." If the officer thinks you might be dangerous, he may then "frisk" you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may "'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.'"

The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or "driving [your] pickup truck … with [your] 3-year-old son and 5-year-old daughter … without [your] seatbelt fastened." At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to "shower with a delousing agent" while you "lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals." Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the "civil death" of discrimination by employers, landlords, and whoever else conducts a background check. And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you "arrestable on sight" in the future.

This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

I dissent.

* * *

In our next chapter, we will review how the Court has applied the exclusionary rule to evidence obtained as a result of *Miranda* Rule violations.

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4.4: Chapter 34 - Exclusionary Rule- Application to the Miranda Rule

THE EXCLUSIONARY RULE

Chapter 34

Exclusionary Rule: Application to the *Miranda* Rule

The *Miranda* Rule has a somewhat unusual status in criminal procedure law because although the Court created the rule to enforce the Self-Incrimination Clause of the Fifth Amendment, the Justices have not announced consistent views on whether violations of *Miranda* are—in and of themselves—violations of the Constitution. In *Miranda*, the Court held that statements obtained during custodial interrogation in violation of the *Miranda* Rule would be presumed involuntary. But the Court has not always treated such statements in the same way as confessions that are truly involuntary. (For example, involuntary statements may not be used for impeachment.) In this chapter, we review how the Court has applied the exclusionary rule to the *Miranda* doctrine.

Our first case concerns the status of testimony given by a witness whom police discovered as a result of a *Miranda* violation.

Supreme Court of the United States

Michigan v. Thomas W. Tucker

Decided June 10, 1974 – 417 U.S. 433

Mr. Justice REHNQUIST delivered the opinion of the Court.

This case presents the question whether the testimony of a witness in respondent's state court trial for rape must be excluded simply because police had learned the identity of the witness by questioning respondent at a time when he was in custody as a suspect, but had not been advised that counsel would be appointed for him if he was indigent.

I

On the morning of April 19, 1966, a 43-year-old woman in Pontiac, Michigan was found in her home by a friend and coworker, Luther White, in serious condition. At the time she was found the woman was tied, gagged, and partially disrobed, and had been both raped and severely beaten. She was unable to tell White anything about her assault at that time and still remains unable to recollect what happened.

While White was attempting to get medical help for the victim and to call for the police, he observed a dog inside the house. This apparently attracted White's attention for he knew that the woman did not own a dog herself. Later, when talking with police officers, White observed the dog a second time, and police followed the dog to respondent's house. Neighbors further connected the dog with respondent.

The police then arrested respondent and brought him to the police station for questioning. Prior to the actual interrogation the police asked respondent whether he knew for what crime he had been arrested, whether he wanted an attorney, and whether he understood his constitutional rights. Respondent replied that he did understand the crime for which he was arrested, that he did not want an attorney, and that he understood his rights. The police further advised him that any statements he might make could be used against him at a later date in court. The police, however, did not advise respondent that he would be furnished counsel free of charge if he could not pay for such services himself.

The police then questioned respondent about his activities on the night of the rape and assault. Respondent replied that during the general time period at issue he had first been with one Robert Henderson and then later at home, alone, asleep. The

police sought to confirm this story by contacting Henderson, but Henderson's story served to discredit rather than to bolster respondent's account. Henderson acknowledged that respondent had been with him on the night of the crime but said that he had left at a relatively early time. Furthermore, Henderson told police that he saw respondent the following day and asked him at that time about scratches on his face—"asked him if he got hold of a wild one or something." Respondent answered: "[S]omething like that." Then, Henderson said, he asked respondent "who it was," and respondent said: "[S]ome woman lived the next block over," adding: "She is a widow woman" or words to that effect.

Prior to trial respondent's appointed counsel made a motion to exclude Henderson's expected testimony because respondent had revealed Henderson's identity without having received full *Miranda* warnings. Although respondent's own statements taken during interrogation were excluded, the trial judge denied the motion to exclude Henderson's testimony. Henderson therefore testified at trial, and respondent was convicted of rape and sentenced to 20 to 40 years' imprisonment. His conviction was affirmed by both the Michigan Court of Appeals and the Michigan Supreme Court.

Respondent then sought habeas corpus relief in Federal District Court. The court [] granted respondent's petition for a writ of habeas corpus unless petitioner retried respondent within 90 days. The Court of Appeals for the Sixth Circuit affirmed. We granted certiorari and now reverse.

II

Although respondent's sole complaint is that the police failed to advise him that he would be given free counsel if unable to afford counsel himself, he did not, and does not now, base his arguments for relief on a right to counsel under the Sixth and Fourteenth Amendments. Nor was the right to counsel, as such, considered to be persuasive by either federal court below.

Respondent's argument, and the opinions of the District Court and Court of Appeals, instead rely upon the Fifth Amendment right against compulsory self-incrimination and the safeguards designed in *Miranda* to secure that right. In brief, the position urged upon this Court is that proper regard for the privilege against compulsory self-incrimination requires, with limited exceptions not applicable here, that all evidence derived solely from statements made without full *Miranda* warnings be excluded at a subsequent criminal trial. For purposes of analysis in this case we believe that the question thus presented is best examined in two separate parts. We will therefore first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right. We will then consider whether the evidence derived from this interrogation must be excluded.

III

[The Court determined "that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*."]

IV

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policeman investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

We have recently said, in a search-and-seizure context, that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." In a proper case this rationale would seem applicable to the Fifth Amendment context as well.

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

We consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*. Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground. For at the time respondent was questioned these police officers were guided, quite rightly, by the [pre-*Miranda*] principles, particularly focusing on the suspect's opportunity to have retained counsel with him during the interrogation if he chose to do so. Thus, the police asked respondent if he wanted counsel, and he answered that he did not. The statements actually made by respondent to the police, as we have observed, were excluded at trial. Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well.

When involuntary statements or the right against compulsory self-incrimination are involved, a second justification for the exclusionary rule also has been asserted: protection of the courts from reliance on untrustworthy evidence. Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be compelled to give evidence against himself. And cases involving statements often depict severe pressures which may override a particular suspect's insistence on innocence.

But those situations are a far cry from that presented here. The pressures on respondent to accuse himself were hardly comparable even with the least prejudicial of those pressures which have been dealt with in our cases. More important, the respondent did not accuse himself. The evidence which the prosecution successfully sought to introduce was not a confession of guilt by respondent, or indeed even an exculpatory statement by respondent, but rather the testimony of a third party who was subjected to no custodial pressures. There is plainly no reason to believe that Henderson's testimony is untrustworthy simply because respondent was not advised of his right to appointed counsel. Henderson was both available at trial and subject to cross-examination by respondent's counsel, and counsel fully used this opportunity, suggesting in the course of his cross-examination that Henderson's character was less than exemplary and that he had been offered incentives by the police to testify against respondent. Thus the reliability of his testimony was subject to the normal testing process of an adversary trial.

In summary, we do not think that any single reason supporting exclusion of this witness' testimony, or all of them together, are very persuasive. By contrast, we find the arguments in favor of admitting the testimony quite strong. For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. In this particular case we also "must consider society's interest in the effective prosecution of criminals in light of the protection our pre-*Miranda* standards afford criminal defendants." These interests may be outweighed by the need to provide an effective sanction to a constitutional right, but they must in any event be valued. Here respondent's own statement, which might have helped the prosecution show respondent's guilty conscience at trial, had already been excised from the prosecution's case. To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent.

Reversed.

Notes, Comments, and Questions

In *Tucker*, the Court declined to suppress evidence in part because officers acted in good faith. "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." This language is similar to the Court's words in *United States v. Leon*, 468 U.S. 897 (1984), which concerned "objectively reasonable reliance on a subsequently invalidated search warrant." The Court held that evidence found during execution of a search warrant issued by a neutral magistrate should not be excluded if a court later found that there was insufficient evidence to satisfy the probable cause requirement in the Warrant Clause—unless the officer had "no reasonable grounds for believing that the warrant was properly issued." In other words, the officer would not be punished for reasonable reliance on the magistrate's probable cause finding, even if the finding was later overturned. The "good faith exception" to exclusion of evidence under the Fourth Amendment was expanded in cases such as *Herring v. United States* (Chapter 32) and *Davis v. United States* (Chapter 32).

The *Tucker* Court also justified its result in part on timing; the interrogation at issue occurred before *Miranda* was decided, making the police behavior less blameworthy. Students should note that the holding of *Tucker*—that a witness identified during an interrogation conducted in violation of *Miranda* may testify against the defendant at trial—remains good law for interrogations conducted well after the Court decided *Miranda*.

Unlike *Tucker*, which concerned testimony by someone other than the defendant, our next case concerns statements police obtained from a defendant after a *Miranda* violation. The question was whether an initial *Miranda* violation necessarily taints, and

renders inadmissible, statements obtained during a subsequent post-warning interrogation.

Supreme Court of the United States

Oregon v. Michael James Elstad

Decided March 4, 1985—470 U.S. 298

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether an initial failure of law enforcement officers to administer the warnings required by *Miranda v. Arizona*, without more, "taints" subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights. Respondent, Michael James Elstad, was convicted of burglary by an Oregon trial court. The Oregon Court of Appeals reversed, holding that respondent's signed confession, although voluntary, was rendered inadmissible by a prior remark made in response to questioning without benefit of *Miranda* warnings. We granted certiorari and we now reverse.

I

In December 1981, the home of Mr. and Mrs. Gilbert Gross, in the town of Salem, Polk County, Ore., was burglarized. Missing were art objects and furnishings valued at $150,000. A witness to the burglary contacted the Polk County Sheriff's office, implicating respondent Michael Elstad, an 18-year-old neighbor and friend of the Grosses' teenage son. Thereupon, Officers Burke and McAllister went to the home of respondent Elstad, with a warrant for his arrest. Elstad's mother answered the door. She led the officers to her son's room where he lay on his bed, clad in shorts and listening to his stereo. The officers asked him to get dressed and to accompany them into the living room. Officer McAllister asked respondent's mother to step into the kitchen, where he explained that they had a warrant for her son's arrest for the burglary of a neighbor's residence. Officer Burke remained with Elstad in the living room. He later testified:

"I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.'"

The officers then escorted Elstad to the back of the patrol car. As they were about to leave for the Polk County Sheriff's office, Elstad's father arrived home and came to the rear of the patrol car. The officers advised him that his son was a suspect in the burglary. Officer Burke testified that Mr. Elstad became quite agitated, opened the rear door of the car and admonished his son: "I told you that you were going to get into trouble. You wouldn't listen to me. You never learn."

Elstad was transported to the Sheriff's headquarters and approximately one hour later, Officers Burke and McAllister joined him in McAllister's office. McAllister then advised respondent for the first time of his *Miranda* rights, reading from a standard card. Respondent indicated he understood his rights, and, having these rights in mind, wished to speak with the officers. Elstad gave a full statement, explaining that he had known that the Gross family was out of town and had been paid to lead several acquaintances to the Gross residence and show them how to gain entry through a defective sliding glass door. The statement was typed, reviewed by respondent, read back to him for correction, initialed and signed by Elstad and both officers. As an afterthought, Elstad added and initialed the sentence, "After leaving the house Robby & I went back to [the] van & Robby handed me a small bag of grass." Respondent concedes that the officers made no threats or promises either at his residence or at the Sheriff's office.

Respondent was charged with first-degree burglary. Respondent moved at once to suppress his oral statement and signed confession. He contended that the statement he made in response to questioning at his house "let the cat out of the bag," citing and tainted the subsequent confession as "fruit of the poisonous tree." The judge ruled that the statement, "I was there," had to be excluded because the defendant had not been advised of his *Miranda* rights. The written confession taken after Elstad's arrival at the Sheriff's office, however, was admitted in evidence. The court found:

"[H]is written statement was given freely, voluntarily and knowingly by the defendant after he had waived his right to remain silent and have counsel present which waiver was evidenced by the card which the defendant had signed. [It] was not tainted in any way by the previous brief statement between the defendant and the Sheriff's Deputies that had arrested him."

Elstad was found guilty of burglary in the first degree. He received a 5-year sentence and was ordered to pay $18,000 in

restitution.

Following his conviction, respondent appealed to the Oregon Court of Appeals. The Court of Appeals reversed respondent's conviction. The State of Oregon petitioned the Oregon Supreme Court for review, and review was declined. This Court granted certiorari to consider the question whether the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant.

II

The arguments advanced in favor of suppression of respondent's written confession rely heavily on metaphor. One metaphor, familiar from the Fourth Amendment context, would require that respondent's confession, regardless of its integrity, voluntariness, and probative value, be suppressed as the "tainted fruit of the poisonous tree" of the *Miranda* violation. A second metaphor questions whether a confession can be truly voluntary once the "cat is out of the bag." Taken out of context, each of these metaphors can be misleading. They should not be used to obscure fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment. The Oregon court assumed and respondent here contends that a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as "fruit of the poisonous tree." We believe this view misconstrues the nature of the protections afforded by *Miranda* warnings and therefore misreads the consequences of police failure to supply them.

A

Prior to *Miranda,* the admissibility of an accused's in-custody statements was judged solely by whether they were "voluntary" within the meaning of the Due Process Clause. If a suspect's statements had been obtained by "techniques and methods offensive to due process," or under circumstances in which the suspect clearly had no opportunity to exercise "a free and unconstrained will," the statements would not be admitted. The Court in *Miranda* required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment. The Fifth Amendment, of course, is not concerned with nontestimonial evidence. Nor is it concerned with moral and psychological pressures to confess emanating from sources other than official coercion. Voluntary statements "remain a proper element in law enforcement." "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. ... Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions."

Respondent's contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as "fruit of the poisonous tree" assumes the existence of a constitutional violation. But [] a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the "fruits" doctrine. The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits. "The exclusionary rule, ... when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth." Where a Fourth Amendment violation "taints" the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted in evidence. Beyond this, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation.

The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.

But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination. Where an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, "the primary criterion of admissibility [remains] the 'old' due process voluntariness test."

We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony. [T]he absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. The Court has often noted: "'[A] living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. ... [T]he living witness is an individual human personality whose attributes of will, perception, memory and *volition* interact to determine what testimony he will give.'"

Because *Miranda* warnings may inhibit persons from giving information, this Court has determined that they need be administered only after the person is taken into "custody" or his freedom has otherwise been significantly restrained. Unfortunately, the task of defining "custody" is a slippery one, and "policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

B

The Oregon court, however, believed that the unwarned remark compromised the voluntariness of respondent's later confession. It was the court's view that the prior *answer* and not the unwarned questioning impaired respondent's ability to give a valid waiver and that only lapse of time and change of place could dissipate what it termed the "coercive impact" of the inadmissible statement. The Oregon court [] identified a subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate. But endowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions.

This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver. The Oregon court, by adopting this expansive view of Fifth Amendment compulsion, effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself. When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.

There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case. Certainly, in respondent's case, the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best. It is difficult to tell with certainty what motivates a suspect to speak. A suspect's confession may be traced to factors as disparate as "a prearrest event such as a visit with a minister" or an intervening event such as the exchange of words respondent had with his father. We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

III

Though belated, the reading of respondent's rights was undeniably complete. McAllister testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad's responses. There is no question that respondent knowingly and voluntarily waived his right to remain silent before he described his participation in the burglary. It is also beyond dispute that respondent's earlier remark was voluntary, within the meaning of the Fifth Amendment. Neither the environment nor the manner of either "interrogation" was coercive. The initial conversation took place at midday, in the living room area of respondent's own home, with his mother in the kitchen area, a few steps away. Although in retrospect the officers testified that respondent was then in custody, at the time he made his statement he had not been informed that he was under arrest. The arresting officers' testimony indicates that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect but to notify his mother of the reason for his arrest.

The State has conceded the issue of custody and thus we must assume that Burke breached *Miranda* procedures in failing to administer *Miranda* warnings before initiating the discussion in the living room. This breach may have been the result of confusion as to whether the brief exchange qualified as "custodial interrogation" or it may simply have reflected Burke's reluctance to initiate an alarming police procedure before McAllister had spoken with respondent's mother. Whatever the reason for Burke's oversight, the incident had none of the earmarks of coercion. Nor did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent.

This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule precludes use of that testimony on retrial. "Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." But the Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily. The Court has also rejected the argument that a defendant's ignorance that a prior coerced confession could not be admitted in evidence compromised the voluntariness of his guilty plea. Thus we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case.

IV

When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. The Court has carefully adhered to this principle, permitting a narrow exception only where pressing public safety concerns demanded. The Court today in no way retreats from the bright-line rule of *Miranda*. We do not imply that good faith excuses a failure to administer *Miranda* warnings; nor do we condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him. A handful of courts have, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda,* was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.

The judgment of the Court of Appeals of Oregon is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Even while purporting to reaffirm [] constitutional guarantees, the Court has engaged of late in a studied campaign to strip the *Miranda* decision piecemeal and to undermine the rights *Miranda* sought to secure. Today's decision not only extends this effort a further step, but delivers a potentially crippling blow to *Miranda* and the ability of courts to safeguard the rights of persons accused of crime. For at least with respect to successive confessions, the Court today appears to strip remedies for *Miranda* violations of the "fruit of the poisonous tree" doctrine prohibiting the use of evidence presumptively derived from official illegality.

Two major premises undergird the Court's decision. The Court rejects as nothing more than "speculative" the long-recognized presumption that an illegally extracted confession causes the accused to confess again out of the mistaken belief that he already has sealed his fate, and it condemns as "'extravagant'" the requirement that the prosecution affirmatively rebut the presumption before the subsequent confession may be admitted. The Court instead adopts a new rule that, so long as the accused is given the usual *Miranda* warnings before further interrogation, the taint of a previous confession obtained in violation of *Miranda* "ordinarily" must be viewed as *automatically* dissipated.

The Court's decision says much about the way the Court currently goes about implementing its agenda. In imposing its new rule, for example, the Court mischaracterizes our precedents, obfuscates the central issues, and altogether ignores the practical realities of custodial interrogation that have led nearly every lower court to reject its simplistic reasoning. Moreover, the Court adopts startling and unprecedented methods of construing constitutional guarantees. Finally the Court reaches out once again to address issues not before us. For example, although the State of Oregon has conceded that the arresting officers broke the law in this case, the Court goes out of its way to suggest that they may have been objectively justified in doing so.

Today's decision, in short, threatens disastrous consequences far beyond the outcome in this case.

The Court today [adopts] a rule that "the psychological impact of *voluntary* disclosure of a guilty secret" neither "qualifies as state compulsion" nor "compromises the voluntariness" of subsequent confessions. So long as a suspect receives the usual *Miranda* warnings before further interrogation, the Court reasons, the fact that he "is free to exercise his own volition in deciding whether or not to make" further confessions "ordinarily" is a sufficient "cure" and serves to break any causal connection between the illegal confession and subsequent statements.

Our precedents did not develop in a vacuum. They reflect an understanding of the realities of police interrogation and the everyday experience of lower courts. Expert interrogators, far from dismissing a first admission or confession as creating merely a "speculative and attenuated" disadvantage for a suspect, understand that such revelations frequently lead directly to a full confession. Standard interrogation manuals advise that "[t]he securing of the first admission is the biggest stumbling block...." If this first admission can be obtained, "there is every reason to expect that the first admission will lead to others, and eventually to the full confession."

Interrogators describe the point of the first admission as the "breakthrough" and the "beachhead," which once obtained will give them enormous "tactical advantages." Thus "[t]he securing of incriminating admissions might well be considered as the beginning of the final stages in crumbling the defenses of the suspect," and the process of obtaining such admissions is described as "the spadework required to motivate the subject into making the full confession."

The practical experience of state and federal courts confirms the experts' understanding. From this experience, lower courts have concluded that a first confession obtained without proper *Miranda* warnings, far from creating merely some "speculative and attenuated" disadvantage for the accused, frequently enables the authorities to obtain subsequent confessions on a "silver platter."

One police practice that courts have frequently encountered involves the withholding of *Miranda* warnings until the end of an interrogation session. Specifically, the police escort a suspect into a room, sit him down and, without explaining his Fifth Amendment rights or obtaining a knowing and voluntary waiver of those rights, interrogate him about his suspected criminal activity. If the police obtain a confession, it is then typed up, the police hand the suspect a pen for his signature, and—just before he signs—the police advise him of his *Miranda* rights and ask him to proceed. Alternatively, the police may call a stenographer in after they have obtained the confession, advise the suspect for the first time of his *Miranda* rights, and ask him to repeat what he has just told them. In such circumstances, the process of giving *Miranda* warnings and obtaining the final confession is "'merely a formalizing, a setting down almost as a scrivener does, [of] what ha[s] already taken [place].'" In such situations, where "it was all over except for reading aloud and explaining the written waiver of the *Miranda* safeguards," courts have time and again concluded that "[t]he giving of the *Miranda* warnings before reducing the product of the day's work to written form could not undo what had been done or make legal what was illegal."

For all practical purposes, the prewarning and post-warning questioning are often but stages of one overall interrogation. Whether or not the authorities explicitly confront the suspect with his earlier illegal admissions makes no significant difference, of course, because the suspect knows that the authorities know of his earlier statements and most frequently will believe that those statements already have sealed his fate.

I would have thought that the Court, instead of dismissing the "cat out of the bag" presumption out of hand, would have accounted for these practical realities. Expert interrogators and experienced lower-court judges will be startled, to say the least, to learn that the connection between multiple confessions is "speculative" and that a subsequent rendition of *Miranda* warnings "ordinarily" enables the accused in these circumstances to exercise his "free will" and to make "a rational and intelligent choice whether to waive or invoke his rights."

Not content merely to ignore the practical realities of police interrogation and the likely effects of its abolition of the derivative-evidence presumption, the Court goes on to assert that nothing in the Fifth Amendment or the general judicial policy of deterring illegal police conduct "ordinarily" requires the suppression of evidence derived proximately from a confession obtained in violation of *Miranda*. The Court does not limit its analysis to successive confessions, but recurrently refers generally to the "fruits" of the illegal confession. Thus the potential impact of the Court's reasoning might extend far beyond the "cat out of the bag" context to include the discovery of physical evidence and other derivative fruits of *Miranda* violations as well.

I dissent.

Justice STEVENS, dissenting.

The desire to achieve a just result in this particular case has produced an opinion that is somewhat opaque and internally inconsistent.

For me, the most disturbing aspect of the Court's opinion is its somewhat opaque characterization of the police misconduct in this case. The Court appears ambivalent on the question whether there was any constitutional violation. This ambivalence is either disingenuous or completely lawless. This Court's power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution. The same constitutional analysis applies whether the custodial interrogation is actually coercive or irrebuttably presumed to be coercive. If the Court does not accept that premise, it must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power. If the Court accepts the proposition that respondent's self-incriminatory statement was inadmissible, it must also acknowledge that the Federal Constitution protected him from custodial police interrogation without first being advised of his right to remain silent.

The source of respondent's constitutional protection is the Fifth Amendment's privilege against compelled self-incrimination that is secured against state invasion by the Due Process Clause of the Fourteenth Amendment. Like many other provisions of the Bill of Rights, that provision is merely a procedural safeguard. It is, however, the specific provision that protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber, by "the Germans of the 1930's and early 1940's," and by some of our own police departments only a few decades ago. Custodial interrogation that violates that provision of the Bill of Rights is a classic example of a violation of a constitutional right.

I respectfully dissent.

Notes, Comments, and Questions

The Court in *Elstad* rejects the "cat out of the bag" theory. It finds three factors persuasive:

1) The police behavior was not especially bad or willful.

2) The non-*Mirandized* confession was voluntary, not the product of compulsion.

3) There was significant attenuation between the two interrogations (not just the warnings given at the second interrogation, but also a trip from home to the police station).

Contrast these factors with the dissent's discussion of the psychological effect of the "cat out of the bag" theory. Which do you find more persuasive? After the Court decided *Elstad*, police departments began conducting intentionally the sort of two-stage interrogation that occurred inadvertently in *Elstad*. That is, as described in Justice's Brennan's *Elstad* dissent, officers would interrogate a suspect in custody without first administering *Miranda* warnings. Then, after obtaining a confession, officers would recite the warnings and restart the questioning, using the information gained during the pre-warning interrogation to induce new statements officers expected could be used at trial. Because of its location, the tactic described in the next case became known as the "Missouri Two-Step."

Supreme Court of the United States

Missouri v. Patrice Seibert

Decided June 28, 2004 – 542 U.S. 600

Justice SOUTER announced the judgment of the Court and delivered an opinion, in which Justice STEVENS, Justice GINSBURG, and Justice BREYER join.

This case tests a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda v. Arizona*, the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time. The question here is the admissibility of the repeated statement. Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*'s constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible.

I

Respondent Patrice Seibert's 12-year-old son Jonathan had cerebral palsy, and when he died in his sleep she feared charges of neglect because of bedsores on his body. In her presence, two of her teenage sons and two of their friends devised a plan to conceal the facts surrounding Jonathan's death by incinerating his body in the course of burning the family's mobile home, in which they planned to leave Donald Rector, a mentally ill teenager living with the family, to avoid any appearance that Jonathan had been unattended. Seibert's son Darian and a friend set the fire, and Donald died.

Five days later, the police awakened Seibert at 3 a.m. at a hospital where Darian was being treated for burns. In arresting her, Officer Kevin Clinton followed instructions from Rolla, Missouri, Officer Richard Hanrahan that he refrain from giving *Miranda* warnings. After Seibert had been taken to the police station and left alone in an interview room for 15 to 20 minutes, Officer Hanrahan questioned her without *Miranda* warnings for 30 to 40 minutes, squeezing her arm and repeating "Donald was also to die in his sleep." After Seibert finally admitted she knew Donald was meant to die in the fire, she was given a 20-minute coffee and cigarette break. Officer Hanrahan then turned on a tape recorder, gave Seibert the *Miranda* warnings, and obtained a signed waiver of rights from her. He resumed the questioning with "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" and confronted her with her prewarning statements:

Hanrahan: "Now, in discussion you told us, you told us that there was a[n] understanding about Donald."

Seibert: "Yes."

Hanrahan: "Did that take place earlier that morning?"

Seibert: "Yes."

Hanrahan: "And what was the understanding about Donald?"

Seibert: "If they could get him out of the trailer, to take him out of the trailer."

Hanrahan: "And if they couldn't?"

Seibert: "I, I never even thought about it. I just figured they would."

Hanrahan: "'Trice, didn't you tell me that he was supposed to die in his sleep?"

Seibert: "If that would happen, 'cause he was on that new medicine, you know ...."

Hanrahan: "The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?"

Seibert: "Yes."

After being charged with first-degree murder for her role in Donald's death, Seibert sought to exclude both her prewarning and postwarning statements. At the suppression hearing, Officer Hanrahan testified that he made a "conscious decision" to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question "until I get the answer that she's already provided once." He acknowledged that Seibert's ultimate statement was "largely a repeat of information ... obtained" prior to the warning.

The trial court suppressed the prewarning statement but admitted the responses given after the *Miranda* recitation. A jury convicted Seibert of second-degree murder. On appeal, the Missouri Court of Appeals affirmed. The Supreme Court of Missouri reversed. We granted certiorari to resolve a split in the Courts of Appeals. We now affirm.

II

[The Court recounted the import of *Miranda* warnings to "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause." The Court concluded that "*Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid

waiver. To point out the obvious, this common consequence would not be common at all were it not that *Miranda* warnings are customarily given under circumstances allowing for a real choice between talking and remaining silent."]

III

There are those, of course, who preferred the old way of doing things, giving no warnings and litigating the voluntariness of any statement in nearly every instance. In the aftermath of *Miranda,* Congress even passed a statute seeking to restore that old regime, although the Act lay dormant for years until finally invoked and challenged in *Dickerson v. United States* (Chapter 23). *Dickerson* reaffirmed *Miranda* and held that its constitutional character prevailed against the statute.

The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri. An officer of that police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. Consistently with the officer's testimony, the Police Law Institute, for example, instructs that "officers may conduct a two-stage interrogation.... At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court." The upshot of all this advice is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy.

IV

When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and question-first. *Miranda* addressed "interrogation practices ... likely ... to disable [an individual] from making a free and rational choice" about speaking and held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees. The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.

Just as "no talismanic incantation [is] required to satisfy [*Miranda*'s] strictures," it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda,* or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

There is no doubt about the answer that proponents of question-first give to this question about the effectiveness of warnings given only after successful interrogation, and we think their answer is correct. By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

V

Missouri argues that a confession repeated at the end of an interrogation sequence envisioned in a question-first strategy is admissible on the authority of *Oregon v. Elstad*, but the argument disfigures that case. Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally.

The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad,* it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying "we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.

VI

Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible. The judgment of the Supreme Court of Missouri is affirmed.

Justice KENNEDY, concurring in the judgment.

The interrogation technique used in this case is designed to circumvent *Miranda v. Arizona*. It undermines the *Miranda* warning and obscures its meaning. The plurality opinion is correct to conclude that statements obtained through the use of this technique are inadmissible. Although I agree with much in the careful and convincing opinion for the plurality, my approach does differ in some respects, requiring this separate statement.

In my view, *Elstad* was correct in its reasoning and its result. *Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning. An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection. In light of these realities it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning. That approach would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the ... testimony."

This case presents different considerations. The police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. As Justice SOUTER points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made. The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained. This tactic relies on an intentional misrepresentation of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use.

Further, the interrogating officer here relied on the defendant's prewarning statement to obtain the postwarning statement used against her at trial. The postwarning interview resembled a cross-examination. The officer confronted the defendant with her inadmissible prewarning statements and pushed her to acknowledge them. This shows the temptations for abuse inherent in the two-step technique. Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false.

The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect. The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps.

The plurality concludes that whenever a two-stage interview occurs, admissibility of the postwarning statement should depend on "whether [the] *Miranda* warnings delivered midstream could have been effective enough to accomplish their object" given the specific facts of the case. This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations. In my view, this test cuts too broadly. *Miranda*'s clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity. I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.

The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient. No curative steps were taken in this case, however, so the postwarning statements are inadmissible and the conviction cannot stand.

For these reasons, I concur in the judgment of the Court.

* * *

In our final case, the Court considered whether physical evidence (as opposed to testimonial evidence) found as a result of a *Miranda* violation should be excluded from use against the defendant. Justice Kennedy, who concurred with the result in *United States v. Patane* but did not join the majority opinion, is the only Justice who voted with the winning side in both *Patane* and *Seibert*. Because these cases were decided on the same day and both concern evidence obtained after a *Miranda* violation, Justice Kennedy's reputation as a swing vote was especially well deserved that day. Students should read his opinion in *Patane* with care.

Supreme Court of the United States

United States v. Samuel Francis Patane

Decided June 28, 2004 – 542 U.S. 630

Justice THOMAS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice SCALIA join.

In this case we must decide whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona* requires suppression of the physical fruits of the suspect's unwarned but voluntary statements. The Court has previously addressed this question but has not reached a definitive conclusion. Because the *Miranda* rule protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements, we answer the question presented in the negative.

I

In June 2001, respondent, Samuel Francis Patane, was arrested for harassing his ex-girlfriend, Linda O'Donnell. He was released on bond, subject to a temporary restraining order that prohibited him from contacting O'Donnell. Respondent apparently violated the restraining order by attempting to telephone O'Donnell. On June 6, 2001, Officer Tracy Fox of the Colorado Springs Police Department began to investigate the matter. On the same day, a county probation officer informed an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF), that respondent, a convicted felon, illegally possessed a .40 Glock pistol. The ATF relayed this information to Detective Josh Benner, who worked closely with the ATF. Together, Detective Benner and Officer Fox proceeded to respondent's residence.

After reaching the residence and inquiring into respondent's attempts to contact O'Donnell, Officer Fox arrested respondent for violating the restraining order. Detective Benner attempted to advise respondent of his *Miranda* rights but got no further than the right to remain silent. At that point, respondent interrupted, asserting that he knew his rights, and neither officer attempted to complete the warning.

Detective Benner then asked respondent about the Glock. Respondent was initially reluctant to discuss the matter, stating: "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." Detective Benner persisted, and respondent told him that the pistol was in his bedroom. Respondent then gave Detective Benner permission to retrieve the pistol. Detective Benner found the pistol and seized it.

A grand jury indicted respondent for possession of a firearm by a convicted felon. The District Court granted respondent's motion to suppress the firearm, reasoning that the officers lacked probable cause to arrest respondent for violating the restraining order.

The Court of Appeals reversed the District Court's ruling with respect to probable cause but affirmed the suppression order on respondent's alternative theory.

As we explain below, the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as *Wong Sun* does not apply. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings.

II

[B]ecause [the *Miranda* rule] necessarily sweep[s] beyond the actual protections of the Self-Incrimination Clause, any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination. Indeed, at times the Court has declined to extend *Miranda* even where it has perceived a need to protect the privilege against self-incrimination.

It is for these reasons that statements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial though the fruits of actually compelled testimony cannot. More generally, the *Miranda* rule "does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted." Such a blanket suppression rule could not be justified by reference to the "Fifth Amendment goal of assuring trustworthy evidence" or by any deterrence rationale, and would therefore fail our close-fit requirement.

Furthermore, the Self-Incrimination Clause contains its own exclusionary rule. It provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Unlike the Fourth Amendment's bar on unreasonable searches, the Self-Incrimination Clause is self-executing. We have repeatedly explained "that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any

subsequent criminal trial."

III

Our cases also make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule. This, of course, follows from the nature of the right protected by the Self-Incrimination Clause, which the *Miranda* rule, in turn, protects. It is "'a fundamental *trial* right.'"

It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, "[t]he exclusion of unwarned statements ... is a complete and sufficient remedy" for any perceived *Miranda* violation.

Thus, unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter. There is therefore no reason to apply the "fruit of the poisonous tree" doctrine of *Wong Sun*. It is not for this Court to impose its preferred police practices on either federal law enforcement officials or their state counterparts.

IV

In the present case, the Court of Appeals wholly adopted the position that the taking of unwarned statements violates a suspect's constitutional rights. But *Dickerson*'s characterization of *Miranda* as a constitutional rule does not lessen the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it. And there is no such fit here. Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, "[t]he exclusion of unwarned statements ... is a complete and sufficient remedy" for any perceived *Miranda* violation. There is simply no need to extend (and therefore no justification for extending) the prophylactic rule of *Miranda* to this context.

Similarly, because police cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements, an exclusionary rule cannot be justified by reference to a deterrence effect on law enforcement.

Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings.

Justice KENNEDY, with whom Justice O'CONNOR joins, concurring in the judgment.

In *Oregon v. Elstad* evidence obtained following an unwarned interrogation was held admissible. This result was based in large part on our recognition that the concerns underlying the *Miranda v. Arizona* rule must be accommodated to other objectives of the criminal justice system. I agree with the plurality that *Dickerson v. United States* did not undermine these precedents and, in fact, cited them in support. Here, it is sufficient to note that the Government presents an even stronger case for admitting the evidence obtained as the result of Patane's unwarned statement. Admission of nontestimonial physical fruits (the Glock in this case), even more so than the postwarning statements to the police in *Elstad* does not run the risk of admitting into trial an accused's coerced incriminating statements against himself. In light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation. Unlike the plurality, however, I find it unnecessary to decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is "[any]thing to deter" so long as the unwarned statements are not later introduced at trial.

With these observations, I concur in the judgment of the Court.

* * *

In our next chapter, we review the basics of how courts consider motions to suppress evidence under the exclusionary rule. We also examine the availability of monetary damages as a remedy for violations of criminal procedure rules grounded in constitutional law.

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4.5: Chapter 35 - The Basics of Suppression Hearings and Money Damages

THE EXCLUSIONARY RULE

Chapter 35

The Basics of Suppression Hearings and Money Damages

Having studied the Court's precedent on when the exclusionary rule applies, we will now turn to an overview of how suppression hearings work. In addition, this chapter reviews the availability of monetary damages to victims of constitutional violations related to criminal procedure law.

The Basics of Suppression Hearings

When a defendant seeks to exclude evidence allegedly obtained in violation of the constitution, the judge normally decides the suppression motion by preponderance of the evidence.[1] With most court motions, the burden of persuasion is on the moving party, meaning that a tie is resolved in favor of the non-moving party. Accordingly, a defendant arguing that a magistrate issued a search warrant without probable cause would have the burden of proof. There are, however, situations in which the prosecution bears the burden of proof. When a confession is challenged as involuntary, for example, "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary."[2]

When defendants seek exclusion of evidence on constitutional grounds, the standard procedure is for the judge to hold a "suppression hearing" outside the presence of the jury. Each side may present witnesses. Police officers commonly testify about what things they observed in advance of a *Terry* stop or arrest that justified a seizure under review. They also explain what evidence provided probable cause to justify warrantless searches under doctrines such as the automobile exception and exigent circumstances. Defendants may testify in support of their suppression motions, and absent unusual circumstances, their testimony at suppression hearings may not be used against them at trial.[3] Under this rule, a defendant may testify that a suitcase belonged to him in order to establish standing to object to an unlawful search of the suitcase, without providing the prosecution a damaging admission usable to prove guilt. If the judge finds for the defendant, then the excluded evidence cannot be shown to the jury. In cases where the prosecution's primary evidence is challenged as unlawfully obtained—for example, a gun seized from a defendant who is then charged with unlawfully possessing it—a suppression ruling in the defendant's favor can result in the dismissal of the charges. A defendant who loses her pre-trial suppression motion may, if subsequently convicted, raise her suppression arguments again on appeal.

Our next case explains how courts resolve allegations that a search warrant was issued on the basis of false statements made by police officers to the issuing magistrate.

Supreme Court of the United States

Jerome Franks v. Delaware

Decided June 26, 1978 – 438 U.S. 154

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents an important and longstanding issue of Fourth Amendment law. Does a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?

In the present case the Supreme Court of Delaware held, as a matter of first impression for it, that a defendant under *no*

circumstances may so challenge the veracity of a sworn statement used by police to procure a search warrant. We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

I

The controversy over the veracity of the search warrant affidavit in this case arose in connection with petitioner Jerome Franks' state conviction for rape, kidnaping, and burglary. On Friday, March 5, 1976, Mrs. Cynthia Bailey told police in Dover, Del., that she had been confronted in her home earlier that morning by a man with a knife, and that he had sexually assaulted her. She described her assailant's age, race, height, build, and facial hair, and gave a detailed description of his clothing as consisting of a white thermal undershirt, black pants with a silver or gold buckle, a brown leather three-quarter-length coat, and a dark knit cap that he wore pulled down around his eyes.

That same day, petitioner Franks coincidentally was taken into custody for an assault involving a 15-year-old girl, Brenda B. _____, six days earlier. After his formal arrest, and while awaiting a bail hearing in Family Court, petitioner allegedly stated to Robert McClements, the youth officer accompanying him, that he was surprised the bail hearing was "about Brenda B. _____. I know her. I thought you said Bailey. I don't know her." At the time of this statement, the police allegedly had not yet recited to petitioner his rights under *Miranda v. Arizona*.

On the following Monday, March 8, Officer McClements happened to mention the courthouse incident to a detective, Ronald R. Brooks, who was working on the *Bailey* case. On March 9, Detective Brooks and Detective Larry D. Gray submitted a sworn affidavit to a Justice of the Peace in Dover, in support of a warrant to search petitioner's apartment. In paragraph 8 of the affidavit's "probable cause page" mention was made of petitioner's statement to McClements. In paragraph 10, it was noted that the description of the assailant given to the police by Mrs. Bailey included the above-mentioned clothing. Finally, the affidavit also described the attempt made by police to confirm that petitioner's typical outfit matched that of the assailant. Paragraph 15 recited: "On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people." Paragraphs 16 and 17 respectively stated: "Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket," and "Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat."

The warrant was issued on the basis of this affidavit. Pursuant to the warrant, police searched petitioner's apartment and found a white thermal undershirt, a knit hat, dark pants, and a leather jacket, and, on petitioner's kitchen table, a single-blade knife. All these ultimately were introduced in evidence at trial.

Prior to the trial, however, petitioner's counsel filed a written motion to suppress the clothing and the knife found in the search; this motion alleged that the warrant on its face did not show probable cause and that the search and seizure were in violation of the Fourth and Fourteenth Amendments. At the hearing on the motion to suppress, defense counsel orally amended the challenge to include an attack on the veracity of the warrant affidavit; he also specifically requested the right to call as witnesses Detective Brooks, Wesley Lucas of the Youth Center, and James D. Morrison, formerly of the Youth Center. Counsel asserted that Lucas and Morrison would testify that neither had been personally interviewed by the warrant affiants, and that, although they might have talked to another police officer, any information given by them to that officer was "somewhat different" from what was recited in the affidavit. Defense counsel charged that the misstatements were included in the affidavit not inadvertently, but in "bad faith." Counsel also sought permission to call Officer McClements and petitioner as witnesses, to seek to establish that petitioner's courthouse statement to police had been obtained in violation of petitioner's *Miranda* rights, and that the search warrant was thereby tainted as the fruit of an illegally obtained confession.

In rebuttal, the State's attorney argued [] that any challenge to a search warrant was to be limited to questions of sufficiency based on the face of the affidavit. The State objected to petitioner's "going behind [the warrant affidavit] in any way," and argued that the court must decide petitioner's motion "on the four corners" of the affidavit.

The trial court sustained the State's objection to petitioner's proposed evidence. The motion to suppress was denied, and the clothing and knife were admitted as evidence at the ensuing trial. Petitioner was convicted. In a written motion for judgment

of acquittal and/or new trial, petitioner repeated his objection to the admission of the evidence, stating that he "should have been allowed to impeach the Affidavit used in the Search Warrant to show purposeful misrepresentation of information contained therein." The motion was denied, and petitioner was sentenced to two consecutive terms of 25 years each and an additional consecutive life sentence.

On appeal, the Supreme Court of Delaware affirmed. Franks' petition for certiorari presented only the issue whether the trial court had erred in refusing to consider his allegation of misrepresentation in the warrant affidavit.

III

Whether the Fourth and Fourteenth Amendments, and the derivative exclusionary rule made applicable to the States under *Mapp v. Ohio,* ever mandate that a defendant be permitted to attack the veracity of a warrant affidavit after the warrant has been issued and executed, is a question that encounters conflicting values. The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search. In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation...." "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, ... was 'credible' or his information 'reliable.'" Because it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment.

First, a flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning. The requirement that a warrant not issue "but upon probable cause, supported by Oath or affirmation," would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile. It is this specter of intentional falsification that, we think, has evoked such widespread opposition to the flat nonimpeachment rule. On occasion, of course, an instance of deliberate falsity will be exposed and confirmed without a special inquiry either at trial or at a hearing on the sufficiency of the affidavit. A flat nonimpeachment rule would bar re-examination of the warrant even in these cases.

Second, the hearing before the magistrate not always will suffice to discourage lawless or reckless misconduct. The pre-search proceeding is necessarily *ex parte,* since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence. The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous. The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations. The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.

Third, the alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap. *Mapp v. Ohio* implicitly rejected the adequacy of these alternatives. Mr. Justice Douglas noted this in his concurrence in *Mapp.* "'Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.'"

Fourth, allowing an evidentiary hearing, after a suitable preliminary proffer of material falsity, would not diminish the importance and solemnity of the warrant-issuing process. It is the *ex parte* nature of the initial hearing, rather than the magistrate's capacity, that is the reason for the review. A magistrate's determination is presently subject to review before trial as to *sufficiency* without any undue interference with the dignity of the magistrate's function. Our reluctance today to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard, leaves a broad field where the magistrate is the sole protection of a citizen's Fourth Amendment rights, namely, in instances where police have been merely negligent in checking or

recording the facts relevant to a probable-cause determination.

Fifth, the claim that a post-search hearing will confuse the issue of the defendant's guilt with the issue of the State's possible misbehavior is footless. The hearing will not be in the presence of the jury. An issue extraneous to guilt already is examined in any probable-cause determination or review of probable cause. Nor, if a sensible threshold showing is required and sensible substantive requirements for suppression are maintained, need there be any new large-scale commitment of judicial resources; many claims will wash out at an early stage, and the more substantial ones in any event would require judicial resources for vindication if the suggested alternative sanctions were truly to be effective. The requirement of a substantial preliminary showing would suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction. And because we are faced today with only the question of the integrity of the affiant's representations as to his own activities, we need not decide, and we in no way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made.

Sixth and finally, as to the argument that the exclusionary rule should not be extended to a "new" area, we cannot regard any such extension really to be at issue here. Despite the deep skepticism of Members of this Court as to the wisdom of extending the exclusionary rule to collateral areas, such as civil or grand jury proceedings, the Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State's case where a Fourth Amendment violation has been substantial and deliberate. We see no principled basis for distinguishing between the question of the sufficiency of an affidavit, which also is subject to a post-search re-examination, and the question of its integrity.

IV

In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Because of Delaware's absolute rule, its courts did not have occasion to consider the proffer put forward by petitioner Franks. Since the framing of suitable rules to govern proffers is a matter properly left to the States, we decline ourselves to pass on petitioner's proffer. The judgment of the Supreme Court of Delaware is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Notes, Comments, and Questions

The details of suppression motion practice differ markedly among jurisdictions and even among judges in the same courthouse. Students who eventually practice criminal law must study carefully the rules and preferences of the judges before whom they appear. The overwhelming bulk of criminal cases never go to trial, and suppression hearings are often the most important court proceeding in a case.

One risk of which defense counsel must be aware concerns the use of suppression hearing testimony against a defendant should a case eventually go to trial. While such testimony cannot be used during the prosecution's case in chief (that is, cannot be used substantively to prove the defendant's guilt), *see Simmons v. United States*, 390 U.S. 377, 390 (1968), it can be used to impeach the defendant should her trial testimony contradict what she said at the hearing. *See, e.g.*, *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1290–91 (9th Cir. 1994); *United States v. Geraldo*, 271 F.3d 1112, 1116 (D.C. Cir. 2001).

An Introduction to the Availability of Monetary Damages

Much as members of the public commonly overestimate the role of the exclusionary rule in freeing guilty defendants on "technicalities," public opinion also overestimates the availability of money damages to the victims of police misconduct. For

multiple reasons, persons who suffer unlawful searches and seizures—as well as those who experience violations of their rights related to interrogations—rarely recover money.

First, many people under police investigation—the people most likely to undergo searches, seizures, and interrogations, whether lawful or unlawful—are criminals. Imagine, for example, that police violate the "knock-and-announce" rule and break down a suspect's door unlawfully. Then, while executing a valid search warrant, police find cocaine. Under the rule of *Hudson v. Michigan* (Chapter 32), the knock-and-announce violation would not stop prosecutors from using the seized drugs at trial to convict the suspect of illegal possession. In theory, the convicted defendant could then sue police for damages related to the breaking of his door. A lawsuit against state officials could be brought under "Section 1983," as 42 U.S.C. § 1983 is commonly known. A suit against federal officials could be brought under the remedy provided in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), which provides a civil remedy (known as a "*Bivens* action") for certain constitutional violations by federal agents. *See also Hernandez v. Mesa*, 140 S. Ct. 735 (U.S. 2020) (holding that family of a Mexican victim of unreasonable cross-border shooting by U.S. Border Patrol agent cannot bring *Bivens* action); *Egbert v. Boule*, 142 S. Ct. 457 (2021) (futher limiting the scope of *Bivens*).

In practice, however, the defendant would likely have trouble finding a lawyer willing to take the case. In order to make his case to jurors, the convicted criminal defendant—now a civil plaintiff—would need to describe the incident, which involves police finding cocaine at his home. Further, the plaintiff's testimony could be impeached with evidence of the drug conviction.[4] Jurors have been known to disfavor claims brought by convicted felons.

While a prevailing plaintiff in a "constitutional tort" case against state officials is entitled to reasonable attorney's fees paid by the defendant,[5] a plaintiff who loses must pay his own lawyer. Therefore, unless the victim of police misconduct has money for legal bills, he must convince a lawyer to take his case on a contingent fee basis, which a lawyer is likely to do only if she expects to win. In addition, if the actual damages awarded to prevailing plaintiffs are low, lawyers may not profit unless they win a high percentage of their cases. A lawyer who represents an indigent civil rights plaintiff on a contingency basis often pays up front for expenses such as travel, depositions, and expert witnesses. If the client loses, the lawyer may never be repaid for expenses in the tens of thousands of dollars. If the client wins, then the lawyer must hope that the judge's definition of a "reasonable fee" is fair, which may not always be true.[6] Unless a lawyer is taking the rare civil rights case on the side of a different kind of practice, the lawyer can make a living only if occasional clients win sizeable judgments. But juries have been known to award trivial sums, even in cases of serious misconduct.[7] While some cases do yield large judgments,[8] the overwhelming majority of practicing lawyers have no interest in representing civil rights plaintiffs who are unable to pay hourly bills. Many would-be plaintiffs with credible claims of unlawful searches and seizures, including police brutality and wrongful shootings, often cannot find lawyers to bring their cases.

Second, even if a plaintiff wins a court ruling that police violated his constitutional rights, he may be denied monetary compensation under the doctrine of "qualified immunity." Under qualified immunity, a defendant need not pay monetary damages unless her conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. In other words, even if a court finds that the defendant violated the plaintiff's constitutional rights, the plaintiff cannot recover unless the defendant's behavior violated "clearly established" law.

Supreme Court of the United States

Andrew Kisela v. Amy Hughes

Decided April 2, 2018 – 138 S. Ct. 1148

PER CURIAM.

Petitioner Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question is whether at the time of the shooting Kisela's actions violated clearly established law.

The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the woman had been acting erratically. About

the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.

All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a $20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick's dog, named Bunny. Chadwick "came home to find" Hughes "somewhat distressed," and Hughes was in the house holding Bunny "in one hand and a kitchen knife in the other." Hughes asked Chadwick if she "wanted [her] to use the knife on the dog." The officers knew none of this, though. Chadwick went outside to get $20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. Based on her experience as Hughes' roommate, Chadwick stated that Hughes "occasionally has episodes in which she acts inappropriately," but "she is only seeking attention."

Hughes sued Kisela, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. Kisela then filed a petition for certiorari in this Court. That petition is now granted.

Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct."

Although "this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." This Court has "'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'"

"[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

"Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." But the general rules [] "do not by themselves create clearly established law outside an 'obvious case.'" Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to

call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

[T]he petition for certiorari is granted; the judgment of the Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared "composed and content" and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he "wanted to continue trying verbal command[s] and see if that would work." But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

If this account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no "clearly established" law. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent.

I

This case arrives at our doorstep on summary judgment, so we must "view the evidence ... in the light most favorable to" Hughes, the nonmovant, "with respect to the central facts of this case." The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.

On May 21, 2010, Kisela and Officer-in-Training Alex Garcia received a "'check welfare'" call about a woman chopping away at a tree with a knife. They responded to the scene, where they were informed by the person who had placed the call (not Chadwick) that the woman with the knife had been acting "erratically." A third officer, Lindsay Kunz, later joined the scene. The officers observed Hughes, who matched the description given to the officers of the woman alleged to have been cutting the tree, emerge from a house with a kitchen knife in her hand. Hughes exited the front door and approached Chadwick, who was standing outside in the driveway.

Hughes then stopped about six feet from Chadwick, holding the kitchen knife down at her side with the blade pointed away from Chadwick. Hughes and Chadwick conversed with one another; Hughes appeared "composed and content," and did not look angry. At no point during this exchange did Hughes raise the kitchen knife or verbally threaten to harm Chadwick or the officers. Chadwick later averred that, during the incident, she was never in fear of Hughes and "was not the least bit threatened by the fact that [Hughes] had a knife in her hand" and that Hughes "never acted in a threatening manner." The officers did not observe Hughes commit any crime, nor was Hughes suspected of committing one.

Nevertheless, the officers hastily drew their guns and ordered Hughes to drop the knife. The officers gave that order twice, but the commands came "in quick succession." The evidence in the record suggests that Hughes may not have heard or understood the officers' commands and may not have been aware of the officers' presence at all. Although the officers were in uniform, they never verbally identified themselves as law enforcement officers.

Kisela did not wait for Hughes to register, much less respond to, the officers' rushed commands. Instead, Kisela immediately and unilaterally escalated the situation. Without giving any advance warning that he would shoot, and without attempting less dangerous methods to deescalate the situation, he dropped to the ground and shot four times at Hughes (who was stationary) through a chain-link fence. After being shot, Hughes fell to the ground, screaming and bleeding from her wounds. She looked

at the officers and asked, "'Why'd you shoot me?'" Hughes was immediately transported to the hospital, where she required treatment for her injuries. Kisela alone resorted to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure.

II

Police officers are not entitled to qualified immunity if "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" Faithfully applying that well-settled standard, the Ninth Circuit held that a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights. That conclusion was correct.

A

I begin with the first step of the qualified-immunity inquiry: whether there was a violation of a constitutional right. [Justice Sotomayer concluded (consistent with the Ninth Circuit opinion) that the "facts would permit a jury to conclude that Kisela acted outside the bounds of the Fourth Amendment by shooting Hughes four times."]

Rather than defend the reasonableness of Kisela's conduct, the majority sidesteps the inquiry altogether and focuses instead on the "clearly established" prong of the qualified-immunity analysis. To be "'clearly established' ... [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." That standard is not nearly as onerous as the majority makes it out to be. As even the majority must acknowledge, this Court has long rejected the notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." At its core, then, the "clearly established" inquiry boils down to whether Kisela had "fair notice" that he acted unconstitutionally.

The answer to that question is yes. This Court's precedents make clear that a police officer may only deploy deadly force against an individual if the officer "has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others." It is equally well established that any use of lethal force must be justified by some legitimate governmental interest. Consistent with those clearly established principles, and contrary to the majority's conclusion, Ninth Circuit precedent predating these events further confirms that Kisela's conduct was clearly unreasonable. Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela's conduct. The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the "clearly established" standard. It is enough that governing law places "the constitutionality of the officer's conduct beyond debate." Because, taking the facts in the light most favorable to Hughes, it is "beyond debate" that Kisela's use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity.

III

This unwarranted summary reversal is symptomatic of "a disturbing trend regarding the use of this Court's resources" in qualified-immunity cases. As I have previously noted, this Court routinely displays an unflinching willingness "to summarily reverse courts for wrongly denying officers the protection of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

Notes, Comments, and Questions

Recently, the Court again constrained the ability of plaintiffs to sue police. In *Vega v. Tekoh*, 142 S. Ct. 858 (2022), the Court held

that when police violate *Miranda* by conducting a custodial interrogation without delivering the required warnings, the *Miranda* violation does not provide the basis for a Section 1983 claim.

Our next case involves serious violations of the Court's rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), which requires that prosecutors provide material exculpatory evidence in their possession to the defense. Although this book does not explore the *Brady* rule, students should recognize its importance to avoiding wrongful convictions. Our next case illustrates the impediments in the path of a defendant who seeks monetary damages after winning release from prison by proving a *Brady* violation.

A bit of background will help students understand the plaintiff's cause of action. Because prosecutors (much like judges) normally enjoy absolute immunity from Section 1983 liability for actions taken during and in preparation for trial, see *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), plaintiff John Thompson alleged that district attorney Harry Connick failed to train his prosecutors adequately about their duty under *Brady* to produce evidence. Only especially egregious failures to train can justify civil liability.

Supreme Court of the United States

Harry F. Connick v. John Thompson

Decided March 29, 2011—563 U.S. 51

Justice THOMAS delivered the opinion of the Court.

The Orleans Parish District Attorney's Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under *Brady v. Maryland*. Thompson was convicted. Because of that conviction Thompson elected not to testify in his own defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson's scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson's convictions were vacated.

After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish District Attorney, for damages. Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson's robbery case. The jury awarded Thompson $14 million, and the Court of Appeals for the Fifth Circuit affirmed by an evenly divided en banc court. We granted certiorari to decide whether a district attorney's office may be held liable under § 1983 for failure to train based on a single *Brady* violation. We hold that it cannot.

I

A

In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza, Jr. in New Orleans. Publicity following the murder charge led the victims of an unrelated armed robbery to identify Thompson as their attacker. The district attorney charged Thompson with attempted armed robbery.

As part of the robbery investigation, a crime scene technician took from one of the victims' pants a swatch of fabric stained with the robber's blood. Approximately one week before Thompson's armed robbery trial, the swatch was sent to the crime laboratory. Two days before the trial, assistant district attorney Bruce Whittaker received the crime lab's report, which stated that the perpetrator had blood type B. There is no evidence that the prosecutors ever had Thompson's blood tested or that they knew what his blood type was. Whittaker claimed he placed the report on assistant district attorney James Williams' desk, but Williams denied seeing it. The report was never disclosed to Thompson's counsel.

Williams tried the armed robbery case with assistant district attorney Gerry Deegan. On the first day of trial, Deegan checked all of the physical evidence in the case out of the police property room, including the blood-stained swatch. Deegan then checked all of the evidence but the swatch into the courthouse property room. The prosecutors did not mention the swatch or the crime lab report at trial, and the jury convicted Thompson of attempted armed robbery.

A few weeks later, Williams and special prosecutor Eric Dubelier tried Thompson for the Liuzza murder. Because of the armed

robbery conviction, Thompson chose not to testify in his own defense. He was convicted and sentenced to death. In the 14 years following Thompson's murder conviction, state and federal courts reviewed and denied his challenges to the conviction and sentence. The State scheduled Thompson's execution for May 20, 1999.

In late April 1999, Thompson's private investigator discovered the crime lab report from the armed robbery investigation in the files of the New Orleans Police Crime Laboratory. Thompson was tested and found to have blood type O, proving that the blood on the swatch was not his. Thompson's attorneys presented this evidence to the district attorney's office, which, in turn, moved to stay the execution and vacate Thompson's armed robbery conviction. The Louisiana Court of Appeals then reversed Thompson's murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial. In 2003, the district attorney's office retried Thompson for Liuzza's murder. The jury found him not guilty.

B

Thompson then brought this action against the district attorney's office, Connick, Williams, and others, alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. The only claim that proceeded to trial was Thompson's claim under § 1983 that the district attorney's office had violated *Brady* by failing to disclose the crime lab report in his armed robbery trial. Thompson alleged liability under two theories: (1) the *Brady* violation was caused by an unconstitutional policy of the district attorney's office; and (2) the violation was caused by Connick's deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations.

Before trial, Connick conceded that the failure to produce the crime lab report constituted a *Brady* violation. Accordingly, the District Court instructed the jury that the "only issue" was whether the nondisclosure was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors.

Although no prosecutor remembered any specific training session regarding *Brady* prior to 1985, it was undisputed at trial that the prosecutors were familiar with the general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused. Prosecutors testified that office policy was to turn crime lab reports and other scientific evidence over to the defense. They also testified that, after the discovery of the undisclosed crime lab report in 1999, prosecutors disagreed about whether it had to be disclosed under *Brady* absent knowledge of Thompson's blood type.

The jury rejected Thompson's claim that an unconstitutional office policy caused the *Brady* violation, but found the district attorney's office liable for failing to train the prosecutors. The jury awarded Thompson $14 million in damages, and the District Court added more than $1 million in attorney's fees and costs.

After the verdict, Connick renewed his objection—which he had raised on summary judgment—that he could not have been deliberately indifferent to an obvious need for more or different *Brady* training because there was no evidence that he was aware of a pattern of similar *Brady* violations. The District Court rejected this argument.

A panel of the Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals sitting en banc vacated the panel opinion, granted rehearing, and divided evenly, thereby affirming the District Court. We granted certiorari.

II

The *Brady* violation conceded in this case occurred when one or more of the four prosecutors involved with Thompson's armed robbery prosecution failed to disclose the crime lab report to Thompson's counsel. Under Thompson's failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. We agree.

A

Title 42 U.S.C. § 1983 provides in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...."

A municipality or other local government may be liable under this section if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. But, under § 1983, local governments are responsible only for "their *own* illegal acts." They are not vicariously liable under § 1983 for their employees' actions.

Plaintiffs who seek to impose liability on local governments under § 1983 must prove that "action pursuant to official municipal policy" caused their injury. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. These are "action[s] for which the municipality is actually responsible."

In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." Only then "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city's "policy of inaction" in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution." A less stringent standard of fault for a failure-to-train claim "would result in *de facto respondeat superior* liability on municipalities ...."

B

A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Although Thompson does not contend that he proved a pattern of similar *Brady* violations, he points out that, during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office. Those four reversals could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.

C

1

Instead of relying on a pattern of similar *Brady* violations, Thompson relies on [] "single-incident" liability. He contends that the *Brady* violation in his case was the "obvious" consequence of failing to provide specific *Brady* training, and that this showing of "obviousness" can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.

Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of [] single-incident liability. Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both.

In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally

subject to an ethical regime designed to reinforce the profession's standards. An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training about how to obey the law. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in "the usual and recurring situations with which [the prosecutors] must deal." A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same "highly predictable" constitutional danger as [an] untrained officer.

We do not assume that prosecutors will always make correct *Brady* decisions or that guidance regarding specific *Brady* questions would not assist prosecutors. But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability. "[P]rov[ing] that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct" will not suffice.

3

The District Court and the Court of Appeals panel erroneously believed that Thompson had proved deliberate indifference by showing the "obviousness" of a need for additional training. They based this conclusion on Connick's awareness that (1) prosecutors would confront *Brady* issues while at the district attorney's office; (2) inexperienced prosecutors were expected to understand *Brady*'s requirements; (3) *Brady* has gray areas that make for difficult choices; and (4) erroneous decisions regarding *Brady* evidence would result in constitutional violations. This is insufficient.

It does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to "a decision by the city itself to violate the Constitution." To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights. He did not do so.

III

We conclude that this case does not fall within the narrow range of "single-incident" liability. The District Court should have granted Connick judgment as a matter of law on the failure-to-train claim because Thompson did not prove a pattern of similar violations that would "establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violate the Constitution." The judgment of the United States Court of Appeals for the Fifth Circuit is reversed.

Justice SCALIA, with whom Justice ALITO joins, concurring.

[T]o recover from a municipality under 42 U.S.C. § 1983, a plaintiff must satisfy a "rigorous" standard of causation; he must "demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Thompson cannot meet that standard. The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan's willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson. According to Deegan's colleague Michael Riehlmann, in 1994 Deegan confessed to him—in the same conversation in which Deegan revealed he had only a few months to live—that he had "suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant." I have no reason to disbelieve that account, particularly since Riehlmann's testimony hardly paints a flattering picture of himself: Riehlmann kept silent about Deegan's misconduct for another five years, as a result of which he incurred professional sanctions. And if Riehlmann's story is true, then the "moving force" behind the suppression of evidence was Deegan, not a failure of continuing legal education.

By now the reader has doubtless guessed the best-kept secret of this case: There was probably no *Brady* violation at all—except for Deegan's (which, since it was a bad-faith, knowing violation, could not possibly be attributed to lack of training). The dissent surely knows this, which is why it leans heavily on the fact that Connick conceded that *Brady* was violated. I can honor that concession in my analysis of the case because even if it extends beyond Deegan's deliberate actions, it remains irrelevant to Connick's training obligations. For any *Brady* violation apart from Deegan's was surely on the very frontier of our *Brady*

jurisprudence; Connick could not possibly have been on notice decades ago that he was required to instruct his prosecutors to respect a right to untested evidence that we had not *(and still have not)* recognized. As a consequence, even if I accepted the dissent's conclusion that failure-to-train liability could be premised on a single *Brady* error, I could not agree that the lack of an accurate training regimen caused the violation Connick has conceded.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In *Brady v. Maryland*, this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment. That obligation, the parties have stipulated, was dishonored in this case; consequently, John Thompson spent 18 years in prison, 14 of them isolated on death row, before the truth came to light: He was innocent of the charge of attempted armed robbery, and his subsequent trial on a murder charge, by prosecutorial design, was fundamentally unfair.

The Court holds that the Orleans Parish District Attorney's Office (District Attorney's Office or Office) cannot be held liable, in a civil rights action under 42 U.S.C. § 1983, for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant *Brady* violation, not a routine practice of giving short shrift to *Brady*'s requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court's assessment. As the trial record in the § 1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to *Brady* was standard operating procedure at the District Attorney's Office.

What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under § 1983.

I dissent from the Court's judgment mindful that *Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps. The prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility—made tangible by § 1983 liability—for adequately conveying what *Brady* requires and for monitoring staff compliance. Failure to train, this Court has said, can give rise to municipal liability under § 1983 "where the failure ... amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." That standard is well met in this case.

Thompson discovered the prosecutors' misconduct through a serendipitous series of events. In 1994, nine years after Thompson's convictions, Deegan, the assistant prosecutor in the armed robbery trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlmann that he had suppressed blood evidence in the armed robbery case. Deegan did not heed Riehlmann's counsel to reveal what he had done. For five years, Riehlmann, himself a former Orleans Parish prosecutor, kept Deegan's confession to himself.

On April 16, 1999, the State of Louisiana scheduled Thompson's execution. In an eleventh-hour effort to save his life, Thompson's attorneys hired a private investigator. Deep in the crime lab archives, the investigator unearthed a microfiche copy of the lab report identifying the robber's blood type. The copy showed that the report had been addressed to Whittaker. Thompson's attorneys contacted Whittaker, who informed Riehlmann that the lab report had been found. Riehlmann thereupon told Whittaker that Deegan "had failed to turn over stuff that might have been exculpatory." Riehlmann prepared an affidavit describing Deegan's disclosure "that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson."

Thompson's lawyers presented to the trial court the crime lab report showing that the robber's blood type was B, and a report identifying Thompson's blood type as O. This evidence proved Thompson innocent of the robbery. The court immediately stayed Thompson's execution and commenced proceedings to assess the newly discovered evidence.

Connick sought an abbreviated hearing. A full hearing was unnecessary, he urged, because the Office had confessed error and

had moved to dismiss the armed robbery charges. The court insisted on a public hearing. Given "the history of this case," the court said, it "was not willing to accept the representations that [Connick] and [his] office made [in their motion to dismiss]." After a full day's hearing, the court vacated Thompson's attempted armed robbery conviction and dismissed the charges. Before doing so, the court admonished:

"[A]ll day long there have been a number of young Assistant D.A.'s ... sitting in this courtroom watching this, and I hope they take home ... and take to heart the message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work."

The District Attorney's Office then initiated grand jury proceedings against the prosecutors who had withheld the lab report. Connick terminated the grand jury after just one day. He maintained that the lab report would not be *Brady* material if prosecutors did not know Thompson's blood type. And he told the investigating prosecutor that the grand jury "w[ould] make [his] job more difficult." In protest, that prosecutor tendered his resignation.

Thereafter, the Louisiana Court of Appeal reversed Thompson's murder conviction. The unlawfully procured robbery conviction, the court held, had violated Thompson's right to testify and thus fully present his defense in the murder trial. The merits of several *Brady* claims arising out of the murder trial, the court observed, had therefore become "moot."

Undeterred by his assistants' disregard of Thompson's rights, Connick retried him for the Liuzza murder. Thompson's defense was bolstered by evidence earlier unavailable to him: ten exhibits the prosecution had not disclosed when Thompson was first tried. The newly produced items included police reports describing the assailant in the murder case as having "close cut" hair, the police report recounting Perkins' meetings with the Liuzza family, audio recordings of those meetings, and a 35-page supplemental police report. After deliberating for only 35 minutes, the jury found Thompson not guilty.

On May 9, 2003, having served more than 18 years in prison for crimes he did not commit, Thompson was released.

On July 16, 2003, Thompson commenced a civil action under 42 U.S.C. § 1983 alleging that Connick, other officials of the Orleans Parish District Attorney's Office, and the Office itself, had violated his constitutional rights by wrongfully withholding *Brady* evidence. Thompson sought to hold Connick and the District Attorney's Office liable for failure adequately to train prosecutors concerning their *Brady* obligations. Such liability attaches, I agree with the Court, only when the failure "amount[s] to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" I disagree, however, with the Court's conclusion that Thompson failed to prove deliberate indifference.

Having weighed all the evidence, the jury in the § 1983 case found for Thompson, concluding that the District Attorney's Office had been deliberately indifferent to Thompson's *Brady* rights and to the need for training and supervision to safeguard those rights. "Viewing the evidence in the light most favorable to [Thompson], as appropriate in light of the verdic[t] rendered by the jury," I see no cause to upset the District Court's determination, affirmed by the Fifth Circuit, that "ample evidence ... adduced at trial" supported the jury's verdict.

* * *

In our next chapter, we return to substantive criminal procedure law, examining the right to counsel provided by the Sixth Amendment.

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5: THE RIGHT TO COUNSEL

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5.1: Chapter 36 - Introduction to the Right to Counsel and Ineffective Assistance

THE RIGHT TO COUNSEL

Chapter 36

Introduction to the Right to Counsel and Ineffective Assistance

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." For more than a century after the ratification of the Amendment, this right allowed criminal defendants to hire their own lawyers but did not require the government to provide counsel to indigent defendants who could not afford to hire counsel. In 1932, the Court held that state court indigent defendants must be provided counsel in death penalty cases. *See Powell v. Alabama*, 287 U.S. 45 (1932) (the "Scottsboro Boys" case). Although the Court soon thereafter required federal courts to provide counsel even in non-capital cases, *see Johnson v. Zerbst*, 304 U.S. 458 (1938), the Court held in 1942 that for ordinary felony cases, state courts could decide for themselves whether to appoint counsel to indigent defendants. *See Betts v. Brady*, 316 U.S. 455, 473 (1942) ("we cannot say that the [Fourteenth A]mendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel").

In 1963, the Court reversed *Betts v. Brady* in the landmark case of *Gideon v. Wainwright*. The story of Clarence Earl Gideon inspired one of the best known works of legal journalism—*Gideon's Trumpet* (1964), by Anthony Lewis—as well as a movie with the same title starring Henry Fonda. Gideon asked for counsel when charged with a Florida crime, and the state judge refused to appoint him a lawyer. After his conviction, he appealed unsuccessfully in Florida courts. He then sent a handwritten note to the Supreme Court, which agreed to take the case.

Supreme Court of the United States

Clarence Earl Gideon v. Louie L. Wainwright

Decided March 18, 1963 – 372 U.S. 335

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. [T]he problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another

review here, we granted certiorari. Since Gideon was proceeding *in forma pauperis*, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in *Betts v. Brady* be reconsidered?"

I

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison. Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision.

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the *Betts* case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts v. Brady* holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that *Betts v. Brady* should be overruled.

II

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the states, the question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment." [T]he Court [in *Betts*] concluded that "appointment of counsel is not a fundamental right, essential to a fair trial." It was for this reason the *Betts* Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon the states by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. In many cases [], this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation, the Fourth Amendment's prohibition of unreasonable searches and seizures, and the Eighth's ban on cruel and unusual punishment.

We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that "the right to the aid of counsel is of this fundamental character."

The fact is that in deciding as it did—that "appointment of counsel is not a fundamental right, essential to a fair trial"—the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder

we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down" and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Notes, Comments, and Questions

After the Court decided *Gideon v. Wainwright*, the state of Florida retried Gideon. He was represented by counsel at his second trial and was acquitted.

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court extended the rule of *Gideon* to all cases in which a defendant faces possible imprisonment, rejecting an argument it should be limited to cases in which a substantial prison sentence was possible. "The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." *Id.* at 33.[1]

Students should note that because the Assistance of Counsel Clause applies only to "criminal prosecutions," the holding of *Gideon* does not provide a right to appointed counsel in all serious cases, only criminal cases. For example, a person at risk of deportation in immigration court has no right to counsel under *Gideon*, nor does a housing court litigant at risk of eviction, nor does a civil defendant sued for millions of dollars.

Students should also note that the right to trial by jury exists only if the maximum potential sentence exceeds six months. If the maximum is exactly six months or less, then the prosecutor can have a bench trial even if defendant objects. *See Duncan v. Louisiana*, 391 U.S. 145 (1968); *see also Baldwin v. New York*, 399 U.S. 66 (1970). If the statutory maximum is, say, eight months, then prosecutor can say she won't seek a sentence in excess of six months to avoid dealing with a jury. If the defendant is charged with two counts, and each count has a maximum sentence of four months, that does not exceed six months for purposes of this rule. The test is whether any offense has a maximum possible sentence above six months. (Also, in actual practice, someone convicted on two counts, each with a maximum sentence of four months, usually serves four months rather than eight months. Sentences for multiple counts usually run concurrently instead of consecutively, absent an unusual statute.)

Because the "assistance of counsel" would have little value if the defendant's lawyer literally arrived only for the trial and provided help at no other time, the Court has held that defendants have the right to counsel not only at trial but also at other "critical stages" of the prosecution. These "critical stages" include: post-indictment line-ups (*see United States v. Wade,* chapter 38),

preliminary hearings (see *Coleman v. Alabama,* 399 U.S. 1 (1970)), post-indictment interrogations (see *Massiah,* chapter 29), and arraignments (see *Hamilton v. Alabama,* 368 U.S. 52 (1961)). Recall also *Rothgery v. Gillespie County* (discussed in Chapter 29), in which the Court held that the right to counsel attaches at a defendant's first presentation before judicial officer, even if no lawyer is there for the prosecution.

By contrast, a defendant has no right to government-funded counsel after the conclusion of initial (direct) appeals. Accordingly, for certiorari petitions, *habeas corpus* petitions, and similar efforts, the defendant must pay a lawyer, find *pro bono* counsel, or proceed *pro se*.

Since the Court decided *Gideon*, states have created systems for the provision of counsel to indigent criminal defendants. The quality of these systems varies tremendously from state to state. Common issues confronted by states include the quality of appointed counsel—especially in complicated cases, and most especially in capital cases—as well as funding to pay lawyers, experts, and other costs. States also diverge in their definitions of who qualifies as sufficiently indigent for appointed counsel. For a review of the state of indigent defense in the states, see the articles collected in the Summer 2010 symposium issue of the *Missouri Law Review*, entitled "Broke and Broken: Can We Fix Our State Indigent Defense System?" Topics include ethical duties lawyers owe to indigent clients, state constitutional challenges to inadequate indigent defense systems, and ethical issues provided by excessive caseloads. One recent example of a state system in crisis occurred in 2016, when the lead public defender in Missouri attempted to assign a criminal case to the state's governor, claiming that grievous underfunding justified the unusual move.[2]

Ineffective Assistance of Counsel

The Sixth Amendment right to counsel has never been interpreted to mean that all defendants have the right to perfect, or even to very good, counsel. However, if the quality of counsel falls below the minimum standards of the legal profession, a convicted defendant may sometimes have a conviction set aside on the basis of "ineffective assistance of counsel." In *Strickland v. Washington*, the Court set forth the standard for ineffective assistance claims.

Supreme Court of the United States

Charles E. Strickland v. David Leroy Washington

Decided May 14, 1984 – 466 U.S. 668

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant

prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. He also stated, however, that he accepted responsibility for the crimes. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Counsel also argued that respondent had no history of criminal activity and that respondent committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sisters-in-law, who sustained severe—in one case, ultimately fatal—injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances "would still clearly far outweigh" that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance and could appreciate the criminality of his acts. Third, none of the victims was a participant in, or consented to, respondent's conduct. Fourth, respondent's participation in the crimes was neither minor nor the result of duress or domination by an accomplice. Finally, respondent's age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent's planning of the crimes and disposition of the proceeds of the various accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances." He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influence of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes.

The trial court denied relief without an evidentiary hearing, finding that the record evidence conclusively showed that the ineffectiveness claim was meritless. Four of the assertedly prejudicial errors required little discussion. First, there were no grounds to request a continuance, so there was no error in not requesting one when respondent pleaded guilty. Second, failure to request a presentence investigation was not a serious error because the trial judge had discretion not to grant such a request and because any presentence investigation would have resulted in admission of respondent's "rap sheet" and thus would have undermined his assertion of no significant history of criminal activity. Third, the argument and memorandum given to the sentencing judge were "admirable" in light of the overwhelming aggravating circumstances and absence of mitigating circumstances. Fourth, there was no error in failure to examine the medical examiner's reports or to cross-examine the medical witnesses testifying on the manner of death of respondent's victims, since respondent admitted that the victims died in the ways shown by the unchallenged medical evidence.

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of extreme mental or emotional disturbance. All three reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack. The Florida Supreme Court affirmed the denial of relief.

C

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. The court [] denied the petition for a writ of habeas corpus.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards.

D

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the

Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. With the exception of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial.

For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. We address the merits of the constitutional issue.

II

In a long line of cases [] this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's

errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. The Court indirectly recognized as much when it stated [] that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's

function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. [P]rejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what

impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]." Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles.

Application of the governing principles is not difficult in this case. The facts as described above, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of

reasonable professional judgment.

With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly [r]eversed.

Justice MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assistance of counsel." The state and lower federal courts have developed standards for distinguishing effective from inadequate assistance. Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. I disagree with both of these rulings.

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably" and must act like "a reasonably competent attorney" is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was

represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

[Justice Marshall then argued that even under the standard set forth by the majority, Strickland's claim should have prevailed.]

Notes, Comments, and Questions

The *Strickland* standard requires two showings from the defendant. First, the defendant must show that there was a deficiency in the attorney's performance, and second, the defendant must how that that deficiency prejudiced the defense. In other words, the defendant must show that but for the attorney's unprofessional errors, the outcome might well have been different.

Justice Marshall, on the other hand, focuses on the fairness of the process. He finds the requirement that a defendant prove prejudice, even after his attorney has been shown to be ineffective, is "senseless" because of the difficulties in making such a showing. Justice Marshall proposes the Sixth Amendment is violated when a defendant is represented by a manifestly ineffective attorney regardless of what other evidence of guilt the prosecution might possess.

Students should consider whether they find the majority or Justice Marshall more persuasive. Why? What are the problems, if any, with the majority's standard (or its application of the standard to the facts before it)? What are the problems, if any, with Justice Marshall's proposed alternative?

While *Strickland* articulated a two-pronged test applicable when a defendant points to a specific error made by counsel, prejudice is presumed (that is, the defendant needs to prove it) when the defendant's ineffective assistance claim rests on counsel's failure "to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648 (1984). The Court in *Cronic*, articulated that surrounding circumstances (rather than specific error) can give rise to a presumption of prejudice when counsel's overall deficiency is akin to having no counsel at all. Some circuit courts have expanded the *Cronic* standard to encompass counsel that sleep during the entirety of trial and counsel that ask no questions on cross examination.

In our next chapter, we continue our examination of ineffective assistance claims. We also review when a criminal defendant may represent himself and when a Court may deny that option to a defendant.

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5.2: Chapter 37 - Self-Representation and More on Ineffective Assistance

THE RIGHT TO COUNSEL

Chapter 37

Self-Representation and More on Ineffective Assistance

In this chapter we continue our study of what constitutes effective (and ineffective) assistance of counsel in criminal cases. We also explore when a criminal defendant has the right to represent herself, even if a judge believes that she would be better served by a lawyer.

We begin with the Court's application of *Strickland v. Washington* (Chapter 36) to cases in which no trial occurs because the defendant enters a plea of guilty.

Supreme Court of the United States

Missouri v. Galin E. Frye

Decided March 21, 2012 – 566 U.S. 134

Justice KENNEDY delivered the opinion of the Court.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later. The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance.

I

In August 2007, respondent Galin Frye was charged with driving with a revoked license. Frye had been convicted for that offense on three other occasions, so the State of Missouri charged him with a class D felony, which carries a maximum term of imprisonment of four years.

On November 15, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains. The prosecutor first offered to recommend a 3-year sentence if there was a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation that Frye serve 10 days in jail as so-called "shock" time. The second offer was to reduce the charge to a misdemeanor and, if Frye pleaded guilty to it, to recommend a 90-day sentence. The misdemeanor charge of driving with a revoked license carries a maximum term of imprisonment of one year. The letter stated both offers would expire on December 28. Frye's attorney did not advise Frye that the offers had been made. The offers expired.

Frye's preliminary hearing was scheduled for January 4, 2008. On December 30, 2007, less than a week before the hearing, Frye was again arrested for driving with a revoked license. At the January 4 hearing, Frye waived his right to a preliminary hearing on the charge arising from the August 2007 arrest. He pleaded not guilty at a subsequent arraignment but then changed his plea to guilty. There was no underlying plea agreement. The state trial court accepted Frye's guilty plea. The prosecutor recommended a 3-year sentence, made no recommendation regarding probation, and requested 10 days shock time in jail. The trial judge sentenced Frye to three years in prison.

Frye filed for postconviction relief in state court. He alleged his counsel's failure to inform him of the prosecution's plea offer denied him the effective assistance of counsel. At an evidentiary hearing, Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer.

A state court denied the postconviction motion, but the Missouri Court of Appeals reversed. To implement a remedy for the violation, the court deemed Frye's guilty plea withdrawn and remanded to allow Frye either to insist on a trial or to plead guilty to any offense the prosecutor deemed it appropriate to charge. This Court granted certiorari.

II

A

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.

With respect to the right to effective counsel in plea negotiations, a proper beginning point is to discuss two cases from this Court considering the role of counsel in advising a client about a plea offer and an ensuing guilty plea: *Hill v. Lockhart,* 474 U.S. 52 (1985) and *Padilla v. Kentucky,* 559 U.S. 356 (2010).

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of *Strickland,* determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill,* the decision turned on the second part of the *Strickland* test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged.

In *Padilla,* the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel.

The State is correct to point out that *Hill* and *Padilla* concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present. Before a guilty plea is entered the defendant's understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against later claims that the plea was the result of inadequate advice. At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea. *Hill* and *Padilla* both illustrate that, nevertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered. Still, the State, and the trial court itself, have had a substantial opportunity to guard against this contingency by establishing at the plea entry proceeding that the defendant has been given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.

When a plea offer has lapsed or been rejected, however, no formal court proceedings are involved. This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event. And, as noted, the State insists there is no right to receive a plea offer. For all these reasons, the State contends, it is unfair to subject it to the consequences of defense counsel's inadequacies, especially when the opportunities for a full and fair trial, or, as here, for a later guilty plea albeit on less favorable terms, are preserved.

The State's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. The

reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. "Anything less ... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"

B

Here the question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.

This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides. The American Bar Association recommends defense counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney" and this standard has been adopted by numerous state and federal courts over the last 30 years. The standard for prompt communication and consultation is also set out in state bar professional standards for attorneys.

The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence.

Here defense counsel did not communicate the formal offers to the defendant. As a result of that deficient performance, the offers lapsed. Under *Strickland,* the question then becomes what, if any, prejudice resulted from the breach of duty.

C

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

This application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill*. In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* was correctly decided and applies in the context in which it arose. *Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea

negotiations. Unlike the defendant in *Hill,* Frye argues that with effective assistance he would have accepted an earlier plea offer (limiting his sentence to one year in prison) as opposed to entering an open plea (exposing him to a maximum sentence of four years' imprisonment). In a case, such as this, where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland*'s inquiry into whether "the result of the proceeding would have been different," requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is of particular importance because a defendant has no right to be offered a plea nor a federal right that the judge accept it. In at least some States, including Missouri, it appears the prosecution has some discretion to cancel a plea agreement to which the defendant has agreed. The Federal Rules, some state rules including in Missouri, and this Court's precedents give trial courts some leeway to accept or reject plea agreements. It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

III

These standards must be applied to the instant case. As regards the deficient performance prong of *Strickland,* the Court of Appeals found the "record is void of *any* evidence of *any* effort by trial counsel to communicate the [formal] Offer to Frye during the Offer window, let alone any evidence that Frye's conduct interfered with trial counsel's ability to do so." On this record, it is evident that Frye's attorney did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired. The Missouri Court of Appeals was correct that "counsel's representation fell below an objective standard of reasonableness."

The Court of Appeals erred, however, in articulating the precise standard for prejudice in this context. As noted, a defendant in Frye's position must show not only a reasonable probability that he would have accepted the lapsed plea but also a reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court. Frye can show he would have accepted the offer, but there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final.

There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor. It may be that in some cases defendants must show more than just a guilty plea to a charge or sentence harsher than the original offer. For example, revelations between plea offers about the strength of the prosecution's case may make a late decision to plead guilty insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him. Here, however, that is not the case. The Court of Appeals did not err in finding Frye's acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it; and there is no need to address here the showings that might be required in other cases.

The Court of Appeals failed, however, to require Frye to show that the first plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court. Whether the prosecution and trial court are required to do so is a matter of state law, and it is not the place of this Court to settle those matters. The Court has established the minimum requirements of the Sixth Amendment as interpreted in *Strickland,* and States have the discretion to add procedural protections under state law if they choose. A State may choose to preclude the prosecution from withdrawing a plea offer once it has been accepted or perhaps to preclude a trial court from rejecting a plea bargain. In Missouri, it appears "a plea offer once accepted by the defendant can be withdrawn without recourse" by the prosecution. The extent of the trial court's discretion in Missouri to reject a plea agreement appears to be in some doubt.

We remand for the Missouri Court of Appeals to consider these state-law questions, because they bear on the federal question of *Strickland* prejudice. If, as the Missouri court stated here, the prosecutor could have canceled the plea agreement, and if Frye fails to show a reasonable probability the prosecutor would have adhered to the agreement, there is no *Strickland* prejudice. Likewise, if the trial court could have refused to accept the plea agreement, and if Frye fails to show a reasonable probability the trial court

would have accepted the plea, there is no *Strickland* prejudice. In this case, given Frye's new offense for driving without a license on December 30, 2007, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it at the January 4, 2008, hearing, unless they were required by state law to do so.

It is appropriate to allow the Missouri Court of Appeals to address this question in the first instance. The judgment of the Missouri Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

* * *

As the *Frye* Court noted, the Court decided in *Padilla v. Kentucky* that effective representation includes informing a defendant of the "immigration consequences" of a guilty plea. Because immigration law is complicated, and the consequences of a conviction (for example, whether it will lead to the convicted defendant's removal from the United States) may not be obvious, criminal defense lawyers should obtain assistance from lawyers with immigration expertise.

In our next case, the Court considered whether a lawyer may concede a defendant's guilt—as part of a strategy to avoid a death sentence—over the client's objection.

Supreme Court of the United States

Robert Leroy McCoy v. Louisiana

Decided May 14, 2018 – 138 S. Ct. 1500

Justice GINSBURG delivered the opinion of the Court.

In *Florida v. Nixon,* 543 U.S. 175 (2004), this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects." In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy.

In the case now before us, in contrast to *Nixon,* the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. Yet the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant "committed three murders.... [H]e's guilty." We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right "to have the *Assistance* of Counsel for *his* defence," the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

I

On May 5, 2008, Christine and Willie Young and Gregory Colston were shot and killed in the Youngs' home in Bossier City, Louisiana. The three victims were the mother, stepfather, and son of Robert McCoy's estranged wife, Yolanda. Several days later, police arrested McCoy in Idaho. Extradited to Louisiana, McCoy was appointed counsel from the public defender's office. A Bossier Parish grand jury indicted McCoy on three counts of first-degree murder, and the prosecutor gave notice of intent to seek the death penalty. McCoy pleaded not guilty. Throughout the proceedings, he insistently maintained he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. At defense counsel's request, a court-appointed sanity commission examined McCoy and found him competent to stand trial.

In December 2009 and January 2010, McCoy told the court his relationship with assigned counsel had broken down irretrievably. He sought and gained leave to represent himself until his parents engaged new counsel for him. In March 2010, Larry English, engaged by McCoy's parents, enrolled as McCoy's counsel. English eventually concluded that the evidence against McCoy was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase. McCoy, English reported, was "furious" when told, two weeks before trial was scheduled to begin, that English would concede McCoy's commission of the triple murders. McCoy told English "not to make that concession," and English knew of McCoy's "complet[e] oppos[ition] to [English] telling the jury that [McCoy] was guilty of killing the three victims";

instead of any concession, McCoy pressed English to pursue acquittal.

At a July 26, 2011 hearing, McCoy sought to terminate English's representation, and English asked to be relieved if McCoy secured other counsel. With trial set to start two days later, the court refused to relieve English and directed that he remain as counsel of record. "[Y]ou are the attorney," the court told English when he expressed disagreement with McCoy's wish to put on a defense case, and "you have to make the trial decision of what you're going to proceed with."

At the beginning of his opening statement at the guilt phase of the trial, English told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than Robert McCoy was the cause of these individuals' death." McCoy protested; out of earshot of the jury, McCoy told the court that English was "selling [him] out" by maintaining that McCoy "murdered [his] family." The trial court reiterated that English was "representing" McCoy and told McCoy that the court would not permit "any other outbursts." Continuing his opening statement, English told the jury the evidence is "unambiguous," "my client committed three murders." McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. In his closing argument, English reiterated that McCoy was the killer. On that issue, English told the jury that he "took [the] burden off of [the prosecutor]." The jury then returned a unanimous verdict of guilty of first-degree murder on all three counts. At the penalty phase, English again conceded "Robert McCoy committed these crimes," but urged mercy in view of McCoy's "serious mental and emotional issues." The jury returned three death verdicts.

Represented by new counsel, McCoy unsuccessfully moved for a new trial, arguing that the trial court violated his constitutional rights by allowing English to concede McCoy "committed three murders" over McCoy's objection. The Louisiana Supreme Court affirmed the trial court's ruling that defense counsel had authority so to concede guilt, despite the defendant's opposition to any admission of guilt.

We granted certiorari in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection.

II

A

The Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence." At common law, self-representation was the norm. As the laws of England and the American Colonies developed, providing for a right to counsel in criminal cases, self-representation remained common and the right to proceed without counsel was recognized. Even now, when most defendants choose to be represented by counsel, an accused may insist upon representing herself—however counterproductive that course may be. As this Court explained, "[t]he right to defend is personal," and a defendant's choice in exercising that right "must be honored out of 'that respect for the individual which is the lifeblood of the law.'"

The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in "grant[ing] to the accused personally the right to make his defense," "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal.

Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.

Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. When a client expressly asserts that the objective of "*his* defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.

Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's,

respective trial management roles. Counsel, in any case, must still develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option. In this case, the court had determined that McCoy was competent to stand trial, *i.e.,* that McCoy had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." If, after consultations with English concerning the management of the defense, McCoy disagreed with English's proposal to concede McCoy committed three murders, it was not open to English to override McCoy's objection. English could not interfere with McCoy's telling the jury "I was not the murderer," although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction.

III

Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence to McCoy's claim. To gain redress for attorney error, a defendant ordinarily must show prejudice. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.

Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt.

Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.

Larry English was placed in a difficult position; he had an unruly client and faced a strong government case. He reasonably thought the objective of his representation should be avoidance of the death penalty. But McCoy insistently maintained: "I did not murder my family." Once he communicated that to court and counsel, strenuously objecting to English's proposed strategy, a concession of guilt should have been off the table. The trial court's allowance of English's admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment. Because the error was structural, a new trial is the required corrective.

For the reasons stated, the judgment of the Louisiana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, dissenting.

The Constitution gives us the authority to decide real cases and controversies; we do not have the right to simplify or otherwise change the facts of a case in order to make our work easier or to achieve a desired result. But that is exactly what the Court does in this case. The Court overturns petitioner's convictions for three counts of first-degree murder by attributing to his trial attorney, Larry English, something that English never did. The Court holds that English violated petitioner's constitutional rights by "admit[ting] h[is] client's guilt of a charged crime over the client's intransigent objection." But English did not admit that petitioner was guilty of first-degree murder. Instead, faced with overwhelming evidence that petitioner shot and killed the three victims, English admitted that petitioner committed one element of that offense, *i.e.,* that he killed the victims. But English strenuously argued that petitioner was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense. So the Court's newly discovered fundamental right simply does not apply to the real facts of this case.

The real case is far more complex. Indeed, the real situation English faced at the beginning of petitioner's trial was the result of a freakish confluence of factors that is unlikely to recur.

Retained by petitioner's family, English found himself in a predicament as the trial date approached. The evidence against his client was truly "overwhelming," as the Louisiana Supreme Court aptly noted. Among other things, the evidence showed the following. Before the killings took place, petitioner had abused and threatened to kill his wife, and she was therefore under police protection. On the night of the killings, petitioner's mother-in-law made a 911 call and was heard screaming petitioner's first name.

She yelled: "'She ain't here, Robert ... I don't know where she is. The detectives have her. Talk to the detectives. She ain't in there, Robert.'" Moments later, a gunshot was heard, and the 911 call was disconnected.

Officers were dispatched to the scene, and on arrival, they found three dead or dying victims—petitioner's mother-in-law, her husband, and the teenage son of petitioner's wife. The officers saw a man who fit petitioner's description fleeing in petitioner's car. They chased the suspect, but he abandoned the car along with critical evidence linking him to the crime: the cordless phone petitioner's mother-in-law had used to call 911 and a receipt for the type of ammunition used to kill the victims. Petitioner was eventually arrested while hitchhiking in Idaho, and a loaded gun found in his possession was identified as the one used to shoot the victims. In addition to all this, a witness testified that petitioner had asked to borrow money to purchase bullets shortly before the shootings, and surveillance footage showed petitioner purchasing the ammunition on the day of the killings. And two of petitioner's friends testified that he confessed to killing at least one person.

Despite all this evidence, petitioner, who had been found competent to stand trial and had refused to plead guilty by reason of insanity, insisted that he did not kill the victims. He claimed that the victims were killed by the local police and that he had been framed by a farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho. Petitioner believed that even his attorney and the trial judge had joined the plot.

The weekend before trial, ... [h]e asked the trial court to replace English, and English asked for permission to withdraw. Petitioner stated that he had secured substitute counsel, but he was unable to provide the name of this new counsel, and no new attorney ever appeared. The court refused these requests and also denied petitioner's last-minute request to represent himself. (Petitioner does not challenge these decisions here.) So petitioner and English were stuck with each other, and petitioner availed himself of his right to take the stand to tell his wild story. Under those circumstances, what was English supposed to do?

The Louisiana Supreme Court held that English could not have put on petitioner's desired defense without violating state ethics rules, but this Court effectively overrules the state court on this issue of state law. However, even if it is assumed that the Court is correct on this ethics issue, the result of mounting petitioner's conspiracy defense almost certainly would have been disastrous. That approach stood no chance of winning an acquittal and would have severely damaged English's credibility in the eyes of the jury, thus undermining his ability to argue effectively against the imposition of a death sentence at the penalty phase of the trial. As English observed, taking that path would have only "help[ed] the District Attorney send [petitioner] to the death chamber." So, again, what was English supposed to do?

When pressed at oral argument before this Court, petitioner's current counsel eventually provided an answer: English was not required to take any affirmative steps to support petitioner's bizarre defense, but instead of conceding that petitioner shot the victims, English should have ignored that element entirely. So the fundamental right supposedly violated in this case comes down to the difference between the two statements set out below.

Constitutional: "First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I submit to you that my client did not have the intent required for conviction for that offense."

Unconstitutional: "First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I admit that my client shot and killed the victims, but I submit to you that he did not have the intent required for conviction for that offense."

The practical difference between these two statements is negligible. If English had conspicuously refrained from endorsing petitioner's story and had based his defense solely on petitioner's dubious mental condition, the jury would surely have gotten the message that English was essentially conceding that petitioner killed the victims. But according to petitioner's current attorney, the difference is fundamental. The first formulation, he admits, is perfectly fine. The latter, on the other hand, is a violation so egregious that the defendant's conviction must be reversed even if there is no chance that the misstep caused any harm. It is no wonder that the Court declines to embrace this argument and instead turns to an issue that the case at hand does not actually present.

The constitutional right that the Court has now discovered—a criminal defendant's right to insist that his attorney contest his guilt with respect to all charged offenses—is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come. Why is this so?

First, it is hard to see how the right could come into play in any case other than a capital case in which the jury must decide both guilt and punishment. In all other cases, guilt is almost always the only issue for the jury, and therefore admitting guilt of all charged offenses will achieve nothing. It is hard to imagine a situation in which a competent attorney might take that approach. So the right that the Court has discovered is effectively confined to capital cases.

Second, few rational defendants facing a possible death sentence are likely to insist on contesting guilt where there is no real chance of acquittal and where admitting guilt may improve the chances of avoiding execution. Indeed, under such circumstances, the odds are that a rational defendant will plead guilty in exchange for a life sentence. By the same token, an attorney is unlikely to insist on admitting guilt over the defendant's objection unless the attorney believes that contesting guilt would be futile. So the right is most likely to arise in cases involving irrational capital defendants.

Third, where a capital defendant and his retained attorney cannot agree on a basic trial strategy, the attorney and client will generally part ways unless, as in this case, the court is not apprised until the eve of trial. The client will then either search for another attorney or decide to represent himself. So the field of cases in which this right might arise is limited further still—to cases involving irrational capital defendants who disagree with their attorneys' proposed strategy yet continue to retain them.

Fourth, if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal.

Finally, even if all the above conditions are met, the right that the Court now discovers will not come into play unless the defendant expressly protests counsel's strategy of admitting guilt. Where the defendant is advised of the strategy and says nothing, or is equivocal, the right is deemed to have been waived.

Notes, Comments, and Questions

In general, courts reviewing claims of ineffective assistance of counsel are deferential to decisions by lawyers that can plausibly be described as "strategy." Notwithstanding the result in *McCoy*, lawyers enjoy broad latitude to decide how to achieve a client's objectives, and judges rarely second guess choices simply because bad results followed. By contrast, ineffective assistance claims have greater success when a lawyer's action (or inaction) appears driven by laziness rather than by tactics.

For example, a lawyer who interviews a potential alibi witness and chooses not to call her as a trial witness can later explain the strategy behind the choice. Perhaps the witness seemed shifty and counsel feared the jury would think poorly of a defendant who called such a witness. But if a client tells a lawyer of a potential alibi witness, and the lawyer conducts no investigation, the lawyer may have trouble justifying that choice.

Relatedly, defense lawyers have a duty to obtain expert testimony in cases where any reasonable lawyer would do so. An insanity defense, for example, will normally require expert testimony about the client's mental health.

A few examples help illustrate the sorts of failings that constitute ineffective assistance:

In *Hinton v. Alabama*, 571 U.S. 263 (2014), the lawyer in a capital case had failed to obtain a qualified expert on "firearms and toolmark" evidence, largely because the lawyer erroneously believed that state law authorized only $1,000 for the cost of an expert. The Court held, "The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance." Subsequently, Hinton was exonerated and released after thirty years in prison. He tells his story in *The Sun Does Shine: How I Found Life and Freedom on Death Row* (2018).

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court found ineffective assistance in the penalty phase of a capital case after trial counsel failed to conduct an adequate investigation into the defendant's background. "Counsel's decision not to expand their investigation beyond the [presentence investigation (PSI) report] and the [Baltimore City Department of Social Services (DSS)] records fell short of the professional standards that prevailed in Maryland in 1989."

In *Rompilla v. Beard*, 545 U.S. 374 (2005), the Court found ineffective assistance in a lawyer's failure to examine a capital defendant's prior case files. "Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. ... [I]t is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation."

Rompilla offers insight on how changes to Court membership can affect constitutional law. Justice Sandra Day O'Connor voted with the majority, and the case was decided 5-4. (She joined the majority opinion and also filed a concurrence.) About two weeks afterward, O'Connor announced her retirement. O'Connor's seat on the Court was then filled by Justice Samuel Alito, who joined the Court in 2006. As it happens, the Third Circuit judgment reversed by the Supreme Court in *Rompilla* was explained in an opinion written by then-Circuit Judge Alito. *See* 355 F.3d 233. Would a case with similar facts be decided the same way today?

Self-Representation by Criminal Defendants

In *Faretta v. California*, 422 U.S. 806 (1975), the Court considered "whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." The Court said that another way to frame the question was "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."

In an opinion by Justice Stewart, the Court noted that a defendant's right to represent himself in criminal cases had long been recognized in America. "In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. With few exceptions, each of the several States also accords a defendant the right to represent himself in any criminal case. The constitutions of 36 States explicitly confer that right. Moreover, many state courts have expressed the view that the right is also supported by the Constitution of the United States." Recognizing that longstanding practice has its own persuasive authority, the Court wrote, "We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."

The Court noted, too, that the Sixth Amendment provides the defendant with various rights; the rights are not provided to the lawyer. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

The Court then decided that even though a defendant would normally be extraordinarily foolish to forgo the assistance of counsel in favor of self-representation, the Constitution provides the option:

"It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage."

When a defendant wishes to forgo counsel, a trial judge must advise the defendant carefully of the consequences. The decision then belongs to the defendant.

The Court's decision inspired a spirited dissent.

Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

This case [] is another example of the judicial tendency to constitutionalize what is thought "good." That effort fails on its own terms here, because there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges. Moreover, there is no constitutional basis for the Court's holding, and it can only add to the problems of an already malfunctioning criminal justice system. I therefore dissent.

The fact of the matter is that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself. The Court's opinion in *Powell v. Alabama* puts the point eloquently:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

Obviously, these considerations do not vary depending upon whether the accused actively desires to be represented by counsel or wishes to proceed pro se. Nor is it accurate to suggest, as the Court seems to later in its opinion, that the quality of his

representation at trial is a matter with which only the accused is legitimately concerned. Although we have adopted an adversary system of criminal justice, the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. That goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the "freedom" "to go to jail under his own banner ...." The system of criminal justice should not be available as an instrument of self-destruction.

In short, both the "spirit and the logic" of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense; in the vast majority of cases this command can be honored only by means of the expressly guaranteed right to counsel, and the trial judge is in the best position to determine whether the accused is capable of conducting his defense. True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution. This discretion is as critical an element of basic fairness as a trial judge's discretion to decline to accept a plea of guilty.

Society has the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system will be considered. However, such considerations are conspicuously absent from the Court's opinion in this case.

Notes, Comments, and Questions

After the Court decided *Faretta*, a few sensational cases followed in which criminal defendants represented themselves in especially ineffective ways, perhaps causing embarrassment to the judicial system in addition to themselves. The case of Colin Ferguson, who shot fellow passengers on a Long Island Rail Road train in 1993, became especially famous. Ferguson killed six passengers and shot several others. He later represented himself at trial, questioning victims he had shot. He referred to himself in the third person, stating, for example, that "at the time that Mr. Ferguson was on the train," he fell asleep and then someone else took his gun.

He asked one witness, "Is it your testimony that the defendant Ferguson stood right in front of you and shot you?"

The witness answered, "You weren't right in front of me. You were about ten to twelve feet away, approximately the distance we're at about now."

His performance was parodied on *Saturday Night Live*. "I did not shoot them. They shot me," the *SNL* Ferguson said in his opening statement. He continued, "There is no such thing as a 'railroad' or a 'Long Island.' Colin Ferguson is the victim of a conspiracy."

Do cases like these show that *Faretta* is wrongly decided, or are they a necessary evil associated with vindicating the rights explained by the Court?

In *Indiana v. Edwards*, the Court considered how to apply *Faretta* to defendants who may lack the mental competence to conduct their own defense. Students should note that the mental state of a defendant can be evaluated at three different times (at least) for different purposes. For a defense based on insanity or mental disease or defect, the question is what mental state the defendant had at the moment she committed an offense. Regardless of the defendant's mental state at the crime scene, a court may deem someone incompetent to stand trial if she is unable to understand the character and consequences of the proceedings against her or is unable properly to assist in her defense (that is, to communicate with counsel about defense strategies). Finally, there is the question of whether a defendant who is competent to stand trial might nonetheless be incompetent to represent himself. The *Edwards* Court decided whether such a category of defendants exists and, if so, how trial courts should deal with them.

Supreme Court of the United States

Indiana v. Ahmad Edwards

Decided June 19, 2008 – 554 U.S. 164

Justice BREYER delivered the opinion of the Court.

This case focuses upon a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. We must decide whether in these circumstances the Constitution

prohibits a State from insisting that the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself. We conclude that the Constitution does not forbid a State so to insist.

I

In July 1999, Ahmad Edwards, the respondent, tried to steal a pair of shoes from an Indiana department store. After he was discovered, he drew a gun, fired at a store security officer, and wounded a bystander. He was caught and then charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. His mental condition subsequently became the subject of three competency proceedings and two self-representation requests, mostly before the same trial judge:

1. *First Competency Hearing: August 2000*. Five months after Edwards' arrest, his court-appointed counsel asked for a psychiatric evaluation. After hearing psychiatrist and neuropsychologist witnesses (in February 2000 and again in August 2000), the court found Edwards incompetent to stand trial, and committed him to Logansport State Hospital for evaluation and treatment.

2. *Second Competency Hearing: March 2002*. Seven months after his commitment, doctors found that Edwards' condition had improved to the point where he could stand trial. Several months later, however, but still before trial, Edwards' counsel asked for another psychiatric evaluation. In March 2002, the judge held a competency hearing, considered additional psychiatric evidence, and (in April) found that Edwards, while "suffer[ing] from mental illness," was "competent to assist his attorneys in his defense and stand trial for the charged crimes."

3. *Third Competency Hearing: April 2003*. Seven months later but still before trial, Edwards' counsel sought yet another psychiatric evaluation of his client. And, in April 2003, the court held yet another competency hearing. Edwards' counsel presented further psychiatric and neuropsychological evidence showing that Edwards was suffering from serious thinking difficulties and delusions. A testifying psychiatrist reported that Edwards could understand the charges against him, but he was "unable to cooperate with his attorney in his defense because of his schizophrenic illness"; "[h]is delusions and his marked difficulties in thinking make it impossible for him to cooperate with his attorney." In November 2003, the court concluded that Edwards was not then competent to stand trial and ordered his recommitment to the state hospital.

4. *First Self-Representation Request and First Trial: June 2005*. About eight months after his commitment, the hospital reported that Edwards' condition had again improved to the point that he had again become competent to stand trial. And almost one year after that, Edwards' trial began. Just before trial, Edwards asked to represent himself. He also asked for a continuance, which, he said, he needed in order to proceed *pro se*. The court refused the continuance. Edwards then proceeded to trial represented by counsel. The jury convicted him of criminal recklessness and theft but failed to reach a verdict on the charges of attempted murder and battery.

5. *Second Self–Representation Request and Second Trial: December 2005*. The State decided to retry Edwards on the attempted murder and battery charges. Just before the retrial, Edwards again asked the court to permit him to represent himself. Referring to the lengthy record of psychiatric reports, the trial court noted that Edwards still suffered from schizophrenia and concluded that "[w]ith these findings, he's competent to stand trial but I'm not going to find he's competent to defend himself." The court denied Edwards' self-representation request. Edwards was represented by appointed counsel at his retrial. The jury convicted Edwards on both of the remaining counts.

Edwards subsequently appealed to Indiana's intermediate appellate court. He argued that the trial court's refusal to permit him to represent himself at his retrial deprived him of his constitutional right of self-representation. The court agreed and ordered a new trial. The matter then went to the Indiana Supreme Court. That court found that "[t]he record in this case presents a substantial basis to agree with the trial court," but it nonetheless affirmed the intermediate appellate court. At Indiana's request, we agreed to consider whether the Constitution required the trial court to allow Edwards to represent himself at trial.

II

Our examination of this Court's precedents convinces us that those precedents frame the question presented, but they do not answer it. The two cases that set forth the Constitution's "mental competence" standard, *Dusky v. United States,* 362 U.S. 402 (1960) *(per curiam),* and *Drope v. Missouri,* 420 U.S. 162 (1975), specify that the Constitution does not permit trial of an individual who lacks "mental competency." *Dusky* defines the competency standard as including both (1) "whether" the defendant has "a rational as well as factual understanding of the proceedings against him" and (2) whether the defendant "has sufficient present ability *to consult with his lawyer* with a reasonable degree of rational understanding." *Drope* repeats that standard, stating that it "has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and

object of the proceedings against him, *to consult with counsel, and to assist in preparing his defense* may not be subjected to a trial." Neither case considered the mental competency issue presented here, namely, the relation of the mental competence standard to the right of self-representation.

The Court's foundational "self-representation" case, *Faretta,* held that the Sixth and Fourteenth Amendments include a "constitutional right to proceed *without* counsel when" a criminal defendant "voluntarily and intelligently elects to do so." The Court implied that right from: (1) a "nearly universal conviction," made manifest in state law, that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so"; (2) Sixth Amendment language granting rights to the "accused"; (3) Sixth Amendment structure indicating that the rights it sets forth, related to the "fair administration of American justice," are "persona[l]" to the accused; (4) the absence of historical examples of *forced* representation; and (5) "'respect for the individual.'"

Faretta does not answer the question before us both because it did not consider the problem of mental competency and because *Faretta* itself and later cases have made clear that the right of self-representation is not absolute. The question here concerns a mental-illness-related limitation on the scope of the self-representation right.

The sole case in which this Court considered mental competence and self-representation together, *Godinez [v. Moran*, 509 U.S. 389 (1993)], presents a question closer to that at issue here. The case focused upon a borderline-competent criminal defendant who had asked a state trial court to permit him to represent himself and to change his pleas from not guilty to guilty. The state trial court had found that the defendant met *Dusky*'s mental competence standard, that he "knowingly and intelligently" waived his right to assistance of counsel, and that he "freely and voluntarily" chose to plead guilty. And the state trial court had consequently granted the defendant's self-representation and change-of-plea requests. A federal appeals court, however, had vacated the defendant's guilty pleas on the ground that the Constitution required the trial court to ask a further question, namely, whether the defendant was competent to waive his constitutional right to counsel. Competence to make that latter decision, the appeals court said, required the defendant to satisfy a higher mental competency standard than the standard set forth in *Dusky*. *Dusky*'s more general standard sought only to determine whether a defendant represented by counsel was competent to stand trial, not whether he was competent to waive his right to counsel.

This Court, reversing the Court of Appeals, "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard." The decision to plead guilty, we said, "is no more complicated than the sum total of decisions that a [represented] defendant may be called upon to make during the course of a trial." Hence "there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights." And even assuming that self-representation might pose special trial-related difficulties, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right,* not the competence to represent himself." For this reason, we concluded, "the defendant's 'technical legal knowledge' is 'not relevant' to the determination."

We concede that *Godinez* bears certain similarities with the present case. Both involve mental competence and self-representation. Both involve a defendant who wants to represent himself. Both involve a mental condition that falls in a gray area between *Dusky*'s minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose.

We nonetheless conclude that *Godinez* does not answer the question before us now. In part that is because the Court of Appeals' higher standard at issue in *Godinez* differs in a critical way from the higher standard at issue here. In *Godinez,* the higher standard sought to measure the defendant's ability to proceed on his own to enter a guilty plea; here the higher standard seeks to measure the defendant's ability to conduct trial proceedings. To put the matter more specifically, the *Godinez* defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue. Thus we emphasized in *Godinez* that we needed to consider only the defendant's "competence to *waive the right*." And we further emphasized that we need *not* consider the defendant's "technical legal knowledge" about how to proceed at trial. We found our holding consistent with this Court's earlier statement that "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." In this case, the very matters that we did not consider in *Godinez* are directly before us.

III

We now turn to the question presented. We assume that a criminal defendant has sufficient mental competence to stand trial (*i.e.*, the defendant meets *Dusky*'s standard) and that the defendant insists on representing himself during that trial. We ask whether the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at

trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented.

Several considerations taken together lead us to conclude that the answer to this question is yes. First, the Court's precedent, while not answering the question, points slightly in the direction of our affirmative answer. *Godinez,* as we have just said, simply leaves the question open. But the Court's "mental competency" cases set forth a standard that focuses directly upon a defendant's "present ability to consult with his lawyer"; a "capacity ... to consult with counsel"; and an ability "to assist [counsel] in preparing his defense." These standards assume representation by counsel and emphasize the importance of counsel. They thus suggest (though do not hold) that an instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard.

At the same time *Faretta,* the foundational self-representation case, rested its conclusion in part upon pre-existing state law set forth in cases all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right.

Second, the nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself. Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways. The history of this case illustrates the complexity of the problem. In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.

The American Psychiatric Association (APA) tells us (without dispute) in its *amicus* brief filed in support of neither party that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." Motions and other documents that the defendant prepared in this case suggest to a layperson the common sense of this general conclusion.

Third, in our view, a right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial.

Further, proceedings must not only be fair, they must "appear fair to all who observe them." An *amicus* brief reports one psychiatrist's reaction to having observed a patient (a patient who had satisfied *Dusky*) try to conduct his own defense: "[H]ow in the world can our legal system allow an insane man to defend himself?" The application of *Dusky*'s basic mental competence standard can help in part to avoid this result. But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient. At the same time, the trial judge, particularly one such as the trial judge in this case, who presided over one of Edwards' competency hearings and his two trials, will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.

We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

The Constitution guarantees a defendant who knowingly and voluntarily waives the right to counsel the right to proceed *pro se* at his trial. *Faretta v. California*. A mentally ill defendant who knowingly and voluntarily elects to proceed pro se instead of through counsel receives a fair trial that comports with the Fourteenth Amendment. *Godinez v. Moran*. The Court today concludes that a State may nonetheless strip a mentally ill defendant of the right to represent himself when that would be fairer. In my view the Constitution does not permit a State to substitute its own perception of fairness for the defendant's right to make his own case before the jury—a specific right long understood as essential to a fair trial.

When a defendant appreciates the risks of forgoing counsel and chooses to do so voluntarily, the Constitution protects his ability to present his own defense even when that harms his case. In fact waiving counsel "usually" does so. We have nonetheless said

that the defendant's "choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" What the Constitution requires is not that a State's case be subject to the most rigorous adversarial testing possible—after all, it permits a defendant to eliminate *all* adversarial testing by pleading guilty. What the Constitution requires is that a defendant be given the right to challenge the State's case against him using the arguments *he* sees fit.

In *Godinez,* we held that the Due Process Clause posed no barrier to permitting a defendant who suffered from mental illness both to waive his right to counsel and to plead guilty, so long as he was competent to stand trial and knowingly and voluntarily waived trial and the counsel right. It was "never the rule at common law" that a defendant could be competent to stand trial and yet incompetent to either exercise or give up some of the rights provided for his defense. We rejected the invitation to craft a higher competency standard for waiving counsel than for standing trial. That proposal, we said, was built on the "flawed premise" that a defendant's "competence to represent himself" was the relevant measure: "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." We grounded this on *Faretta*'s candid acknowledgment that the Sixth Amendment protected the defendant's right to conduct a defense to his disadvantage.

While there is little doubt that preserving individual "'dignity'" (to which the Court refers) is paramount among those purposes [for which the right of self-representation was intended], there is equally little doubt that the loss of "dignity" the right is designed to prevent is *not* the defendant's making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice.

Because I think a defendant who is competent to stand trial, and who is capable of knowing and voluntary waiver of assistance of counsel, has a constitutional right to conduct his own defense, I respectfully dissent.

* * *

Our next few chapters concern eyewitness identifications evidence. We will examine first when the Court has held that a suspect has the right to have counsel attend an identification procedure such as a lineup. Then we will consider substantive regulations on the quality of such procedures, along with best practices for identifications suggested by modern social science.

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6: IDENTIFICATIONS

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6.1: Chapter 38 - Identifications and the Right to Counsel

IDENTIFICATIONS

Chapter 38

Identifications and the Right to Counsel

In this chapter we begin our three-chapter unit on identification evidence, which generally consists of witness statements about who committed a crime. A victim or other witness can identify a perpetrator in court (saying, in front of the jury, something like, “That’s the one who did it”), and police often ask witnesses to identify suspects out of court. Out-of-court identification procedures include lineups—at which several similar-looking persons are presented to a witness in the hope that the witness will identify the correct person—as well as less elaborate presentations which are essentially lineups with only one suspect, about whom the witness says “yes” or “no.” Further, police can show photos to witnesses, a process much quicker than in-person identification.

This chapter concerns when a suspect has the right to have counsel present during an identification procedure.

Supreme Court of the United States

United States v. Billy Joe Wade

Decided June 12, 1967 – 388 U.S. 218

Mr. Justice BRENNAN delivered the opinion of the Court.

The question here is whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused’s appointed counsel.

The federally insured bank in Eustace, Texas, was robbed on September 21, 1964. A man with a small strip of tape on each side of his face entered the bank, pointed a pistol at the female cashier and the vice president, the only persons in the bank at the time, and forced them to fill a pillowcase with the bank’s money. The man then drove away with an accomplice who had been waiting in a stolen car outside the bank. On March 23, 1965, an indictment was returned against respondent, Wade, and two others for conspiring to rob the bank, and against Wade and the accomplice for the robbery itself. Wade was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later an FBI agent, without notice to Wade’s lawyer, arranged to have the two bank employees observe a lineup made up of Wade and five or six other prisoners and conducted in a courtroom of the local county courthouse. Each person in the line wore strips of tape such as allegedly worn by the robber and upon direction each said something like ‘put the money in the bag,’ the words allegedly uttered by the robber. Both bank employees identified Wade in the lineup as the bank robber.

At trial the two employees, when asked on direct examination if the robber was in the courtroom, pointed to Wade. The prior lineup identification was then elicited from both employees on cross-examination. At the close of testimony, Wade’s counsel moved for a judgment of acquittal or, alternatively, to strike the bank officials’ courtroom identifications on the ground that conduct of the lineup, without notice to and in the absence of his appointed counsel, violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and Wade was convicted. The Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded. We granted certiorari and set the case for oral argument with [other cases] which present similar questions. We reverse the judgment of the Court of Appeals and remand to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

I

Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature ...." "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. [C]ompelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial" nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. [T]he distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's "communications" in whatever form, vocal or physical, and "compulsion which makes a suspect or accused the source of 'real or physical evidence.'" "[B]oth federal and state courts have usually held that ... [the privilege] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial lineup.

Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the bank employees involved no violation of Wade's privilege.

II

The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the courtroom identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel. [I]n this case it is urged that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."

As early as *Powell v. State of Alabama*, 287 U.S. 45 (1932), we recognized that the period from arraignment to trial was "perhaps the most critical period of the proceedings ..." during which the accused "requires the guiding hand of counsel ..." if the guarantee is not to prove an empty right. That principle has since been applied to require the assistance of counsel at the type of arraignment where certain rights might be sacrificed or lost: "What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted ...." The principle was also applied in *Massiah v. United States* (Chapter 29), where we held that incriminating statements of the defendant should have been excluded from evidence when it appeared that they were overheard by federal agents who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice turned informant.

In *Escobedo v. State of Illinois*, 378 U.S. 478 (1964), we [held] that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer.[1] We again noted the necessity of counsel's presence if the accused was to have a fair opportunity to present a defense at the trial itself.

Finally in *Miranda v. State of Arizona* (Chapter 23), the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation.

Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions "no more than [reflect] a constitutional principle established as long ago as *Powell v. Alabama* ...." It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution.

In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

III

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different—for Sixth Amendment purposes—from various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.

IV

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure." A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may [in the absence of other relevant evidence] for all practical purposes be determined there and then, before the trial."

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an "identification parade" or "showup," as in the present case, or presentation of the suspect alone to the witness. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification. But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on ...." For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers; in any event, the participants' names are rarely recorded or divulged at trial. The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives. In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled

in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present. In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

The potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. In the present case, the testimony of the identifying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade "standing in the hall" within sight of an FBI agent. Five or six other prisoners later appeared in the hall. The vice president testified that he saw a person in the hall in the custody of the agent who "resembled the person that we identified as the one that had entered the bank."

Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—"that's the man."

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the postindictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel]... as at the trial itself." Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an "intelligent waiver." [W]e leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay.

"[A]n attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution."

In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence. That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.

Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical." But neither Congress nor the federal authorities have seen fit to provide a solution. What we hold today "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect."

V

We come now to the question whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified. A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would

render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identifications, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.

We think it follows that the proper test to be applied in these situations is "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

We doubt that the Court of Appeals applied the proper test for exclusion of the in-court identification of the two witnesses. On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error and for the District Court to reinstate the conviction or order a new trial, as may be proper.

The judgment of the Court of Appeals is vacated and the case is remanded to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

Notes, Comments, and Questions

In *Wade*, the FBI held a lineup, and the defendant's counsel was not notified or present. The Court did not find a Fifth Amendment violation. Why not? Were you persuaded by the potential damages as identified by the majority in *Wade*? Why or why not?

Our next case, *Gilbert v. California*, was decided on the same day as *Wade* and presents similar issues. It also allowed the Court to apply the rule of *Wade* to handwriting evidence.

After reading *Wade* and *Gilbert*, students should note the Court's two distinct rules governing evidence resulting from a post-indictment lineup conducted without the defendant's counsel present. One rule concerns in-court identification of a suspect whom a witness previously encountered at a defective lineup (testimony that need not mention the prior lineup), and the other involves in-court testimony about the defective lineup itself.

Supreme Court of the United States

Jesse James Gilbert v. California

Decided June 12, 1967 – 388 U.S. 263

Mr. Justice BRENNAN delivered the opinion of the Court.

This case was argued with *United States v. Wade* and presents the same alleged constitutional error in the admission in evidence of in-court identifications there considered. In addition, petitioner alleges constitutional errors in the admission in evidence of testimony of some of the witnesses that they also identified him at the lineup [and] in the admission of handwriting exemplars taken from him after his arrest.

Petitioner was convicted in the Superior Court of California of the armed robbery of the Mutual Savings and Loan Association of Alhambra and the murder of a police officer who entered during the course of the robbery. There were separate guilt and penalty stages of the trial before the same jury, which rendered a guilty verdict and imposed the death penalty. The California Supreme

Court affirmed. We granted certiorari. If our holding today in *Wade* is applied to this case, the issue whether admission of the in-court and lineup identifications is constitutional error which requires a new trial could be resolved on this record only after further proceedings in the California courts. We must therefore first determine whether petitioner's other contentions warrant any greater relief.

I

THE HANDWRITING EXEMPLARS

Petitioner was arrested in Philadelphia by an FBI agent and refused to answer questions about the Alhambra robbery without the advice of counsel. He later did answer questions of another agent about some Philadelphia robberies in which the robber used a handwritten note demanding that money be handed over to him, and during that interrogation gave the agent the handwriting exemplars. They were admitted in evidence at trial over objection that they were obtained in violation of petitioner's Fifth and Sixth Amendment rights. The California Supreme Court upheld admission of the exemplars on the sole ground that petitioner had waived any rights that he might have had not to furnish them. [W]e conclude that the taking of the exemplars violated none of petitioner's constitutional rights.

First. The taking of the exemplars did not violate petitioner's Fifth Amendment privilege against self-incrimination.

Second. The taking of the exemplars was not a "critical" stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, "the accused has the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary processes of cross-examination of the [State's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts."

[In Parts II and III, the Court briefly discussed issues related to hearsay evidence and Fourth Amendment search and seizure claims.]

IV

THE IN-COURT AND LINEUP IDENTIFICATIONS

Since none of the petitioner's other contentions warrants relief, the issue becomes what relief is required by application to this case of the principles today announced in *United States v. Wade*.

Three eyewitnesses to the Alhambra crimes who identified Gilbert at the guilt stage of the trial had observed him at a lineup conducted without notice to his counsel in a Los Angeles auditorium 16 days after his indictment and after appointment of counsel. The manager of the apartment house in which incriminating evidence was found, and in which Gilbert allegedly resided, identified Gilbert in the courtroom and also testified, in substance, to her prior lineup identification on examination by the State. Eight witnesses who identified him in the courtroom at the penalty stage were not eyewitnesses to the Alhambra crimes but to other robberies allegedly committed by him. In addition to their in-court identifications, these witnesses also testified that they identified Gilbert at the same lineup.

The line-up was on a stage behind-bright lights which prevented those in the line from seeing the audience. Upwards of 100 persons were in the audience, each an eyewitness to one of the several robberies charged to Gilbert. The record is otherwise virtually silent as to what occurred at the lineup.

At the guilt stage, after the first witness, a cashier of the savings and loan association, identified Gilbert in the courtroom, defense counsel moved, out of the presence of the jury, to strike her testimony on the ground that she identified Gilbert at the pretrial lineup conducted in the absence of counsel in violation of the Sixth Amendment. He requested a hearing outside the presence of the jury to present evidence supporting his claim that her in-court identification was, and others to be elicited by the State from other eyewitnesses would be, "predicated at least in large part upon their identification or purported identification of Mr. Gilbert at the showup." The trial judge denied the motion as premature. Defense counsel then elicited the fact of the cashier's lineup

identification on cross-examination and again moved to strike her identification testimony. Without passing on the merits of the Sixth Amendment claim, the trial judge denied the motion on the ground that, assuming a violation, it would not in any event entitle Gilbert to suppression of the in-court identification. Defense counsel thereafter elicited the fact of lineup identifications from two other eyewitnesses who on direct examination identified Gilbert in the courtroom. Defense counsel unsuccessfully objected at the penalty stage, to the testimony of the eight witnesses to the other robberies that they identified Gilbert at the lineup.

The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error. However, as in *Wade*, the record does not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source. Gilbert is therefore entitled only to a vacation of his conviction pending the holding of such proceedings as the California Supreme Court may deem appropriate to afford the State the opportunity to establish that the in-court identifications had an independent source, or that their introduction in evidence was in any event harmless error.

Quite different considerations are involved as to the admission of the testimony of the manager of the apartment house at the guilt phase and of the eight witnesses at the penalty stage that they identified Gilbert at the lineup. That testimony is the direct result of the illegal lineup "come at by exploitation of [the primary] illegality." The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence. That conclusion is buttressed by the consideration that the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial. Therefore, unless the California Supreme Court is "able to declare a belief that it was harmless beyond a reasonable doubt," Gilbert will be entitled on remand to a new trial or, if no prejudicial error is found on the guilt stage but only in the penalty stage, to whatever relief California law affords where the penalty stage must be set aside.

* * *

In the next case, the Court considered whether to apply the holdings of *Wade* and *Gilbert* to identification procedures conducted before formal proceedings had begun—that is, before the Sixth Amendment right to counsel had attached.

Supreme Court of the United States

Thomas Kirby v. Illinois

Decided June 7, 1972 – 406 U.S. 682

Mr. Justice STEWART announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice REHNQUIST join.

In *United States v. Wade* and *Gilbert v. California* this Court held "that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth (and Fourteenth) Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." Those cases further held that no "in-court identifications" are admissible in evidence if their "source" is a lineup conducted in violation of this constitutional standard. "Only a *per se* exclusionary rule as to such testimony can be an effective sanction," the Court said, "to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." In the present case we are asked to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony based upon a police station showup that took place before the defendant had been indicted or otherwise formally charged with any criminal offense.

On February 21, 1968, a man named Willie Shard reported to the Chicago police that the previous day two men had robbed him on a Chicago street of a wallet containing, among other things, traveler's checks and a Social Security card. On February 22, two police officers stopped the petitioner and a companion, Ralph Bean, on West Madison Street in Chicago. When asked for identification, the petitioner produced a wallet that contained three traveler's checks and a Social Security card, all bearing the name of Willie Shard. Papers with Shard's name on them were also found in Bean's possession. When asked to explain his possession of Shard's property, the petitioner first said that the traveler's checks were "play money," and then told the officers

that he had won them in a crap game. The officers then arrested the petitioner and Bean and took them to a police station.

Only after arriving at the police station, and checking the records there, did the arresting officers learn of the Shard robbery. A police car was then dispatched to Shard's place of employment, where it picked up Shard and brought him to the police station. Immediately upon entering the room in the police station where the petitioner and Bean were seated at a table, Shard positively identified them as the men who had robbed him two days earlier. No lawyer was present in the room, and neither the petitioner nor Bean had asked for legal assistance, or been advised of any right to the presence of counsel.

More than six weeks later, the petitioner and Bean were indicted for the robbery of Willie Shard. Upon arraignment, counsel was appointed to represent them, and they pleaded not guilty. A pretrial motion to suppress Shard's identification testimony was denied, and at the trial Shard testified as a witness for the prosecution. In his testimony he described his identification of the two men at the police station on February 22, and identified them again in the courtroom as the men who had robbed him on February 20. He was cross-examined at length regarding the circumstances of his identification of the two defendants. The jury found both defendants guilty, and the petitioner's conviction was affirmed on appeal. The Illinois appellate court held that the admission of Shard's testimony was not error, relying upon an earlier decision of the Illinois Supreme Court ... that [held] the *Wade-Gilbert per se* exclusionary rule is not applicable to preindictment confrontations. We granted certiorari, limited to this question.

I

We note at the outset that the constitutional privilege against compulsory self-incrimination is in no way implicated here. The Court emphatically rejected the claimed applicability of that constitutional guarantee in *Wade* itself.

It follows that the doctrine of *Miranda v. Arizona* has no applicability whatever to the issue before us; for the *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial interrogation is inherently coercive.

The *Wade-Gilbert* exclusionary rule, by contrast, stems from a quite different constitutional guarantee—the guarantee of the right to counsel contained in the Sixth and Fourteenth Amendments. [I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.

This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. Less than a year after *Wade* and *Gilbert* were decided, the Court explained the rule of those decisions as follows: "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the prosecution,' and that a post-indictment lineup is such a 'critical stage.'" We decline to depart from that rationale today by imposing a *per se* exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever.

II

What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. The judgment is affirmed.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL join, dissenting.

While it should go without saying, it appears necessary, in view of the plurality opinion today, to re-emphasize that *Wade* did

not require the presence of counsel at pretrial confrontations for identification purposes simply on the basis of an abstract consideration of the words "criminal prosecutions" in the Sixth Amendment. Counsel is required at those confrontations because "the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification" mean that protection must be afforded to the "most basic right [of] a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined."

An arrest evidences the belief of the police that the perpetrator of a crime has been caught. A post-arrest confrontation for identification is not "a mere preparatory step in the gathering of the prosecution's evidence." A primary, and frequently sole, purpose of the confrontation for identification at that stage is to accumulate proof to buttress the conclusion of the police that they have the offender in hand. The plurality offers no reason, and I can think of none, for concluding that a post-arrest confrontation for identification, unlike a post-charge confrontation, is not among those "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

The highly suggestive form of confrontation employed in this case underscores the point. This showup was particularly fraught with the peril of mistaken identification. In the setting of a police station squad room where all present except petitioner and Bean were police officers, the danger was quite real that Shard's understandable resentment might lead him too readily to agree with the police that the pair under arrest, and the only persons exhibited to him, were indeed the robbers. "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." The State had no case without Shard's identification testimony,[2] and safeguards against that consequence were therefore of critical importance. Shard's testimony itself demonstrates the necessity for such safeguards. On direct examination, Shard identified petitioner and Bean not as the alleged robbers on trial in the courtroom, but as the pair he saw at the police station. His testimony thus lends strong support to the observation that "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may [in the absence of other relevant evidence] for all practical purposes be determined there and then, before the trial."

Wade and *Gilbert*, of course, happened to involve post-indictment confrontations. Yet even a cursory perusal of the opinions in those cases reveals that nothing at all turned upon that particular circumstance. For my part, I do not agree that we "extend" *Wade* and *Gilbert* by holding that the principles of those cases apply to confrontations for identification conducted after arrest. Because Shard testified at trial about his identification of petitioner at the police station showup, the exclusionary rule of *Gilbert* requires reversal.

* * *

Wade and *Gilbert* involved in-person identification of suspects by witnesses. In the next case, the Court considered whether to apply the rules of those cases to identification procedures conducted outside the presence of the suspect, such as a witness review of a photo array.

Supreme Court of the United States

United States v. Charles J. Ash, Jr.

Decided June 21, 1973 – 413 U.S. 300

Mr. Justice BLACKMUN delivered the opinion of the Court.

In this case the Court is called upon to decide whether the Sixth Amendment grants an accused the right to have counsel present whenever the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender. The United States Court of Appeals for the District of Columbia Circuit, sitting en banc, held, by a 5-to-4 vote, that the accused possesses this right to counsel. The court's holding is inconsistent with decisions of the courts of appeals of nine other circuits. We granted certiorari to resolve the conflict and to decide this important constitutional question. We reverse and remand.

I

On the morning of August 26, 1965, a man with a stocking mask entered a bank in Washington, D.C., and began waving a pistol. He ordered an employee to hang up the telephone and instructed all others present not to move. Seconds later a second man, also

wearing a stocking mask, entered the bank, scooped up money from tellers' drawers into a bag, and left. The gunman followed, and both men escaped through an alley. The robbery lasted three or four minutes.

A Government informer, Clarence McFarland, told authorities that he had discussed the robbery with Charles J. Ash, Jr., the respondent here. Acting on this information, an FBI agent, in February 1966, showed five black-and-white mug shots of [Black] males of generally the same age, height, and weight, one of which was of Ash, to four witnesses. All four made uncertain identifications of Ash's picture. At this time Ash was not in custody and had not been charged. On April 1, 1966, an indictment was returned charging Ash and a codefendant, John L. Bailey, in five counts related to this bank robbery.

Trial was finally set for May 1968, almost three years after the crime. In preparing for trial, the prosecutor decided to use a photographic display to determine whether the witnesses he planned to call would be able to make in-court identifications. Shortly before the trial, an FBI agent and the prosecutor showed five color photographs to the four witnesses who previously had tentatively identified the black-and-white photograph of Ash. Three of the witnesses selected the picture of Ash, but one was unable to make any selection. None of the witnesses selected the picture of Bailey which was in the group. This post-indictment identification provides the basis for respondent Ash's claim that he was denied the right to counsel at a "critical stage" of the prosecution.

No motion for severance was made, and Ash and Bailey were tried jointly. The trial judge held a hearing on the suggestive nature of the pretrial photographic displays. The judge did not make a clear ruling on suggestive nature, but held that the Government had demonstrated by "clear and convincing" evidence that in-court identifications would be "based on observation of the suspect other than the intervening observation."

At trial, the three witnesses who had been inside the bank identified Ash as the gunman, but they were unwilling to state that they were certain of their identifications. None of these made an in-court identification of Bailey. The fourth witness, who had been in a car outside the bank and who had seen the fleeing robbers after they had removed their masks, made positive in-court identifications of both Ash and Bailey. Bailey's counsel then sought to impeach this in-court identification by calling the FBI agent who had shown the color photographs to the witnesses immediately before trial. Bailey's counsel demonstrated that the witness who had identified Bailey in court had failed to identify a color photograph of Bailey. During the course of the examination, Bailey's counsel also, before the jury, brought out the fact that this witness had selected another man as one of the robbers. At this point the prosecutor became concerned that the jury might believe that the witness had selected a third person when, in fact, the witness had selected a photograph of Ash. After a conference at the bench, the trial judge ruled that all five color photographs would be admitted into evidence. The Court of Appeals held that this constituted the introduction of a post-indictment identification at the prosecutor's request and over the objection of defense counsel.

McFarland testified as a Government witness. He said he had discussed plans for the robbery with Ash before the event and, later, had discussed the results of the robbery with Ash in the presence of Bailey. McFarland was shown to possess an extensive criminal record and a history as an informer.

The jury convicted Ash on all counts. It was unable to reach a verdict on the charges against Bailey, and his motion for acquittal was granted. Ash received concurrent sentences on the several counts, the two longest being 80 months to 12 years.

The five-member majority of the Court of Appeals held that Ash's right to counsel, guaranteed by the Sixth Amendment, was violated when his attorney was not given the opportunity to be present at the photographic displays conducted in May 1968 before the trial.

II

[The Court reviewed the historical significance of the Sixth Amendment.] This historical background suggests that the core purpose of the counsel guarantee was to assure "Assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor. Later developments have led this Court to recognize that "Assistance" would be less than meaningful if it were limited to the formal trial itself.

This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.

The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to

counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself.

Throughout this expansion of the counsel guarantee to trial-like confrontations, the function of the lawyer has remained essentially the same as his function at trial. In all cases considered by the Court, counsel has continued to act as a spokesman for, or advisor to, the accused. The accused's right to the "Assistance of Counsel" has meant just that, namely, the right of the accused to have counsel acting as his assistant.

This review of the history and expansion of the Sixth Amendment counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary. Against the background of this traditional test, we now consider the opinion of the Court of Appeals.

III

Although the Court of Appeals' majority recognized the argument that "a major purpose behind the right to counsel is to protect the defendant from errors that he himself might make if he appeared in court alone," the court concluded that "other forms of prejudice," mentioned and recognized in *Wade*, could also give rise to a right to counsel. These forms of prejudice were felt by the court to flow from the possibilities for mistaken identification inherent in the photographic display.

We conclude that the dangers of mistaken identification, mentioned in *Wade*, were removed from context by the Court of Appeals and were incorrectly utilized as a sufficient basis for requiring counsel. Although *Wade* did discuss possibilities for suggestion and the difficulty for reconstructing suggestivity, this discussion occurred only after the Court had concluded that the lineup constituted a trial-like confrontation, requiring the "Assistance of Counsel" to preserve the adversary process by compensating for advantages of the prosecuting authorities.

The above discussion of *Wade* has shown that the traditional Sixth Amendment test easily allowed extension of counsel to a lineup. The similarity to trial was apparent, and counsel was needed to render "Assistance" in counterbalancing any "overreaching" by the prosecution.

The Court of Appeals considered its analysis complete after it decided that a photographic display lacks scientific precision and ease of accurate reconstruction at trial. That analysis, under *Wade*, however, merely carries one to the point where one must establish that the trial itself can provide no substitute for counsel if a pretrial confrontation is conducted in the absence of counsel.

We now undertake the threshold analysis that must be addressed.

IV

A substantial departure from the historical test would be necessary if the Sixth Amendment were interpreted to give Ash a right to counsel at the photographic identification in this case. Since the accused himself is not present at the time of the photographic display, and asserts no right to be present, no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary. Similarly, the counsel guarantee would not be used to produce equality in a trial-like adversary confrontation. Rather, the guarantee was used by the Court of Appeals to produce confrontation at an event that previously was not analogous to an adversary trial.

Even if we were willing to view the counsel guarantee in broad terms as a generalized protection of the adversary process, we would be unwilling to go so far as to extend the right to a portion of the prosecutor's trial-preparation interviews with witnesses. Although photography is relatively new, the interviewing of witnesses before trial is a procedure that predates the Sixth Amendment. The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.

That adversary mechanism remains as effective for a photographic display as for other parts of pretrial interviews. No greater limitations are placed on defense counsel in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution. Selection of the picture of a person other than the accused, or the inability of a witness to make any selection, will be useful to the defense in precisely the same manner that the selection of a picture of the defendant would be useful to the prosecution. In this very case, for example, the initial tender of the photographic display was by Bailey's counsel, who sought to demonstrate that the witness had failed to make a photographic identification.

Although we do not suggest that equality of access to photographs removes all potential for abuse, it does remove any inequality in the adversary process itself and thereby fully satisfies the historical spirit of the Sixth Amendment's counsel guarantee.

The argument has been advanced that requiring counsel might compel the police to observe more scientific procedures or might encourage them to utilize corporeal rather than photographic displays. This Court recognized that improved procedures can minimize the dangers of suggestion. Commentators have also proposed more accurate techniques.

Pretrial photographic identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may "strike hard blows" but not "foul ones." If that safeguard fails, review remains available under due process standards. These same safeguards apply to misuse of photographs.

We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required.

We hold, then, that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender. This holding requires reversal of the judgment of the Court of Appeals. Reversed and remanded.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL join, dissenting.

The Court holds today that a pretrial display of photographs to the witnesses of a crime for the purpose of identifying the accused, unlike a lineup, does not constitute a "critical stage" of the prosecution at which the accused is constitutionally entitled to the presence of counsel. In my view, today's decision is wholly unsupportable in terms of such considerations as logic, consistency, and, indeed, fairness. As a result, I must reluctantly conclude that today's decision marks simply another step towards the complete evisceration of the fundamental constitutional principles established by this Court.

As the Court of Appeals recognized, "the dangers of mistaken identification ... set forth in *Wade* are applicable in large measure to photographic as well as corporeal identifications." To the extent that misidentification may be attributable to a witness' faulty memory or perception, or inadequate opportunity for detailed observation during the crime, the risks are obviously as great at a photographic display as at a lineup. But "[b]ecause of the inherent limitations of photography, which presents its subject in two dimensions rather than the three dimensions of reality, ... a photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification."

Moreover, as in the lineup situation, the possibilities for impermissible suggestion in the context of a photographic display are manifold. Such suggestion, intentional or unintentional, may derive from three possible sources. First, the photographs themselves might tend to suggest which of the pictures is that of the suspect. For example, differences in age, pose, or other physical characteristics of the persons represented, and variations in the mounting, background, lighting, or markings of the photographs all might have the effect of singling out the accused.

Second, impermissible suggestion may inhere in the manner in which the photographs are displayed to the witness. The danger of misidentification is, of course, "increased if the police display to the witness ... the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." And, if the photographs are arranged in an asymmetrical pattern, or if they are displayed in a time sequence that tends to emphasize a particular photograph, "any identification of the photograph which stands out from the rest is no more reliable than an identification of a single photograph, exhibited alone."

Third, gestures or comments of the prosecutor at the time of the display may lead an otherwise uncertain witness to select the "correct" photograph. More subtly, the prosecutor's inflection, facial expressions, physical motions, and myriad other almost imperceptible means of communication might tend, intentionally or unintentionally, to compromise the witness' objectivity.

Moreover, as with lineups, the defense can "seldom reconstruct" at trial the mode and manner of photographic identification. Finally, and unlike the lineup situation, the accused himself is not even present at the photographic identification, thereby reducing the likelihood that irregularities in the procedures will ever come to light.

Thus, the difficulties of reconstructing at trial an uncounseled photographic display are at least equal to, and possibly greater than, those involved in reconstructing an uncounseled lineup. As a result, both photographic and corporeal identifications create

grave dangers that an innocent defendant might be convicted simply because of his inability to expose a tainted identification. This being so, considerations of logic, consistency, and, indeed, fairness compel the conclusion that a pretrial photographic identification, like a pretrial corporeal identification, is a "critical stage of the prosecution at which [the accused is] 'as much entitled to such aid (of counsel) ... as at the trial itself.'"

Ironically, the Court does not seriously challenge the proposition that presence of counsel at a pretrial photographic display is essential to preserve the accused's right to a fair trial on the issue of identification. Rather, in what I can only characterize a triumph of form over substance, the Court seeks to justify its result by engrafting a wholly unprecedented—and wholly unsupportable-limitation on the Sixth Amendment right of "the accused ... to have the Assistance of Counsel for his defence." Although apparently conceding that the right to counsel attaches, not only at the trial itself, but at all "critical stages" of the prosecution, the Court holds today that, in order to be deemed "critical," the particular "stage of the prosecution" under consideration must, at the very least, involve the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused requires the "guiding hand of counsel." According to the Court a pretrial photographic identification does not, of course, meet these criteria.

The fundamental premise underlying all of this Court's decisions holding the right to counsel applicable at "critical" pretrial proceedings, is that a "stage" of the prosecution must be deemed "critical" for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary "to protect the fairness of the trial itself."

This established conception of the Sixth Amendment guarantee is, of course, in no sense dependent upon the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused requires the "guiding hand of counsel." On the contrary, in *Powell v. Alabama*, the seminal decision in this area, we explicitly held the right to counsel applicable at a stage of the pretrial proceedings involving none of the three criteria set forth by the Court today.

Moreover, despite the Court's efforts to rewrite *Wade* so as to suggest a precedential basis for its own analysis, the rationale of *Wade* lends no support whatever to today's decision.

There is something ironic about the Court's conclusion today that a pretrial lineup identification is a "critical stage" of the prosecution because counsel's presence can help to compensate for the accused's deficiencies as an observer, but that a pretrial photographic identification is not a "critical stage" of the prosecution because the accused is not able to observe at all. In my view, there simply is no meaningful difference, in terms of the need for attendance of counsel, between corporeal and photographic identifications. And applying established and well-reasoned Sixth Amendment principles, I can only conclude that a pretrial photographic display, like a pretrial lineup, is a "critical stage" of the prosecution at which the accused is constitutionally entitled to the presence of counsel.

* * *

In our next two chapters, we examine the Court's substantive regulation of identification procedures. Specifically, we will identify what methods of witness identification are so unreliable that the Court has found them to violate a defendant's right to due process of law.

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6.2: Chapter 39 - Identifications and Due Process

IDENTIFICATIONS

Chapter 39

Identifications and Due Process

Our last chapter covered when suspects have a right to counsel during an identification procedure, which the Court held is sometimes—but not always—a "critical stage" of a prosecution. Here, we begin our review of how the Court has regulated identifications using the Due Process Clauses, holding that some identification evidence is so unreliable that offering it against a defendant violates the minimum standards of a fair criminal trial.

In our first case, *Simmons v. United States*, the Court considered a due process challenge to the introduction of evidence associated with the allegedly-improper (unduly suggestive) presentation of photographs to witnesses of a bank robbery.

Before turning to *Simmons*, it is useful to have a bit of background from a prior decision. In *Stovall v. Denno*, 388 U.S. 293 (1967), the Court held that a sufficiently bad identification procedure might violate a defendant's right to due process. In other words, the procedure could be "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." In that case, a suspect was taken by police (with no other suspects) and presented to a witness, who identified him as the man who killed the witness's husband and stabbed the witness wife eleven times. While the Court held that a due process challenge could work in theory, it held as well that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it" and that "the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative." Because police feared the witness could die at any moment, it was reasonable for police to conduct a "show up" procedure that would normally be disfavored because of its highly suggestive nature. Time was of the essence, and police had no other way to learn whether the witness would identify the suspect as the killer.

It is possible that today the analysis of a similar "show up" would be different. Today, police could easily use a tablet to display photographs of a suspect (along with a few other people) to a witness. The array could be arranged on short notice. But in the 1960s, such technology did not exist. In any event, the Court's decision in *Stovall* set the stage for subsequent cases in which defendants argued that the particular identification procedures to which they were subjected violated their due process rights.

Supreme Court of the United States

Thomas Earl Simmons v. United States

Decided March 18, 1968 – 390 U.S. 377

Mr. Justice HARLAN delivered the opinion of the Court.

This case presents issues arising out of the petitioners' trial and conviction in the United States District Court for the Northern District of Illinois for the armed robbery of a federally insured savings and loan association.

The evidence at trial showed that at about 1:45 p.m. on February 27, 1964, two men entered a Chicago savings and loan association. One of them pointed a gun at a teller and ordered her to put money into a sack which the gunman supplied. The men remained in the bank about five minutes. After they left, a bank employee rushed to the street and saw one of the men sitting on the passenger side of a departing white 1960 Thunderbird automobile with a large scrape on the right door. Within an hour police located in the vicinity a car matching this description. They discovered that it belonged to a Mrs. Rey, sister-in-law of petitioner Simmons. She told the police that she had loaned the car for the afternoon to her brother, William Andrews.

At about 5:15 p.m. the same day, two FBI agents came to the house of Mrs. Mahon, Andrews' mother, about half a block from the place where the car was then parked. The agents had no warrant, and at trial it was disputed whether Mrs. Mahon gave them

permission to search the house. They did search, and in the basement they found two suitcases, of which Mrs. Mahon disclaimed any knowledge. One suitcase contained, among other items, a gun holster, a sack similar to the one used in the robbery, and several coin cards and bill wrappers from the bank which had been robbed.

The following morning the FBI obtained from another of Andrews' sisters some snapshots of Andrews and of petitioner Simmons, who was said by the sister to have been with Andrews the previous afternoon. These snapshots were shown to the five bank employees who had witnessed the robbery. Each witness identified pictures of Simmons as representing one of the robbers. A week or two later, three of these employees identified photographs of petitioner Garrett as depicting the other robber, the other two witnesses stating that they did not have a clear view of the second robber.

The petitioners, together with William Andrews, subsequently were indicted and tried for the robbery, as indicated. Just prior to the trial, Garrett moved to suppress the Government's exhibit consisting of the suitcase containing the incriminating items. In order to establish his standing so to move, Garrett testified that, although he could not identify the suitcase with certainty, it was similar to one he had owned, and that he was the owner of clothing found inside the suitcase. The District Court denied the motion to suppress. Garrett's testimony at the "suppression" hearing was admitted against him at trial.

During the trial, all five bank employee witnesses identified Simmons as one of the robbers. Three of them identified Garrett as the second robber, the other two testifying that they did not get a good look at the second robber. The District Court denied the petitioners' request [] for production of the photographs which had been shown to the witnesses before trial.

The jury found Simmons and Garrett, as well as Andrews, guilty as charged. On appeal, the Court of Appeals for the Seventh Circuit affirmed as to Simmons and Garrett, but reversed the conviction of Andrews on the ground that there was insufficient evidence to connect him with the robbery.

We granted certiorari as to Simmons to consider the following claim[:] Simmons asserts that his pretrial identification by means of photographs was in the circumstances so unnecessarily suggestive and conducive to misidentification as to deny him due process of law, or at least to require reversal of his conviction in the exercise of our supervisory power over the lower federal courts. For reasons which follow, we affirm the judgment of the Court of Appeals.

I

The facts as to the identification claim are these. As has been noted previously, FBI agents on the day following the robbery obtained from Andrews' sister a number of snapshots of Andrews and Simmons. There seem to have been at least six of these pictures, consisting mostly of group photographs of Andrews, Simmons, and others. Later the same day, these were shown to the five bank employees who had witnessed the robbery at their place of work, the photographs being exhibited to each employee separately. Each of the five employees identified Simmons from the photographs. At later dates, some of these witnesses were again interviewed by the FBI and shown indeterminate numbers of pictures. Again, all identified Simmons. At trial, the Government did not introduce any of the photographs, but relied upon in-court identification by the five eyewitnesses, each of whom swore that Simmons was one of the robbers.

In support of his argument, Simmons looks to last Term's "lineup" decisions—*United States v. Wade* and *Gilbert v. State of California*. Simmons [] does not contend that he was entitled to counsel at the time the pictures were shown to the witnesses. Rather, he asserts simply that in the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction. This is a claim which must be evaluated in light of the totality of surrounding circumstances. Viewed in that context, we find the claim untenable.

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law

enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Applying the standard to this case, we conclude that petitioner Simmons' claim on this score must fail. In the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to Andrews and Simmons. It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities.

In the second place, there was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons. The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber later identified as Simmons for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh. At least six photographs were displayed to each witness. Apparently, these consisted primarily of group photographs, with Simmons and Andrews each appearing several times in the series. Each witness was alone when he or she saw the photographs. There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion.

Under these conditions, all five eyewitnesses identified Simmons as one of the robbers. None identified Andrews, who apparently was as prominent in the photographs as Simmons. These initial identifications were confirmed by all five witnesses in subsequent viewings of photographs and at trial, where each witness identified Simmons in person. Notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective identifications of Simmons. Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal. We hold that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law or to call for reversal under our supervisory authority.

For the foregoing reasons, we affirm the judgment of the Court of Appeals so far as it relates to petitioner Simmons.

Mr. Justice BLACK, concurring in part.

I concur in affirmance of the conviction of Simmons.

Simmons' chief claim is that his "pretrial identification [was] so unnecessarily suggestive and conducive to irreparable mistaken identification, that he was denied due process of law." The Court rejects this contention. I agree with the Court but for quite different reasons. The Court's opinion rests on a lengthy discussion of inferences that the jury could have drawn from the evidence of identifying witnesses. A mere summary reading of the evidence as outlined by this Court shows that its discussion is concerned with the weight of the testimony given by the identifying witnesses. The weight of the evidence, however, is not a question for the Court but for the jury, and does not raise a due process issue. The due process question raised by Simmons is, and should be held to be, frivolous. The identifying witnesses were all present in the bank when it was robbed and all saw the robbers. The due process contention revolves around the circumstances under which these witnesses identified pictures of the robbers shown to them, and these circumstances are relevant only to the weight the identification was entitled to be given. The Court, however, considers Simmons' contention on the premise that a denial of due process could be found in the "totality of circumstances" of the picture identification. I do not believe the Due Process Clause or any other constitutional provision vests this Court with any such wideranging, uncontrollable power. A trial according to due process of law is a trial according to the "law of the land"—the law as enacted by the Constitution or the Legislative Branch of Government, and not "laws" formulated by the courts according to the "totality of the circumstances." Simmons' due process claim here should be denied because it is frivolous. For these reasons I vote to affirm Simmons' conviction.

* * *

In the next case, *Foster v. California*, the Court finds an identification procedure so unreasonable that it violated the defendant's right to due process of law. *Foster* represents the height of the Court's willingness to regulate identification procedures, and defendants have not had much success replicating its result.

Supreme Court of the United States

Walter B. Foster v. California

Decided April 1, 1969 – 394 U.S. 440

Mr. Justice FORTAS delivered the opinion of the Court.

Petitioner was charged by information with the armed robbery of a Western Union office. The day after the robbery one of the robbers, Clay, surrendered to the police and implicated Foster and Grice. Allegedly, Foster and Clay had entered the office while Grice waited in a car. Foster and Grice were tried together. Grice was acquitted. Foster was convicted. The California District Court of Appeal affirmed the conviction; the State Supreme Court denied review. We granted certiorari, limited to the question whether the conduct of the police lineup resulted in a violation of petitioner's constitutional rights.

Except for the robbers themselves, the only witness to the crime was Joseph David, the late-night manager of the Western Union office. After Foster had been arrested, David was called to the police station to view a lineup. There were three men in the lineup. One was petitioner. He is a tall man—close to six feet in height. The other two men were short—five feet, five or six inches. Petitioner wore a leather jacket which David said was similar to the one he had seen underneath the coveralls worn by the robber. After seeing this lineup, David could not positively identify petitioner as the robber. He 'thought' he was the man, but he was not sure. David then asked to speak to petitioner, and petitioner was brought into an office and sat across from David at a table. Except for prosecuting officials there was no one else in the room. Even after this one-to-one confrontation David still was uncertain whether petitioner was one of the robbers: "truthfully—I was not sure," he testified at trial. A week or 10 days later, the police arranged for David to view a second lineup. There were five men in that lineup. Petitioner was the only person in the second lineup who had appeared in the first lineup. This time David was "convinced" petitioner was the man.

At trial, David testified to his identification of petitioner in the lineups, as summarized above. He also repeated his identification of petitioner in the courtroom. The only other evidence against petitioner which concerned the particular robbery with which he was charged was the testimony of the alleged accomplice Clay.

[Because the identifications in this case occurred prior to the Court's decisions in *Wade* and *Gilbert* (Chapter 38), the right to counsel holdings set forth in those cases did not apply to Foster's case. Instead, the lineup in this case was "judged by the 'totality of the circumstances,' [to determine if] the conduct of identification procedures [are] 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law."]

Judged by that standard, this case presents a compelling example of unfair lineup procedures. In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Even after this the witness' identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup. This finally produced a definite identification.

The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, "This is the man." This procedure so undermined the reliability of the eyewitness identification as to violate due process.

Accordingly, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

Mr. Justice BLACK, dissenting.

[T]he Court looks to the "totality of circumstances" to show "unfair lineup procedures." This means "unfair" according to the Court's view of what is unfair. The Constitution, however, does not anywhere prohibit conduct deemed unfair by the courts. "Rules of evidence are designed in the interests of fair trials. But unfairness in result is no sure measure of unconstitutionality."

The Constitution sets up its own standards of unfairness in criminal trials in the Fourth, Fifth, and Sixth Amendments, among other provisions of the Constitution. Many of these provisions relate to evidence and its use in criminal cases. The Constitution provides that the accused shall have the right to compulsory process for obtaining witnesses in his favor. It ordains that evidence shall not be obtained by compulsion of the accused. It ordains that the accused shall have the right to confront the witnesses

against him. In these ways the Constitution itself dictates what evidence is to be excluded because it was improperly obtained or because it is not sufficiently reliable. But the Constitution does not give this Court any general authority to require exclusion of all evidence that this Court considers improperly obtained or that this Court considers insufficiently reliable. Hearsay evidence, for example, is in most instances rendered inadmissible by the Confrontation Clause, which reflects a judgment, made by the Framers of the Bill of Rights, that such evidence may be unreliable and cannot be put in proper perspective by cross-examination of the person repeating it in court. Nothing in this constitutional plan suggests that the Framers drew up the Bill of Rights merely in order to mention a few types of evidence "for illustration," while leaving this Court with full power to hold unconstitutional the use of any other evidence that the Justices of this Court might decide was not sufficiently reliable or was not sufficiently subject to exposure by cross-examination. On the contrary, as we have repeatedly held, the Constitution leaves to the States and to the people all these questions concerning the various advantages and disadvantages of admitting certain types of evidence.

It has become fashionable to talk of the Court's power to hold governmental laws and practices unconstitutional whenever this Court believes them to be "unfair," contrary to basic standards of decency, implicit in ordered liberty, or offensive to "those canons of decency and fairness which express the notions of justice of English-speaking peoples ...." All of these different general and indefinable words or phrases are the fruit of the same, what I consider to be poisonous, tree, namely, the doctrine that this Court has power to make its own ideas of fairness, decency, and so forth, enforceable as though they were constitutional precepts. When I consider the incontrovertible fact that our Constitution was written to limit and define the powers of the Federal Government as distinguished from the powers of States, and to divide those powers granted the United States among the separate Executive, Legislative, and Judicial branches, I cannot accept the premise that our Constitution grants any powers except those specifically written into it, or absolutely necessary and proper to carry out the powers expressly granted.

I realize that some argue that there is little difference between the two constitutional views expressed below:

One. No law should be held unconstitutional unless its invalidation can be firmly planted on a specific constitutional provision plus the Necessary and Proper Clause.

Two. All laws are unconstitutional that are unfair, shock the conscience of the Court, offend its sense of decency, or violate concepts implicit in ordered liberty.

The first of these two constitutional standards plainly tells judges they have no power to hold laws unconstitutional unless such laws are believed to violate the written Constitution. The second constitutional standard, based on the words "due process," not only does not require judges to follow the Constitution as written, but actually encourages judges to hold laws unconstitutional on the basis of their own conceptions of fairness and justice. This formula imposes no "restraint" on judges beyond requiring them to follow their own best judgment as to what is wise, just, and best under the circumstances of a particular case. This case well illustrates the extremes to which the formula can take men who are both wise and good. Although due process requires that courts summon witnesses so that juries can determine the guilt or innocence of defendants, the Court, because of its sense of fairness, decides that due process deprives juries of a chance to hear witnesses who the Court holds could not or might not tell the truth.

For the above reasons I dissent from the reversal and remand of this case.

* * *

It is well known that a lineup containing only one suspect, sometimes called a "showup," is highly suggestive and can cause false identifications. In the next case, the Court considered whether such procedures are so unreliable as to offend the Due Process Clause.

Supreme Court of the United States

William S. Neil v. Archie Nathaniel Biggers

Decided Dec. 6, 1972 – 409 U.S. 188

Mr. Justice POWELL delivered the opinion of the Court.

In 1965, after a jury trial in a Tennessee court, respondent was convicted of rape and was sentenced to 20 years' imprisonment. The State's evidence consisted in part of testimony concerning a station-house identification of respondent by the victim. The Tennessee Supreme Court affirmed. On certiorari, the judgment of the Tennessee Supreme Court was affirmed by an equally divided Court. Respondent then brought a federal habeas corpus action raising several claims. The District Court [] held in an

unreported opinion that the station-house identification procedure was so suggestive as to violate due process. The Court of Appeals affirmed. We granted certiorari to decide whether the identification procedure violated due process.

II

As the [due process] claim turns upon the facts, we must first review the relevant testimony at the jury trial and at the habeas corpus hearing regarding the rape and the identification. The victim testified at trial that on the evening of January 22, 1965, a youth with a butcher knife grabbed her in the doorway to her kitchen:

"A. [H]e grabbed me from behind, and grappled—twisted me on the floor. Threw me down on the floor.

"Q. And there was no light in that kitchen?

"A. Not in the kitchen.

"Q. So you couldn't have seen him then?

"A. Yes, I could see him, when I looked up in his face.

"Q. In the dark?

"A. He was right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was.

"Q. You could see? No light? And you could see him and know him then?

"A. Yes."

When the victim screamed, her 12-year-old daughter came out of her bedroom and also began to scream. The assailant directed the victim to "tell her [the daughter] to shut up, or I'll kill you both." She did so, and was then walked at knifepoint about two blocks along a railroad track, taken into a woods, and raped there. She testified that "the moon was shining brightly, full moon." After the rape, the assailant ran off, and she returned home, the whole incident having taken between 15 minutes and half an hour.

She then gave the police what the Federal District Court characterized as "only a very general description," describing him as "being fat and flabby with smooth skin, bushy hair and a youthful voice." Additionally, though not mentioned by the District Court, she testified at the habeas corpus hearing that she had described her assailant as being between 16 and 18 years old and between five feet ten inches and six feet, tall, as weighing between 180 and 200 pounds, and as having a dark brown complexion. This testimony was substantially corroborated by that of a police officer who was testifying from his notes.

On several occasions over the course of the next seven months, she viewed suspects in her home or at the police station, some in lineups and others in showups, and was shown between 30 and 40 photographs. She told the police that a man pictured in one of the photographs had features similar to those of her assailant, but identified none of the suspects. On August 17, the police called her to the station to view respondent, who was being detained on another charge. In an effort to construct a suitable lineup, the police checked the city jail and the city juvenile home. Finding no one at either place fitting respondent's unusual physical description, they conducted a showup instead.

The showup itself consisted of two detectives walking respondent past the victim. At the victim's request, the police directed respondent to say "shut up or I'll kill you." The testimony at trial was not altogether clear as to whether the victim first identified him and then asked that he repeat the words or made her identification after he had spoken. In any event, the victim testified that she had "no doubt" about her identification. At the habeas corpus hearing, she elaborated in response to questioning.

"A. That I have no doubt, I mean that I am sure that when I—see, when I first laid eyes on him, I knew that it was the individual, because his face—well, there was just something that I don't think I could ever forget. I believe—

"Q. You say when you first laid eyes on him, which time are you referring to?

"A. When I identified him—when I seen him in the courthouse when I was took up to view the suspect."

We must decide whether, as the courts below held, this identification and the circumstances surrounding it failed to comport with due process requirements.

III

Some general guidelines emerge from the [due process identification] cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But [] the admission of evidence of a showup without more does not violate due process.

What is less clear from our cases is whether [] unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process.

We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Applying these factors, we disagree with the District Court's conclusion.

In part, as discussed above, we think the District Court focused unduly on the relative reliability of a lineup as opposed to a showup, the issue on which expert testimony was taken at the evidentiary hearing. The testimony was addressed to the jury, and the jury apparently found the identification reliable. Some of the State's testimony at the federal evidentiary hearing may well have been self-serving in that it too neatly fit the case law, but it surely does nothing to undermine the state record, which itself fully corroborated the identification.

We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes. Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough. She had "no doubt" that respondent was the person who raped her. In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited opportunity of observation. The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face "I don't think I could ever forget."

There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.

* * *

Our next case concerns the photographic version of a one-suspect "showup"—a photo array containing only a single suspect's photograph.

Supreme Court of the United States

John R. Manson v. Nowell A. Brathwaite

Decided June 16, 1977 – 432 U.S. 98

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents the issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. This Court's decisions in *Stovall v. Denno* and *Neil v. Biggers* are particularly implicated.[1]

I

Jimmy D. Glover, a full-time trooper of the Connecticut State Police, in 1970 was assigned to the Narcotics Division in an undercover capacity. On May 5 of that year, about 7:45 p. m., e.d.t., and while there was still daylight, Glover and Henry Alton Brown, an informant, went to an apartment building at 201 Westland, in Hartford, for the purpose of purchasing narcotics from "Dickie Boy" Cicero, a known narcotics dealer. Cicero, it was thought, lived on the third floor of that apartment building. Glover and Brown entered the building, observed by back-up Officers D'Onofrio and Gaffey, and proceeded by stairs to the third floor. Glover knocked at the door of one of the two apartments served by the stairway. The area was illuminated by natural light from a window in the third floor hallway. The door was opened 12 to 18 inches in response to the knock. Glover observed a man standing at the door and, behind him, a woman. Brown identified himself. Glover then asked for "two things" of narcotics. The man at the door held out his hand, and Glover gave him two $10 bills. The door closed. Soon the man returned and handed Glover two glassine bags. While the door was open, Glover stood within two feet of the person from whom he made the purchase and observed his face. Five to seven minutes elapsed from the time the door first opened until it closed the second time.

Glover and Brown then left the building. This was about eight minutes after their arrival. Glover drove to headquarters where he described the seller to D'Onofrio and Gaffey. Glover at that time did not know the identity of the seller. He described him as being "a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt." D'Onofrio, suspecting from this description that respondent might be the seller, obtained a photograph of respondent from the Records Division of the Hartford Police Department. He left it at Glover's office. D'Onofrio was not acquainted with respondent personally but did know him by sight and had seen him "[s]everal times" prior to May 5. Glover, when alone, viewed the photograph for the first time upon his return to headquarters on May 7; he identified the person shown as the one from whom he had purchased the narcotics.

The toxicological report on the contents of the glassine bags revealed the presence of heroin. The report was dated July 16, 1970. Respondent was arrested on July 27 while visiting at the apartment of a Mrs. Ramsey on the third floor of 201 Westland. This was the apartment at which the narcotics sale had taken place on May 5.

Respondent was charged, in a two-count information, with possession and sale of heroin. At his trial in January 1971, the photograph from which Glover had identified respondent was received in evidence without objection on the part of the defense. Glover also testified that, although he had not seen respondent in the eight months that had elapsed since the sale, "there [was] no doubt whatsoever" in his mind that the person shown on the photograph was respondent. Glover also made a positive in-court identification without objection.

No explanation was offered by the prosecution for the failure to utilize a photographic array or to conduct a lineup.

Respondent, who took the stand in his own defense, testified that on May 5, the day in question, he had been ill at his Albany Avenue apartment ("a lot of back pains, muscle spasms ... a bad heart ... high blood pressure ... neuralgia in my face, and sinus"), and that at no time on that particular day had he been at 201 Westland. His wife testified that she recalled, after her husband had refreshed her memory, that he was home all day on May 5. Doctor Wesley M. Vietzke, an internist and assistant professor of medicine at the University of Connecticut, testified that respondent had consulted him on April 15, 1970, and that he took a medical history from him, heard his complaints about his back and facial pain, and discovered that he had high blood pressure. The physician found respondent, subjectively, "in great discomfort." Respondent in fact underwent surgery for a herniated disc at L5 and S1 on August 17.

The jury found respondent guilty on both counts of the information. He received a sentence of not less than six nor more than nine years. His conviction was affirmed *per curiam* by the Supreme Court of Connecticut. Fourteen months later, respondent filed a petition for habeas corpus in the United States District Court for the District of Connecticut. He alleged that the admission of

the identification testimony at his state trial deprived him of due process of law to which he was entitled under the Fourteenth Amendment. The District Court, by an unreported written opinion based on the court's review of the state trial transcript, dismissed respondent's petition. On appeal, the United States Court of Appeals for the Second Circuit reversed, with instructions to issue the writ unless the State gave notice of a desire to retry respondent and the new trial occurred within a reasonable time to be fixed by the District Judge.

In brief summary, the court felt that evidence as to the photograph should have been excluded, regardless of reliability, because the examination of the single photograph was unnecessary and suggestive. And, in the court's view, the evidence was unreliable in any event. We granted certiorari.

II

Stovall v. Denno decided in 1967, concerned a petitioner who had been convicted in a New York court of murder. He was arrested the day following the crime and was taken by the police to a hospital where the victim's wife, also wounded in the assault, was a patient. After observing Stovall and hearing him speak, she identified him as the murderer. She later made an in-court identification. On the identification issue, the Court reviewed the practice of showing a suspect singly for purposes of identification, and the claim that this was so unnecessarily suggestive and conducive to irreparable mistaken identification that it constituted a denial of due process of law. The Court noted that the practice "has been widely condemned," but it concluded that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." In that case, showing Stovall to the victim's spouse "was imperative." The Court then quoted the observations of the Court of Appeals, to the effect that the spouse was the only person who could possibly exonerate the accused; that the hospital was not far from the courthouse and jail; that no one knew how long she might live; that she was not able to visit the jail; and that taking Stovall to the hospital room was the only feasible procedure, and, under the circumstances, "'the usual police station line-up ... was out of the question.'"

[The Court recounted the facts and holding of *Neil v. Biggers*.]

Biggers well might be seen to provide an unambiguous answer to the question before us: The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability. In one passage, however, the Court observed that the challenged procedure occurred pre-*Stovall* and that a strict rule would make little sense with regard to a confrontation that preceded the Court's first indication that a suggestive procedure might lead to the exclusion of evidence. One perhaps might argue that, by implication, the Court suggested that a different rule could apply post-*Stovall*. The question before us, then, is simply whether the *Biggers* analysis applies to post-*Stovall* confrontations as well to those pre-*Stovall*.

III

In the present case the District Court observed that the "sole evidence tying Brathwaite to the possession and sale of the heroin consisted in his identifications by the police undercover agent, Jimmy Glover." On the constitutional issue, the court stated that the first inquiry was whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification. If so, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.

IV

Petitioner at the outset acknowledges that "the procedure in the instant case was suggestive (because only one photograph was used) and unnecessary" (because there was no emergency or exigent circumstance). The respondent proposes a *per se* rule of exclusion that he claims is dictated by the demands of the Fourteenth Amendment's guarantee of due process. He rightly observes that this is the first case in which this Court has had occasion to rule upon strictly post-*Stovall* out-of-court identification evidence of the challenged kind.

Since the decision in *Biggers*, the Courts of Appeals appear to have developed at least two approaches to such evidence. The first, or *per se* approach, employed by the Second Circuit in the present case, focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggestive confrontation procedures. The justifications advanced are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated "fair assurance against the awful risks of misidentification."

The second, or more lenient, approach is one that continues to rely on the totality of the circumstances. It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. Its adherents feel that the *per se* approach is not mandated by the Due Process Clause of the Fourteenth Amendment. This second approach, in contrast to the other, is ad hoc and serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact.

Mr. Justice Stevens, in writing for the Seventh Circuit observed: "There is surprising unanimity among scholars in regarding such a rule (the *per se* approach) as essential to avoid serious risk of miscarriage of justice." He pointed out that well-known federal judges have taken the position that "evidence of, or derived from, a showup identification should be inadmissible unless the prosecutor can justify his failure to use a more reliable identification procedure." Indeed, the ALI Model Code of Pre-Arraignment Procedure §§ 160.1 and 160.2 (1975), frowns upon the use of a showup or the display of only a single photograph.

The respondent here stresses the same theme and the need for deterrence of improper identification practice, a factor he regards as pre-eminent. Photographic identification, it is said, continues to be needlessly employed. He notes that the legislative regulation "the Court had hoped [*United States v.*] *Wade* would engender," has not been forthcoming. He argues that a totality rule cannot be expected to have a significant deterrent impact; only a strict rule of exclusion will have direct and immediate impact on law enforcement agents. Identification evidence is so convincing to the jury that sweeping exclusionary rules are required. Fairness of the trial is threatened by suggestive confrontation evidence, and thus, it is said, an exclusionary rule has an established constitutional predicate.

There are, of course, several interests to be considered and taken into account. The driving force behind *United States v. Wade*, *Gilbert v. California*, and *Stovall*, all decided on the same day, was the Court's concern with the problems of eyewitness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police. Thus, *Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability. It must be observed that both approaches before us are responsive to this concern. The *per se* rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant.

The second factor is deterrence. Although the *per se* approach has the more significant deterrent effect, the totality approach also has an influence on police behavior. The police will guard against unnecessarily suggestive procedures under the totality rule, as well as the *per se* one, for fear that their actions will lead to the exclusion of identifications as unreliable.

The third factor is the effect on the administration of justice. Here the *per se* approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the *per se* approach may make error by the trial judge more likely than the totality approach. And in those cases in which the admission of identification evidence is error under the *per se* approach but not under the totality approach—cases in which the identification is reliable despite an unnecessarily suggestive identification procedure—reversal is a Draconian sanction. Certainly, inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm.

We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

V

We turn, then, to the facts of this case and apply the analysis:

1. The opportunity to view. Glover testified that for two to three minutes he stood at the apartment door, within two feet of the respondent. The door opened twice, and each time the man stood at the door. The moments passed, the conversation took place, and payment was made. Glover looked directly at his vendor. It was near sunset, to be sure, but the sun had not yet set, so it was not dark or even dusk or twilight. Natural light from outside entered the hallway through a window. There was natural light, as well, from inside the apartment.

2. The degree of attention. Glover was not a casual or passing observer, as is so often the case with eyewitness identification. Trooper Glover was a trained police officer on duty and specialized and dangerous duty when he called at the third floor of 201

Westland in Hartford on May 5, 1970. Glover himself was [Black] and unlikely to perceive only general features of "hundreds of Hartford black males," as the Court of Appeals stated. It is true that Glover's duty was that of ferreting out narcotics offenders and that he would be expected in his work to produce results. But it is also true that, as a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial.

3. The accuracy of the description. Glover's description was given to D'Onofrio within minutes after the transaction. It included the vendor's race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing the vendor wore. No claim has been made that respondent did not possess the physical characteristics so described. D'Onofrio reacted positively at once. Two days later, when Glover was alone, he viewed the photograph D'Onofrio produced and identified its subject as the narcotics seller.

4. The witness' level of certainty. There is no dispute that the photograph in question was that of respondent. Glover, in response to a question whether the photograph was that of the person from whom he made the purchase, testified: "There is no question whatsoever." This positive assurance was repeated.

5. The time between the crime and the confrontation. Glover's description of his vendor was given to D'Onofrio within minutes of the crime. The photographic identification took place only two days later. We do not have here the passage of weeks or months between the crime and the viewing of the photograph.

These indicators of Glover's ability to make an accurate identification are hardly outweighed by the corrupting effect of the challenged identification itself. Although identifications arising from single-photograph displays may be viewed in general with suspicion, we find in the instant case little pressure on the witness to acquiesce in the suggestion that such a display entails. D'Onofrio had left the photograph at Glover's office and was not present when Glover first viewed it two days after the event. There thus was little urgency and Glover could view the photograph at his leisure. And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another. The identification was made in circumstances allowing care and reflection.

Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment.

Surely, we cannot say that under all the circumstances of this case there is "a very substantial likelihood of irreparable misidentification." Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Of course, it would have been better had D'Onofrio presented Glover with a photographic array including "so far as practicable ... a reasonable number of persons similar to any person then suspected whose likeness is included in the array." The use of that procedure would have enhanced the force of the identification at trial and would have avoided the risk that the evidence would be excluded as unreliable. But we are not disposed to view D'Onofrio's failure as one of constitutional dimension to be enforced by a rigorous and unbending exclusionary rule. The defect, if there be one, goes to weight and not to substance.

We conclude that the criteria laid down in *Biggers* are to be applied in determining the admissibility of evidence offered by the prosecution concerning a post-*Stovall* identification, and that those criteria are satisfactorily met and complied with here.

The judgment of the Court of Appeals is reversed.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

Today's decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in *United States v. Wade; Gilbert v. California*; and *Stovall v. Denno*. But it is still distressing to see the Court virtually ignore the teaching of experience embodied in those decisions and blindly uphold the conviction of a defendant who may well be innocent.

[T]he Court disregards two significant distinctions between the *per se* rule advocated in this case and the exclusionary remedies for certain other constitutional violations.

First, the *per se* rule here is not "inflexible." Where evidence is suppressed, for example, as the fruit of an unlawful search, it may well be forever lost to the prosecution. Identification evidence, however, can by its very nature be readily and effectively reproduced. The in-court identification, permitted under *Wade* and *Simmons* if it has a source independent of an uncounseled or suggestive procedure, is one example. Similarly, when a prosecuting attorney learns that there has been a suggestive confrontation, he can easily arrange another lineup conducted under scrupulously fair conditions. Since the same factors are evaluated in applying both the Court's totality test and the *Wade-Simmons* independent-source inquiry, any identification which is "reliable" under the Court's test will support admission of evidence concerning such a fairly conducted lineup. The evidence of an additional, properly conducted confrontation will be more persuasive to a jury, thereby increasing the chance of a justified conviction where a reliable identification was tainted by a suggestive confrontation. At the same time, however, the effect of an unnecessarily suggestive identification which has no value whatsoever in the law enforcement process will be completely eliminated.

Second, other exclusionary rules have been criticized for preventing jury consideration of relevant and usually reliable evidence in order to serve interests unrelated to guilt or innocence, such as discouraging illegal searches or denial of counsel. Suggestively obtained eyewitness testimony is excluded, in contrast, precisely because of its unreliability and concomitant irrelevance. Its exclusion both protects the integrity of the truth-seeking function of the trial and discourages police use of needlessly inaccurate and ineffective investigatory methods.

Indeed, impermissibly suggestive identifications are not merely worthless law enforcement tools. They pose a grave threat to society at large in a more direct way than most governmental disobedience of the law. For if the police and the public erroneously conclude, on the basis of an unnecessarily suggestive confrontation, that the right man has been caught and convicted, the real outlaw must still remain at large. Law enforcement has failed in its primary function and has left society unprotected from the depredations of an active criminal.

For these reasons, I conclude that adoption of the *per se* rule would enhance, rather than detract from, the effective administration of justice. In my view, the Court's totality test will allow seriously unreliable and misleading evidence to be put before juries. Equally important, it will allow dangerous criminals to remain on the streets while citizens assume that police action has given them protection. According to my calculus, all three of the factors upon which the Court relies point to acceptance of the *per se* approach.

Accordingly, I dissent from the Court's reinstatement of respondent's conviction.

* * *

In our last case in this chapter, the Court considered how to treat identification evidence made unreliable by someone for whom the state is not responsible. In other words, the question was whether a state actor requirement applies when a defendant challenges unreliable identification evidence on due process grounds or if instead the unreliability itself—regardless of its source—compels exclusion of sufficiently unreliable identification evidence.

Supreme Court of the United States

Barion Perry v. New Hampshire

Decided Jan. 11, 2012 – 565 U.S. 228

Justice GINSBURG delivered the opinion of the Court.

In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. Those safeguards apart, admission of evidence in state trials is ordinarily governed by state law, and the reliability of relevant testimony typically falls within the province of the jury to determine. This Court has recognized, in addition, a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.

An identification infected by improper police influence, our case law holds, is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is "a very substantial likelihood of irreparable misidentification," the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice. Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

I

A

Around 3 a.m. on August 15, 2008, Joffre Ullon called the Nashua, New Hampshire, Police Department and reported that an African-American male was trying to break into cars parked in the lot of Ullon's apartment building. Officer Nicole Clay responded to the call. Upon arriving at the parking lot, Clay heard what "sounded like a metal bat hitting the ground." She then saw petitioner Barion Perry standing between two cars. Perry walked toward Clay, holding two car-stereo amplifiers in his hands. A metal bat lay on the ground behind him. Clay asked Perry where the amplifiers came from. "[I] found them on the ground," Perry responded.

Meanwhile, Ullon's wife, Nubia Blandon, woke her neighbor, Alex Clavijo, and told him she had just seen someone break into his car. Clavijo immediately went downstairs to the parking lot to inspect the car. He first observed that one of the rear windows had been shattered. On further inspection, he discovered that the speakers and amplifiers from his car stereo were missing, as were his bat and wrench. Clavijo then approached Clay and told her about Blandon's alert and his own subsequent observations.

By this time, another officer had arrived at the scene. Clay asked Perry to stay in the parking lot with that officer, while she and Clavijo went to talk to Blandon. Clay and Clavijo then entered the apartment building and took the stairs to the fourth floor, where Blandon's and Clavijo's apartments were located. They met Blandon in the hallway just outside the open door to her apartment.

Asked to describe what she had seen, Blandon stated that, around 2:30 a.m., she saw from her kitchen window a tall, African-American man roaming the parking lot and looking into cars. Eventually, the man circled Clavijo's car, opened the trunk, and removed a large box.

Clay asked Blandon for a more specific description of the man. Blandon pointed to her kitchen window and said the person she saw breaking into Clavijo's car was standing in the parking lot, next to the police officer. Perry's arrest followed this identification.

About a month later, the police showed Blandon a photographic array that included a picture of Perry and asked her to point out the man who had broken into Clavijo's car. Blandon was unable to identify Perry.

B

Perry was charged in New Hampshire state court with one count of theft by unauthorized taking and one count of criminal mischief. Before trial, he moved to suppress Blandon's identification on the ground that admitting it at trial would violate due process. Blandon witnessed what amounted to a one-person showup in the parking lot, Perry asserted, which all but guaranteed that she would identify him as the culprit.

The New Hampshire Superior Court denied the motion. At the ensuing trial, Blandon and Clay testified to Blandon's out-of-court identification. The jury found Perry guilty of theft and not guilty of criminal mischief.

On appeal, Perry repeated his challenge to the admissibility of Blandon's out-of-court identification. The New Hampshire Supreme Court rejected Perry's argument and affirmed his conviction.

We granted certiorari to resolve a division of opinion on the question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police.

II

The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, compulsory process, and confrontation plus cross-examination of witnesses. Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial. Only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice," have we imposed a constraint tied to the Due Process Clause.

Perry concedes that, in contrast to every case in the *Stovall* line, law enforcement officials did not arrange the suggestive circumstances surrounding Blandon's identification. He contends, however, that it was mere happenstance that each of the *Stovall* cases involved improper police action. The rationale underlying our decisions, Perry asserts, supports a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. We disagree.

Perry's argument depends, in large part, on the Court's statement in *Brathwaite* that "reliability is the linchpin in determining the admissibility of identification testimony." If reliability is the linchpin of admissibility under the Due Process Clause, Perry maintains, it should make no difference whether law enforcement was responsible for creating the suggestive circumstances that marred the identification.

Perry has removed our statement in *Brathwaite* from its mooring, and thereby attributes to the statement a meaning a fair reading of our opinion does not bear. [T]he *Brathwaite* Court's reference to reliability appears in a portion of the opinion concerning the appropriate remedy *when the police use an unnecessarily suggestive identification procedure*. The Court adopted a judicial screen for reliability as a course preferable to a *per se* rule requiring exclusion of identification evidence whenever law enforcement officers employ an improper procedure. The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct.

[Perry's] position would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications. External suggestion is hardly the only factor that casts doubt on the trustworthiness of an eyewitness' testimony. As one of Perry's *amici* points out, many other factors bear on "the likelihood of misidentification"—for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness. There is no reason why an identification made by an eyewitness with poor vision, for example, or one who harbors a grudge against the defendant, should be regarded as inherently more reliable, less of a "threat to the fairness of trial," than the identification Blandon made in this case. To embrace Perry's view would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence.

Perry maintains that the Court can limit the due process check he proposes to identifications made under "suggestive circumstances." Even if we could rationally distinguish suggestiveness from other factors bearing on the reliability of eyewitness evidence, Perry's limitation would still involve trial courts, routinely, in preliminary examinations. Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do. Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances. For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned "theft suspect," or hearing a radio report implicating the defendant in the crime. Or suppose the witness knew that the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might have "suggested" to the witness that the defendant was the person the witness observed committing the crime.

In urging a broadly applicable due process check on eyewitness identifications, Perry maintains that eyewitness identifications are a uniquely unreliable form of evidence. We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in recognizing that defendants have a constitutional right to counsel at postindictment police lineups, we observed that "the annals of criminal law are rife with instances of mistaken identification."

We have concluded in other contexts, however, that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair. We reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

Our unwillingness to enlarge the domain of due process as Perry and the dissent urge rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant's Sixth Amendment right to confront the eyewitness. Another is the defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence.

State and federal rules of evidence, moreover, permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury. In appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence.

Finding no convincing reason to alter our precedent, we hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. Accordingly, the judgment of the New Hampshire Supreme Court is [a]ffirmed.

Justice SOTOMAYOR, dissenting.

This Court has long recognized that eyewitness identifications' unique confluence of features—their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial. Our cases thus establish a clear rule: The admission at trial of out-of-court eyewitness identifications derived from impermissibly suggestive circumstances that pose a very substantial likelihood of misidentification violates due process. The Court today announces that that rule does not even "com[e] into play" unless the suggestive circumstances are improperly "police-arranged."

Our due process concern, however, arises not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification. By rendering protection contingent on improper police arrangement of the suggestive circumstances, the Court effectively grafts a *mens rea* inquiry onto our rule. The Court's holding enshrines a murky distinction—between suggestive confrontations intentionally orchestrated by the police and, as here, those inadvertently caused by police actions—that will sow confusion. It ignores our precedents' acute sensitivity to the hazards of intentional and unintentional suggestion alike and unmoors our rule from the very interest it protects, inviting arbitrary results. And it recasts the driving force of our decisions as an interest in police deterrence, rather than reliability. Because I see no warrant for declining to assess the circumstances of this case under our ordinary approach, I respectfully dissent.

Notes, Comments, and Questions

In our next chapter we will conclude our review of identification evidence, focusing on recent state-court decisions, and will examine best practices suggested by modern research.

Before moving on, students may wish to consider some real-life consequences of unintentional witness misidentification. In one case, Ronald Cotton was identified as the rapist who attacked Jennifer Thompson in 1984 in North Carolina. Police showed Thompson a photo array, and she chose Cotton's photo. She later identified Cotton at a line up. He was convicted of rape and sentenced to life in prison. Subsequently, DNA evidence proved that a different man—who looked somewhat like Cotton—had committed the rape. Cotton was released from prison in 1995. Cotton and Thompson have since become advocates for criminal justice reform. They give talks and have published a book: *Picking Cotton: Our Memoir of Injustice and Redemption*

On the book's website, one can view documents from the case file, as well as photos of Cotton and of Bobby Poole, who committed the rape for which Cotton served more than ten years in prison. A short video (three minutes) about the case is available here: [YouTube].

A longer video (30 minutes), featuring remarks from Thompson and Cotton, is available here: [YouTube].

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6.3: Chapter 40 - Best Practices and Modern State Court Approaches

IDENTIFICATIONS

Chapter 40

Best Practices and Modern State Court Approaches

The Supreme Court's eyewitness identification jurisprudence has remained virtually unchanged for the past 40 years.[1] In the next two cases, students will observe how two state courts have dealt with eyewitness identification evidence in light of a plethora of scientific research showing how it can be unreliable.

Supreme Court of Connecticut

State of Connecticut v. Brady Guilbert

Decided Sept. 4, 2012 – 49 A.3d 705

PALMER, J.

A jury found the defendant, Brady Guilbert, guilty of capital felony, two counts of murder, and assault in the first degree. The trial court rendered judgments in accordance with the jury verdicts and sentenced the defendant to a term of life imprisonment without the possibility of release, plus twenty years. On appeal, the defendant [] contends that the trial court improperly precluded him from presenting expert testimony on the fallibility of eyewitness identification testimony. The defendant maintains that this court should overrule *State v. Kemp,* 507 A.2d 1387 (Conn. 1986), and *State v. McClendon,* 730 A.2d 1107 (Conn. 1999), in which we concluded that the average juror knows about the factors affecting the reliability of eyewitness identification and that expert testimony on the issue is disfavored because it invades the province of the jury to determine what weight to give the evidence. We agree that the time has come to overrule *Kemp* and *McClendon* and, further, that testimony by a qualified expert on the fallibility of eyewitness identification is admissible when that testimony would aid the jury in evaluating the state's identification evidence.

[The court recounted the facts of the case. Cedric Williams, Terry Ross, and William Robinson were all shot. Robinson survived the shooting and identified the defendant as his shooter but denied the identification at trial. Witnesses Lashon Baldwin, Jackie Gomez, and Scott Lang also identified the defendant. Baldwin and Gomez knew the defendant, but Lang did not. These witnesses identified the defendant after seeing his photograph in a newspaper. The trial court granted the prosecution's motion to preclude expert witness testimony on eyewitness identification. The defendant was convicted of murder, capital felony, and assault.]

I

We [] address the defendant's claim that the trial court improperly granted the state's motion to preclude expert testimony on the reliability of eyewitness identifications in reliance on our decisions in *Kemp* and *McClendon*. We agree that *Kemp* and *McClendon* should be overruled and that expert testimony on eyewitness identification is admissible upon a determination by the trial court that the expert is qualified and the proffered testimony is relevant and will aid the jury. We also conclude, however, that the trial court's exclusion of the proffered expert testimony in the present case did not substantially affect the verdicts.

The following undisputed facts and procedural history are relevant to our resolution of this claim. Before trial, defense counsel indicated that he intended to call Charles A. Morgan III as an expert on eyewitness identifications. The state filed a motion to preclude Morgan's testimony on the ground that the reliability of eyewitness identifications is within the knowledge of the average juror. The trial court then conducted an evidentiary hearing on the state's motion at which Morgan proffered testimony that he is a medical doctor with "specialty training" in psychiatry and that, for the last seventeen years, he has spent 50 percent of his time researching how stress affects thought processes and memory. In 1997, Morgan published a study showing that, contrary

to common belief, memory of traumatic events changes over time. In 2004, he published a study of military personnel who were subject to harsh interrogation techniques during training. The study showed that the subjects' identification of an interrogator was much more accurate after low stress interrogations than after high stress ones.

Morgan testified that stress hormones are detrimental to certain aspects of memory. According to his testimony, high levels of stress impair thinking and memory formation. Morgan explained that there are three phases of memory formation—encoding, storage and retrieval—and that stress can disrupt both encoding and storage. When a subject is exposed to information about the remembered event during the storage phase—for example, when, following the event, the subject discusses the observation with someone else or sees a photograph of the person in the newspaper—the subject may incorporate the information into his or her memory and come to believe that the information actually was obtained at an earlier time. This process is known as retrofitting. Furthermore, Morgan testified that the majority of eyewitness identification researchers agree that there is little or no correlation between confidence and accuracy; in other words, an eyewitness' confidence in the accuracy of an identification is not a reliable indicator of the identification's true accuracy. Although Morgan observed that, if an eyewitness is familiar with a person, the eyewitness' identification of that person is likely to be more accurate, he explained that an identification's accuracy may be adversely affected by such factors as the length of time during which the eyewitness was able to observe the person, lighting, distance, and whether the eyewitness was paying attention.

Morgan testified that the effect of stress on memory is not a matter of common knowledge. Although Morgan was not aware of any scientific public opinion polls on the question, he testified that it was his opinion that most laypeople do not know about the concept of retrofitting. Morgan also testified that studies have shown that most jurors mistakenly believe that the more confident someone is of an identification, the more likely the identification is to be accurate.

At the conclusion of the hearing, the trial court granted the state's motion to preclude Morgan's testimony. The court seemed to find that Morgan's theory had not been sufficiently tested, had no known or potential rate of error, lacked consistent standards, and was not generally accepted in the scientific community. The court also appeared to conclude that Morgan's general opinions about the effects of stress on memory, the lack of a correlation between confidence and accuracy of identifications, and the risk of retrofitting were all inadmissible because these matters generally were within the common knowledge of jurors.

Although the trial court granted the motion to preclude Morgan's testimony, the court indicated that it had prepared jury instructions on the reliability of eyewitness identifications and that it would provide a copy of the draft instructions to counsel for their review. Ultimately, the trial court instructed the jury that stress and the receipt of postevent information can reduce the accuracy of an eyewitness identification and that confidence often is not a reliable indicator of accuracy.

We now conclude that *Kemp* and *McClendon* are out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. This broad based judicial recognition tracks a near perfect scientific consensus. The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification. "[T]he scientific evidence ... is both reliable and useful." "Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings.... [C]onsensus exists among the experts ... within the ... research community." "[T]he science abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications."

Courts across the country now accept that (1) there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy, (2) the reliability of an identification can be diminished by a witness' focus on a weapon, (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events, (4) cross-racial identifications are considerably less accurate than same race identifications, (5) a person's memory diminishes rapidly over a period of hours rather than days or weeks, (6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure, (7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification, and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another. This list is not exhaustive; courts have permitted expert testimony on other factors deemed to affect the accuracy of eyewitness identification testimony.

Although these findings are widely accepted by scientists, they are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive. For example, people often believe that the more confident an eyewitness is in an identification, the more likely the identification is to be accurate. Similarly, the average person is likely to believe that eyewitnesses held at

gunpoint or otherwise placed in fear are likely to have been acutely observant and therefore more accurate in their identifications. Most people also tend to think that cross-racial identifications are no less likely to be accurate than same race identifications. Yet none of these beliefs is true. Indeed, laypersons commonly are unaware of the effect of the other aforementioned factors, including the rate at which memory fades, the influence of postevent or postidentification information, the phenomenon of unconscious transference, and the risks inherent in the use by police of identification procedures that are not double-blind and sequential. Moreover, although there is little if any correlation between confidence and accuracy, an eyewitness' confidence "is the most powerful single determinant of whether ... observers ... will believe that the eyewitness made an accurate identification ...."

As a result of this strong scientific consensus, federal and state courts around the country have recognized that the methods traditionally employed for alerting juries to the fallibility of eyewitness identifications—cross-examination, closing argument and generalized jury instructions on the subject—frequently are not adequate to inform them of the factors affecting the reliability of such identifications.

Cross-examination, the most common method, often is not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs. An eyewitness who expresses confidence in the accuracy of his or her identification may of course believe sincerely that the identification is accurate. Furthermore, although cross-examination may expose the *existence* of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the *import* of these factors. "Thus, while skillful cross-examination may succeed in exposing obvious inconsistencies in an [eyewitness'] account, because nothing is obvious about the psychology of eyewitness identification and most people's intuitions on the subject of identification are wrong ... some circumstances undoubtedly call for more than mere cross-examination of the eyewitness."

Defense counsel's closing argument to the jury that an eyewitness identification is unreliable also is an inadequate substitute for expert testimony. In the absence of evidentiary support, such an argument is likely to be viewed as little more than partisan rhetoric. This is especially true if the argument relates to a factor that is counterintuitive.

Finally, research has revealed that jury instructions that direct jurors in broad terms to exercise caution in evaluating eyewitness identifications are less effective than expert testimony in apprising the jury of the potential unreliability of eyewitness identification testimony. "[Generalized] instructions given at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court, are unlikely to have much effect on the minds of [the jurors].... [Moreover], instructions may come too late to alter [a juror's] opinion of a witness whose testimony might have been heard days before. [Perhaps most important], even the best cautionary instructions tend to touch only generally on the empirical evidence. The judge may explain that certain factors are known to influence perception and memory ... but will not explain how this occurs or to what extent."

An expert should not be permitted to give an opinion about the credibility or accuracy of the eyewitness testimony itself; that determination is solely within the province of the jury. Rather, the expert should be permitted to testify only about factors that generally have an adverse effect on the reliability of eyewitness identifications and are relevant to the specific eyewitness identification at issue.

We depart from *Kemp* and *McClendon* mindful of recent studies confirming what courts have long suspected, namely, that mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions. A highly effective safeguard against this serious and well documented risk is the admission of expert testimony on the reliability of eyewitness identification.

Of course, a trial court retains broad discretion in ruling on the qualifications of expert witnesses and determining whether their opinions are relevant. We also wish to reiterate that a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on the fallibility of eyewitness identification evidence ... would alone be adequate to aid the jury in evaluating the eyewitness identification at issue. We emphasize, however, that any such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case; broad, generalized instructions on eyewitness identifications ... do not suffice.

[Applying the law to the defendant's claim, the court held that the "the trial court did not abuse its discretion in precluding [the expert] from testifying on the reliability of the identification testimony" with respect to Baldwin and Gomez because those witnesses knew the defendant. The court "conclude[d] that, with respect to Lang, Morgan's proposed testimony on the effect of stress on memory, the risk of retrofitting based on postevent information, and the relationship, or lack thereof, between confidence and accuracy, was relevant and would have been helpful to the jury. The trial court therefore abused its discretion in precluding [] expert testimony insofar as it pertained to Lang's identification of the defendant."]

Notes, Comments, and Questions

The Supreme Court of Connecticut focused on how a defendant might educate a jury about the unreliability of eyewitness identification, ameliorating the negative consequences of unreliable evidence. Students who have taken Evidence may recognize similarities between this kind of testimony and other forms of hotly-disputed expert testimony. For example, testimony about "battered woman syndrome" and "rape trauma syndrome" may be helpful to the jury in some cases. For example, a woman who kills her abusive boyfriend may wish to offer syndrome evidence in support of a self-defense theory. But such testimony is valuable only to the extent it is based on sound scientific research. Also, when such testimony is admissible, courts normally are careful to limit its scope. For example, in a rape case, the defense might argue that the alleged victim's behavior is not consistent with that of a "real" rape victim (if, for example, she voluntarily spent time with the defendant after the alleged rape). A prosecution expert might help the jury understand that somewhat counterintuitive behavior is actually within the range of normal behavior observed among victims. The expert normally may not, however, speculate about whether any particular complaining witness was or was not raped.

In our next case, the Supreme Court of New Jersey addressed how to avoid unreliable identifications in the first place.

Supreme Court of New Jersey

State of New Jersey v. Larry R. Henderson

Decided Aug. 24, 2011 – 27 A.3d 872

Chief Justice RABNER delivered the opinion of the Court.

I. Introduction

In the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence, which New Jersey adopted soon after, a vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory. It also calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications.

II. Facts and Procedural History

[Rodney Harper was murdered, and his friend James Womble was held at gunpoint. Womble identified the defendant from a photo array. Following a *Wade* hearing, the trial court allowed admission of the identification. "At the close of trial on July 20, 2004, the court relied on the existing model jury charge on eyewitness identification." The defendant was convicted and appealed. The Appellate Division reversed and remanded, finding the identification procedure "impermissibly suggestive." The Supreme Court of New Jersey appointed a Special Master,[2] who heard testimony from seven expert witnesses and viewed 360 exhibits, including more than 200 "published scientific studies on human memory and eyewitness identification."]

III. Proof of Misidentifications

Nationwide, "more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification." In half of the cases, eyewitness testimony was not corroborated by confessions, forensic science, or informants. Thirty-six percent of the defendants convicted were misidentified by more than one eyewitness. "[I]t has been estimated that approximately 7,500 of every 1.5 million annual convictions for serious offenses may be based on misidentifications."

But DNA exonerations are rare. To determine whether statistics from such cases reflect system-wide flaws, police departments have allowed social scientists to analyze case files and observe and record data from real-world identification procedures.

Four such studies—two from Sacramento, California and two from London, England—produced data from thousands of actual eyewitness identifications. For the larger London study, 39% of eyewitnesses identified the suspect, 20% identified a filler, and 41% made no identification. Thus, about one-third of eyewitnesses who made an identification (20 of 59) in real police investigations wrongly selected an innocent filler. The results were comparable for the Valentine study. Across both Sacramento studies, 51% of eyewitnesses identified the suspect, 16% identified a filler, and 33% identified no one. In other words, nearly 24% of those who made an identification (16 of 67) mistakenly identified an innocent filler.

Although the studies revealed alarming rates at which witnesses chose innocent fillers out of police lineups, the data cannot identify how many of the suspects actually selected were the real culprits. Researchers have conducted field experiments to try to answer that more elusive question: how often are innocent suspects wrongly identified?

Three experiments targeted unassuming convenience store clerks and one focused on bank tellers. Each study unfolded with different variations of the following approach: a customer walked into a store and tried to buy a can of soda with a $10 traveler's check; he produced two pieces of identification and chatted with the clerk; and the encounter lasted about three minutes. Two to twenty-four hours later, a different person entered the same store and asked the same clerk to identify the man with the traveler's check; the clerk was told that the suspect might not be among the six photos presented; and no details of the investigation were given. Only after making a choice was the clerk told that he or she had participated in an experiment.

Across the four experiments, researchers gathered data from more than 500 identifications. Dr. Penrod testified that on average, 42% of clerks made correct identifications, 41% identified photographs of innocent fillers, and 17% chose to identify no one. Those numbers, like the results from the Sacramento and London studies, reveal high levels of misidentifications.

In two of the studies, researchers showed some clerks target-absent arrays—lineups that purposely excluded the perpetrator and contained only fillers. In those experiments, Dr. Penrod testified that 64% of eyewitnesses made no identification, but 36% picked a foil. Those field experiments suggest that when the true perpetrator is not in the lineup, eyewitnesses may nonetheless select an innocent suspect more than one-third of the time.

Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false—which are the product of reliable memories and which are distorted by one of a number of factors.

We presume that jurors are able to detect liars from truth tellers.[3] But as scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and "[b]ecause the eyewitness is testifying honestly (*i.e.*, sincerely), he or she will not display the demeanor of the dishonest or biased witness." Instead, some mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications.

IV. Current Legal Framework

[The court reviewed Supreme Court jurisprudence on the admissibility of eyewitness identification evidence, including *United States v. Wade* and *Manson v. Brathwaite*. This material is covered in Chapters 38 and 39.]

V. Scope of Scientific Research

Virtually all of the scientific evidence considered on remand emerged after *Manson*. In fact, the earliest study the State submitted is from 1981, and only a handful of the more than 200 scientific articles in the record pre-date 1970.

VI. How Memory Works

Research contained in the record has refuted the notion that memory is like a video recording, and that a witness need only replay the tape to remember what happened. Human memory is far more complex. The parties agree with the Special Master's finding that memory is a constructive, dynamic, and selective process.

The process of remembering consists of three stages: acquisition—"the perception of the original event"; retention—"the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval—the "stage during which a person recalls stored information."

Science has proven that memory is malleable. The body of eyewitness identification research further reveals that an array of variables can affect and dilute memory and lead to misidentifications.

Scientific literature divides those variables into two categories: system and estimator variables. System variables are factors like lineup procedures which are within the control of the criminal justice system. Estimator variables are factors related to the witness, the perpetrator, or the event itself—like distance, lighting, or stress—over which the legal system has no control.

A. System Variables

We begin with variables within the State's control.

1. Blind Administration

An identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion. Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array.

Research has shown that lineup administrators familiar with the suspect may leak that information "by consciously or unconsciously communicating to witnesses which lineup member is the suspect." Psychologists refer to that phenomenon as the "expectancy effect": "the tendency for experimenters to obtain results they expect … because they have helped to shape that response." In a seminal meta-analysis of 345 studies across eight broad categories of behavioral research, researchers found that "[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero."

We find that the failure to perform blind lineup procedures can increase the likelihood of misidentification.

2. Pre-identification Instructions

Identification procedures should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification. There is a broad consensus for that conclusion.

Without an appropriate warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members.

The scientists agree. In two meta-analyses, they found that telling witnesses in advance that the suspect may not be present in the lineup, and that they need not make a choice, led to more reliable identifications in target-absent lineups. In one experiment, 45% more people chose innocent fillers in target-absent lineups when administrators failed to warn that the suspect may not be there.

The failure to give proper pre-lineup instructions can increase the risk of misidentification.

3. Lineup Construction

The way that a live or photo lineup is constructed can also affect the reliability of an identification. Properly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing.

A number of features affect the construction of a fair lineup. First, the Special Master found that "mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup." As a result, a suspect should be included in a lineup comprised of look-alikes. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness' confidence in the identification because the selection process seemed easy.

Second, lineups should include a minimum number of fillers. The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness' ability to distinguish the culprit from an innocent person. As Dr. Wells testified, no magic number exists, but there appears to be general agreement that a minimum of five fillers should be used.

Third, based on the same reasoning, lineups should not feature more than one suspect. As the Special Master found, "if multiple suspects are in the lineup, the reliability of a positive identification is difficult to assess, for the possibility of 'lucky' guesses is magnified."

We find that courts should consider whether a lineup is poorly constructed when evaluating the admissibility of an identification. When appropriate, jurors should be told that poorly constructed or biased lineups can affect the reliability of an identification and enhance a witness' confidence.

4. Avoiding Feedback and Recording Confidence

Information received by witnesses both before and after an identification can affect their memory. Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness' recollection of the quality of his or her view of an event.

There is substantial research about confirmatory feedback. A meta-analysis of twenty studies encompassing 2,400 identifications found that witnesses who received feedback "expressed significantly more … confidence in their decision compared with participants who received no feedback." The analysis also revealed that "those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general."

Confirmatory feedback can distort memory. As a result, to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness' own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record—written or otherwise—of the witness' statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided.

[W]e find that feedback affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness' report of how he or she viewed an event.

5. Multiple viewings

Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.

Multiple identification procedures that involve more than one viewing of the same suspect [] can create a risk of "mugshot exposure" and "mugshot commitment." Mugshot exposure is when a witness initially views a set of photos and makes no identification, but then selects someone—who had been depicted in the earlier photos—at a later identification procedure. A meta-analysis of multiple studies revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, that percentage increased to 37% if the witness had seen the innocent person in a prior mugshot.

Mugshot commitment occurs when a witness identifies a photo that is then included in a later lineup procedure. Studies have shown that once witnesses identify an innocent person from a mugshot, "a significant number" then "reaffirm[ ] their false identification" in a later lineup—even if the actual target is present.

Thus, both mugshot exposure and mugshot commitment can affect the reliability of the witness' ultimate identification and create a greater risk of misidentification. As a result, law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.

6. Simultaneous v. Sequential Lineups

Lineups are presented either simultaneously or sequentially. Traditional, simultaneous lineups present all suspects at the same time, allowing for side-by-side comparisons. In sequential lineups, eyewitnesses view suspects one at a time. Because the science supporting one procedure over the other remains inconclusive, we are unable to find a preference for either.

As research in this field continues to develop, a clearer answer may emerge. For now, there is insufficient authoritative evidence accepted by scientific experts for a court to make a finding in favor of either procedure. As a result, we do not limit either one at this time.

7. Composites

When a suspect is unknown, eyewitnesses sometimes work with artists who draw composite sketches. Composites can also be prepared with the aid of computer software or non-computerized "tool kits" that contain picture libraries of facial features.

As the Special Master observed, based on the record, "composites produce poor results." In one study, college freshmen used computer software to generate composites of students and teachers from their high schools. Different students who had attended

the same schools were only able to name 3 of the 500 people depicted in the composites.

Researchers attribute those results to a mismatch between how composites are made and how memory works. Evidence suggests that people perceive and remember faces "holistically" and not "at the level of individual facial features." Thus, creating a composite feature-by-feature may not comport with the holistic way that memories for faces "are generally processed, stored, and retrieved."

It is not clear, though, what effect the process of making a composite has on a witness' memory—that is, whether it contaminates or confuses a witness' memory of what he or she actually saw.

Without more accepted research, courts cannot make a finding on the effect the process of making a composite has on a witness. We thus do not limit the use of composites in investigations.

8. Showups

Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime soon after its commission. The Special Master noted that they are a "useful—and necessary—technique when used in appropriate circumstances," but they carry their "own risks of misidentifications."

By their nature, showups are suggestive and cannot be performed blind or double-blind. Nonetheless, as the Special Master found, "the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours" because "the benefits of a fresh memory seem to balance the risks of undue suggestion."

Thus, the record casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification. [L]ineups are a preferred identification procedure because we continue to believe that showups, while sometimes necessary, are inherently suggestive.

B. Estimator variables

Unlike system variables, estimator variables are factors beyond the control of the criminal justice system. They can include factors related to the incident, the witness, or the perpetrator. Estimator variables are equally capable of affecting an eyewitness' ability to perceive and remember an event.

1. Stress

Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification. The Special Master found that "while moderate levels of stress improve cognitive processing and might improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator." Scientific research affirms that conclusion. A meta-analysis of sixty-three studies showed "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details."

We find that high levels of stress are likely to affect the reliability of eyewitness identifications. There is no precise measure for what constitutes "high" stress, which must be assessed based on the facts presented in individual cases.

2. Weapon Focus

When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. "Weapon focus" can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.

The duration of the crime is also an important consideration. Dr. Steblay concluded that weapon-focus studies speak to real-world "situations in which a witness observes a threatening object … in an event of short duration." As Dr. Wells testified, the longer the duration, the more time the witness has to adapt to the presence of a weapon and focus on other details.

Thus, when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness' description of the perpetrator.

3. Duration

Not surprisingly, the amount of time an eyewitness has to observe an event may affect the reliability of an identification. The Special Master found that "while there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure."

[S]tudies have shown, and the Special Master found, "that witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful."

4. Distance and Lighting

It is obvious that a person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.

Scientists have refined those common-sense notions with further study. Research has also shown that people have difficulty estimating distances.

5. Witness Characteristics

Characteristics like a witness' age and level of intoxication can affect the reliability of an identification.

The Special Master found that "the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications" and that "low alcohol intake produces fewer misidentifications than high alcohol intake."

The Special Master also found that "[a] witness's age … bears on the reliability of an identification." A meta-analysis has shown that children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults. Showups in particular "are significantly more suggestive or leading with children."

[T]he data about memory and older witnesses is more nuanced, according to the scientific literature. In addition, there was little other testimony at the hearing on the topic. Based on the record before us, we cannot conclude that a standard jury instruction questioning the reliability of identifications by all older eyewitnesses would be appropriate for use in all cases.

6. Characteristics of Perpetrator

Disguises and changes in facial features can affect a witness' ability to remember and identify a perpetrator. The Special Master found that "[d]isguises (*e.g.*, hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications."

Disguises as simple as hats have been shown to reduce identification accuracy. If facial features are altered between the time of the event and the identification procedure—if, for example, the culprit grows a beard—the accuracy of an identification may decrease.

7. Memory Decay

Memories fade with time. And as the Special Master observed, memory decay "is irreversible"; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability.

8. Race-Bias

"A cross-racial identification occurs when an eyewitness is asked to identify a person of another race." A meta-analysis [] involving thirty-nine studies and nearly 5,000 identifications, confirmed the Court's prior finding. Cross-racial recognition continues to be a factor that can affect the reliability of an identification.

9. Private Actors

Studies show that witness memories can be altered when co-eyewitnesses share information about what they observed. Those studies bolster the broader finding "that post-identification feedback does not have to be presented by the experimenter or

an authoritative figure (*e.g.*, police officer) in order to affect a witness' subsequent crime-related judgments." Feedback and suggestiveness can come from co-witnesses and others not connected to the State.

Co-witness feedback may cause a person to form a false memory of details that he or she never actually observed. One of the experiments evaluated the effect of the nature of the witnesses' relationships with one another and compared co-witnesses who were strangers, friends, and couples. The study found that "witnesses who were previously acquainted with their co-witness (as a friend or romantic partner) were significantly more likely to incorporate information obtained solely from their co-witness into their own accounts." Private actors can also affect witness confidence.

To uncover relevant information about possible feedback from co-witnesses and other sources, we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information should be recorded and disclosed to defendants.

Based on the record, we find that non-State actors like co-witnesses and other sources of information can affect the independent nature and reliability of identification evidence and inflate witness confidence—in the same way that law enforcement feedback can. As a result, law enforcement officers should instruct witnesses not to discuss the identification process with fellow witnesses or obtain information from other sources.

10. Speed of Identification

The Special Master also noted that the speed with which a witness makes an identification can be a reliable indicator of accuracy. Laboratory studies offer mixed results. Because of the lack of consensus in the scientific community, we make no finding on this issue.

C. Juror Understanding

Some of the findings described above are intuitive. Everyone knows, for instance, that bad lighting conditions make it more difficult to perceive the details of a person's face. Some findings are less obvious. Although many may believe that witnesses to a highly stressful, threatening event will "never forget a face" because of their intense focus at the time, the research suggests that is not necessarily so.

Neither juror surveys nor mock-jury studies can offer definitive proof of what jurors know or believe about memory. But they reveal generally that people do not intuitively understand all of the relevant scientific findings. As a result, there is a need to promote greater juror understanding of those issues.

D. Consensus Among Experts

The Special Master found broad consensus within the scientific community on the relevant scientific issues. Primarily, he found support in a 2001 survey of sixty-four experts, mostly cognitive and social psychologists. Ninety percent or more of the experts found research on the following topics reliable: suggestive wording; lineup instruction bias; confidence malleability; mugshot bias; post-event information; child suggestivity; alcohol intoxication; and own-race bias. Seventy to 87% found the following research reliable: weapon focus; the accuracy-confidence relationship; memory decay; exposure time; sequential presentation; showups; description-matched foils; child-witness accuracy; and lineup fairness.

VII. Responses to Scientific Studies

Beyond the scientific community, law enforcement and reform agencies across the nation have taken note of the scientific findings. In turn, they have formed task forces and recommended or implemented new procedures to improve the reliability of eyewitness identifications.

IX. Legal Conclusions

A. Scientific Evidence

[The court concludes that the scientific evidence "is both reliable and useful."]

B. The *Manson*[] Test Needs to Be Revised

To protect due process concerns, the *Manson* Court's two-part test rested on three assumptions: (1) that it would adequately measure the reliability of eyewitness testimony; (2) that the test's focus on suggestive police procedure would deter improper practices; and (3) that jurors would recognize and discount untrustworthy eyewitness testimony. We conclude [] that [those assumptions] are not [valid].

The hearing revealed that *Manson*[] does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony. As a result of those concerns, we now revise the State's framework for evaluating eyewitness identification evidence.

C. Revised Framework

Remedying the problems with the current *Manson*[] test requires an approach that addresses its shortcomings: one that allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory—because we recognize that most identifications will be admitted in evidence.

Two principal changes to the current system are needed to accomplish that: first, the revised framework should allow all relevant system *and* estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness; and second, courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence.

The new framework also needs to be flexible enough to serve twin aims: to guarantee fair trials to defendants, who must have the tools necessary to defend themselves, and to protect the State's interest in presenting critical evidence at trial. With that in mind, we first outline the revised approach for evaluating identification evidence and then explain its details and the reasoning behind it.

First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. That evidence, in general, must be tied to a system—and not an estimator—variable.

Second, the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables—subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless.

Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. To do so, a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.

Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions, as discussed further below.

To evaluate whether there is evidence of suggestiveness to trigger a hearing, courts should consider the following non-exhaustive list of system variables:

1. *Blind Administration.* Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the "envelope method" to ensure that the administrator had no knowledge of where the suspect appeared in the photo array or lineup?

2. *Pre-identification Instructions.* Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?

3. *Lineup Construction.* Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?

4. *Feedback.* Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?

5. *Recording Confidence*. Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?

6. *Multiple Viewings*. Did the witness view the suspect more than once as part of multiple identification procedures? Did police use the same fillers more than once?

7. *Showups*. Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?

8. *Private Actors*. Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?

9. *Other Identifications Made*. Did the eyewitness initially make no choice or choose a different suspect or filler?

If some actual proof of suggestiveness remains, courts should consider the above system variables as well as the following non-exhaustive list of estimator variables to evaluate the overall reliability of an identification and determine its admissibility:

1. *Stress*. Did the event involve a high level of stress?

2. *Weapon focus*. Was a visible weapon used during a crime of short duration?

3. *Duration*. How much time did the witness have to observe the event?

4. *Distance and Lighting*. How close were the witness and perpetrator? What were the lighting conditions at the time?

5. *Witness Characteristics*. Was the witness under the influence of alcohol or drugs? Was age a relevant factor under the circumstances of the case?

6. *Characteristics of Perpetrator*. Was the culprit wearing a disguise? Did the suspect have different facial features at the time of the identification?

7. *Memory decay*. How much time elapsed between the crime and the identification?

8. *Race-bias*. Does the case involve a cross-racial identification?

Some of the above estimator variables overlap with the five reliability factors outlined in *Neil v. Biggers* which we nonetheless repeat:

9. *Opportunity to view the criminal at the time of the crime*.

10. *Degree of attention*.

11. *Accuracy of prior description of the criminal*.

12. *Level of certainty demonstrated at the confrontation*.

Did the witness express high confidence at the time of the identification before receiving any feedback or other information?

13. *The time between the crime and the confrontation*.

The above factors are not exclusive. Nor are they intended to be frozen in time. We recognize that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now. By providing the above lists, we do not intend to hamstring police departments or limit them from improving practices. Likewise, we do not limit trial courts from reviewing evolving, substantial, and generally accepted scientific research. But to the extent the police undertake new practices, or courts either consider variables differently or entertain new ones, they must rely on reliable scientific evidence that is generally accepted by experts in the community.

XI. Application

[Under the facts of this case, the court remanded "for an expanded hearing consistent with the principles outlined in this

decision."]

Notes, Comments, and Questions

Connecticut and New Jersey are two examples of states that have endeavored to incorporate evidence-based recommendations into eyewitness identification practices. In 2009, The New York State Justice Task Force was created to "eradicate the systemic and individual harms caused by wrongful convictions, and to promote public safety by examining the causes of wrongful convictions and recommending reforms to safeguard against any such convictions in the future." In 2011, the task force made the following recommendations:

New York State Justice Task Force

Recommendations for Improving Eyewitness Identifications

(Excerpt)

I. Instructions to the Witness

Preliminary instructions given to a witness by the administrator of an identification procedure before the procedure begins, should include the following:

a. Instructing the witness orally or in writing about the details of the identification procedure (including that they will be asked about their confidence in the identification if any identification is made).

b. Advising the witness that the person who committed the crime may or may not be in the photo array or lineup.

c. Advising the witness that individuals may not appear exactly as they did on the day of the incident because features such as hair are subject to change.

d. Advising the witness as follows:

i. If an array or lineup is conducted double-blind, the administrator shall inform the witness that he does not know who the suspect is; and

ii. If the array or lineup is not conducted double-blind, the administrator shall inform the witness that he should not assume that the administrator knows who the perpetrator is.

e. Advising the witness that he or she should not feel compelled [or obligated] to make an identification.

After the identification procedure is completed, the administrator of the identification procedure should:

f. Instruct the witness not to discuss what was said, seen or done during the identification procedure with other witnesses involved in the case.

II. Witness Confidence Statements

a. In every case in which an identification is made, the administrator should elicit a statement of the witness' confidence in the identification, by asking a question to the effect of, "in your own words, how sure are you?" Witnesses should not be asked to rate their confidence in any identification on a numerical scale.

b. All witnesses should be instructed in advance that they will be asked about their confidence in any identification made.

c. Witness confidence statements should be documented before any feedback on the identification is given to the witness by the administrator or others.

III. Documentation of Identification Procedures

Documentation of identification procedures should include:

a. Documentation of all lineups with a color photograph of the lineup as the witness viewed it and preservation of all photo arrays viewed by a witness.

b. Documentation of the logistics of the identification procedure, including date, time, location and people present in the viewing room with the witness and/or the lineup room with the suspect, including anyone who escorted the witness to and/or from the procedure.

c. Documentation of any speech, movement or clothing change the lineup members are asked to perform.

d. Verbatim documentation of all statements and physical reactions made by a witness during an identification procedure.

e. Ensuring that the witness sign and date the written results of the identification procedure, including a photograph of the live lineup if one is available.

IV. Photo Arrays

a. Photo arrays should be conducted double-blind whenever practicable.

b. If a photo array is conducted with a non-blind administrator, the procedure should be conducted blinded (as defined herein), whenever practicable.

c. Photo array administrators must ensure that the photos in the photo array do not contain any writing, stray markings or information about the suspect such as information concerning previous arrests.

d. At least five fillers should be used in each photo array, in addition to the suspect. There should be only one suspect per array.

e. Fillers should be similar in appearance to the suspect in the array. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features or other distinctive characteristics. Fillers should not be known to the witness.

f. If there is more than one suspect, photo array administrators should avoid reusing fillers when showing an array with a new suspect to the same witness.

g. The position of the suspect should be moved or a new photo array (with new fillers) should be created each time an array is shown to a different witness.

V. Live Lineups

a. Lineups may be conducted double-blind and if not, should be conducted in accordance with the procedures outlined by the NYS Identification Procedure Guidelines mentioned above, which include instructions on how to remain neutral and stand out of the witness' line of sight while the witness is viewing the lineup, and which when coupled with appropriate preliminary instructions are intended to create a neutral environment free of inadvertent cues.

b. There should be five fillers in addition to the suspect, where practicable, but in no case fewer than four fillers. There should be only one suspect per lineup.

c. Fillers should be similar in appearance to the suspect in the lineup. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features or other distinctive characteristics. Fillers should not be known to the witness.

d. If there is more than one suspect, the lineup administrator should avoid reusing fillers when showing a lineup with a new suspect to the same witness.

e. The position of the suspect should be moved each time the lineup is shown to a different witness, assuming the suspect and/or defense counsel agree.

f. If an action is taken or words are spoken by one member of the lineup, all other members of the lineup must take the same action or speak the same words.

g. All members of the lineup should be seated, if necessary, to eliminate any extreme variations in height.

h. Fillers from a photo array previously viewed by the witness should not be used as fillers in the lineup.

i. In those jurisdictions that regularly use live lineup procedures, consideration should be given to running lineups after the first witness makes an identification from the photo array. Where practicable, additional witnesses can view only the lineup and not the photo array.

* * *

In her student note, "The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness," 54 B.C. L. Rev. 1415 (2013), Dana Walsh articulates the connection between scientific research on identification and due process of law. She argues that because the Supreme Court has focused on the reliability of eyewitness identifications outside the context of scientific research, state courts should "grant greater protections under their own constitutions in the field of eyewitness identification."

"The right to due process must include an established framework to ensure fundamental fairness. The rules should create a system where only evidence that comports with due process is admitted at trial. The great unreliability of eyewitness identifications, in addition to their great influence on a criminal proceeding, suggest that a defendant's right to a fundamentally fair proceeding is violated by the admission of unreliable eyewitness testimony at trial. Accurate eyewitness identifications are, however, beneficial crime-fighting and prosecutorial tools. By focusing on reliability, the Court has attempted to find a balance between admitting identifications and preserving due process rights. If reliability is the linchpin of the analysis, then only reliable identifications should be admissible...."

"Substantial amounts of research indicate that eyewitness identifications have serious flaws. In 1995, a judge on the Massachusetts Supreme Judicial Court wrote that scientific studies conducted since 1977 have confirmed that eyewitness identifications are often 'hopelessly unreliable.' The malleability and vulnerability of human memory highlight the dangers involved with eyewitness identification. Because of these risks, identifications should be scrutinized closely to avoid miscarriages of justice. The Court in *Perry*, however, largely ignored the data by barely addressing it and by maintaining the *Biggers* factors. Such a result seems incompatible under jurisprudence that deems due process a fundamental right."

In addition to rulings based on state constitutional law, courts can regulate the admission of identification evidence under ordinary evidence law. State evidence codes contain provisions similar (or identical) to Federal Rule of Evidence 403, which gives judges discretion to exclude relevant evidence that poses a significant risk of "unfair prejudice."

* * *

For further information on the problems associated with eyewitness identification evidence (along with other testimony dependent on accurate memory), students should read work by Professor Elizabeth Loftus, a member of the psychology faculty and the law faculty at the University of California-Irvine (along with various collaborators). *See, e.g.*, Steven J. Frenda *et al.*, "False Memories of Fabricated Political Events," 49 J. Experimental Soc. Psych. 280 (2013) (showing ease with which false memories can be implanted in unwitting subjects); Deborah Davis & Elizabeth F. Loftus, "Remembering Disputed Sexual Encounters: A New Frontier for Witness Memory Research," 105 J. Crim. L. & Criminology 811 (2015); Charles A. Morgan *et al.*, "Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events," 36 Int'l J. L. & Psych. 11 (2013) (examining false memories among participants in military POW interrogation training program). A 2015 lecture delivered by Professor Loftus at Harvard University, titled "The Memory Factory," is available online.

Consider the practices described in this chapter. Which seem easy to implement? Which seem difficult to implement?

In our next and final chapter, we will consider a few criminal procedure issues that do not fit neatly into any of the categories around which prior chapters of this book have been organized.

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6.4: Chapter 41 - Electronic Surveillance, Torture, and the “War on Terror”

CONFRONTING NEW CHALLENGES

Chapter 41

Electronic Surveillance, Torture, and the “War on Terror”

In this final chapter of the semester, we briefly consider some issues that either have required the Court to apply old law to new problems or have inspired debate about how the Court ought to address a question once it is properly presented. In particular, we review (1) the somewhat novel question of whether the executive may conduct electronic surveillance without a warrant in service of national security, (2) whether the executive may torture prisoners suspected of possessing knowledge of potential terrorist plans and activities—and, if so, how such terrible state actions should be regulated, and (3) other questions presented by the ongoing conflicts often described as the “War on Terror,” along with other modern national security challenges.

Electronic Surveillance

It has been observed that the United States became a different country on September 11, 2001. For example, students too young to remember the attacks of that day may find it hard to believe how comparatively relaxed airports were in the late twentieth century. The desire of government investigators to overhear the electronic communications of suspects is not, however, a phenomenon unique to the twenty-first century. Indeed, *Katz v. United States* (Chapter 2) presented such a case involving ordinary criminal investigation of unlawful gambling. Further, more than forty years ago, the Court decided a case in which law enforcement sought to conduct warrantless electronic eavesdropping for reasons related to national security.

Supreme Court of the United States

United States v. U.S. District Court for the Eastern District of Michigan

Decided June 19, 1972 – 407 U.S. 297

Mr. Justice POWELL delivered the opinion of the Court.

The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President’s power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government’s right to protect itself from unlawful subversion and attack and to the citizen’s right to be secure in his privacy against unreasonable Government intrusion.

This case arises from a criminal proceeding in the United States District Court for the Eastern District of Michigan, in which the United States charged three defendants with conspiracy to destroy Government property. One of the defendants, Plamondon, was charged with the dynamite bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan.

During pretrial proceedings, the defendants moved to compel the United States to disclose certain electronic surveillance information and to conduct a hearing to determine whether this information “tainted” the evidence on which the indictment was based or which the Government intended to offer at trial. In response, the Government filed an affidavit of the Attorney General, acknowledging that its agents had overheard conversations in which Plamondon had participated. The affidavit also stated that the Attorney General approved the wiretaps “to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.” The logs of the surveillance were filed in a sealed exhibit for in camera inspection by the District Court.

On the basis of the Attorney General's affidavit and the sealed exhibit, the Government asserted that the surveillance was lawful, though conducted without prior judicial approval, as a reasonable exercise of the President's power (exercised through the Attorney General) to protect the national security. The District Court held that the surveillance violated the Fourth Amendment, and ordered the Government to make full disclosure to Plamondon of his overheard conversations. The Government then filed in the Court of Appeals for the Sixth Circuit a petition for a writ of mandamus to set aside the District Court order, which was stayed pending final disposition of the case. [T]hat court held that the surveillance was unlawful and that the District Court had properly required disclosure of the overheard conversations. We granted certiorari.

I

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510—2520, authorizes the use of electronic surveillance for classes of crimes carefully specified in 18 U.S.C. § 2516. Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression.

Together with the elaborate surveillance requirements in Title III, there is the following proviso, 18 U.S.C. § 2511(3):

"Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

The Government [] argues that "in excepting national security surveillances from the Act's warrant requirement Congress recognized the President's authority to conduct such surveillances without prior judicial approval." The section thus is viewed as a recognition or affirmance of a constitutional authority in the President to conduct warrantless domestic security surveillance such as that involved in this case.

We think the language of § 2511(3), as well as the legislative history of the statute, refutes this interpretation. The relevant language is that:

"Nothing contained in this chapter ... shall limit the constitutional power of the President to take such measures as he deems necessary to protect ..." against the dangers specified. At most, this is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this, as the section refers—among other things—to protection "against actual or potential attack or other hostile acts of a foreign power." But so far as the use of the President's electronic surveillance power is concerned, the language is essentially neutral.

Section 2511(3) certainly confers no power, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them. This view is reinforced by the general context of Title III. Section 2511(1) broadly prohibits the use of electronic surveillance "[e]xcept as otherwise specifically provided in this chapter." Subsection (2) thereof contains four specific exceptions. In each of the specified exceptions, the statutory language is as follows:

"It shall not be unlawful ... to intercept" the particular type of communication described.[1]

The language of subsection (3), here involved, is to be contrasted with the language of the exceptions set forth in the preceding subsection. Rather than stating that warrantless presidential uses of electronic surveillance "shall not be unlawful" and thus employing the standard language of exception, subsection (3) merely disclaims any intention to "limit the constitutional power of the President."

The express grant of authority to conduct surveillances is found in § 2516, which authorizes the Attorney General to make application to a federal judge when surveillance may provide evidence of certain offenses. These offenses are described with meticulous care and specificity.

In view of these and other interrelated provisions delineating permissible interceptions of particular criminal activity upon carefully specified conditions, it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances.

The legislative history of § 2511(3) supports this interpretation. [N]othing in § 2511(3) was intended to expand or to contract or to define whatever presidential surveillance powers existed in matters affecting the national security. [W]e hold that the statute is not the measure of the executive authority asserted in this case. Rather, we must look to the constitutional powers of the President.

II

It is important at the outset to emphasize the limited nature of the question before the Court. This case raises no constitutional challenge to electronic surveillance as specifically authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Nor is there any question or doubt as to the necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest. Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General's affidavit in this case states that the surveillances were "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government." There is no evidence of any involvement, directly or indirectly, of a foreign power.

Our present inquiry, though important, is therefore a narrow one. It addresses a question left open by *Katz*:

"Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security ...."

The determination of this question requires the essential Fourth Amendment inquiry into the "reasonableness" of the search and seizure in question, and the way in which that "reasonableness" derives content and meaning through reference to the warrant clause.

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to "preserve, protect and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government. The use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946.

It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy. Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. Senator Hart addressed this dilemma in the floor debate on § 2511(3):

"As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government."

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

III

As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and the free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

[T]he very heart of the Fourth Amendment directive [is] that, where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a "neutral and detached magistrate." The further requirement of "probable cause" instructs the magistrate that baseless searches shall not proceed.

These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

It may well be that, in the instant case, the Government's surveillance of Plamondon's conversations was a reasonable one which readily would have gained prior judicial approval. But this Court "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. The independent check upon executive discretion is not satisfied, as the Government argues, by "extremely limited" post-surveillance judicial review. Indeed, post-surveillance review would never reach the surveillances which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights.

It is true that there have been some exceptions to the warrant requirement. But those exceptions are few in number and carefully delineated. The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security. We are told further that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions. It is said that this type of surveillance should not be subject to traditional warrant requirements which were established to govern investigation of criminal activity, not ongoing intelligence gathering.

The Government further insists that courts "as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security." These security problems, the Government contends, involve "a large number of complex and subtle factors" beyond the competence of courts to evaluate. As a final reason for exemption from a warrant requirement, the Government believes that disclosure to a magistrate of all or even a significant portion of the information involved in domestic security surveillances "would create serious potential dangers to the national security and to the lives of informants and agents ...."

We certainly do not reject [these contentions] lightly, especially at a time of worldwide ferment and when civil disorders in this country are more prevalent than in the less turbulent periods of our history. There is, no doubt, pragmatic force to the

Government's position.

But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny. Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. [] If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

IV

We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents. Nor does our decision rest on the language of § 2511(3) or any other section of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. That Act does not attempt to define or delineate the powers of the President to meet domestic threats to the national security.

Moreover, we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. We do not attempt to detail the precise standards for domestic security warrants any more than our decision in *Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III. We do hold, however, that prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe.

V

The judgment of the Court of Appeals is hereby affirmed.

MR. JUSTICE DOUGLAS, concurring.

While I join in the opinion of the Court, I add these words in support of it.

This is an important phase in the campaign of the police and intelligence agencies to obtain exemptions from the Warrant Clause of the Fourth Amendment. For, due to the clandestine nature of electronic eavesdropping, the need is acute for placing on the Government the heavy burden to show that "exigencies of the situation [make its] course imperative." Other abuses, such as the search incident to arrest, have been partly deterred by the threat of damage actions against offending officers, the risk of adverse publicity, or the possibility of reform through the political process. These latter safeguards, however, are ineffective against lawless wiretapping and "bugging" of which their victims are totally unaware. Moreover, even the risk of exclusion of tainted evidence would here appear to be of negligible deterrent value inasmuch as the United States frankly concedes that the primary purpose of these searches is to fortify its intelligence collage rather than to accumulate evidence to support indictments and convictions. If the Warrant Clause were held inapplicable here, then the federal intelligence machine would literally enjoy unchecked discretion.

Here, federal agents wish to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines, simply to seize those few utterances which may add to their sense of the pulse of a domestic underground.

We are told that one national security wiretap lasted for 14 months and monitored over 900 conversations. Senator Edward Kennedy found recently that "warrantless devices accounted for an average of 78 to 209 days of listening per device, as compared with a 13-day per device average for those devices installed under court order." He concluded that the Government's revelations posed "the frightening possibility that the conversations of untold thousands of citizens of this country are being monitored on secret devices which no judge has authorized and which may remain in operation for months and perhaps years at a time."

Even the most innocent and random caller who uses or telephones into a tapped line can become a flagged number in the Government's data bank.

Such gross invasions of privacy epitomize the very evil to which the Warrant Clause was directed. That "domestic security" is said to be involved here does not draw this case outside the mainstream of Fourth Amendment law. Rather, the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of that prohibition.

As illustrated by a flood of cases before us this Term, we are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their patriotism and loyalty are questioned. Senator Sam Ervin, who has chaired hearings on military surveillance of civilian dissidents, warns that "it is not an exaggeration to talk in terms of hundreds of thousands of ... dossiers."

Senator Kennedy found "the frightening possibility that the conversations of untold thousands are being monitored on secret devices." More than our privacy is implicated. Also at stake is the reach of the Government's power to intimidate its critics.

When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedients. "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." "[T]his concept of 'national defense' cannot be deemed an end in itself, justifying any ... power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart.... It would indeed be ironic if, in the name of national defense, we would sanction the subversion of ... those liberties ... which [make] the defense of the Nation worthwhile."

The Warrant Clause has stood as a barrier against intrusions by officialdom into the privacies of life. But if that barrier were lowered now to permit suspected subversives' most intimate conversations to be pillaged then why could not their abodes or mail be secretly searched by the same authority? To defeat so terrifying a claim of inherent power we need only stand by the enduring values served by the Fourth Amendment. "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won ... a right of personal security against arbitrary intrusions ... If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." We have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our form of governing.

MR. JUSTICE WHITE, concurring in the judgment.

[Justice White wrote that he would have avoided the constitutional issue decided by the majority and would have instead held that the evidence was inadmissible because the government had failed to meet its burden under the Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which prohibits certain wiretaps and allows it in certain circumstances. (Title III is discussed further below.) In other words, Justice White would have left open the possibility that the Attorney General could order warrantless phone tapping to protect national security if authorized by Congress—or, perhaps, so long as not prohibited by Congress.]

Notes, Comments, and Questions

Title III of the Omnibus Crime Control and Safe Streets Act (sometimes known as the "Wiretap Act" or as "Title III") is an important statute with provisions this book cannot explore. Students should know a few key details. First, the act prohibits most warrantless wiretapping, both by government actors and by private actors. It also includes procedures by which government investigators can obtain judicial approval (in the form of warrants) for certain wiretaps, and it authorizes some wiretapping even without warrants (some of which is discussed in our next case). Further, Title III contains an exclusionary rule, prohibiting evidence collected in violation of the act from being introduced in court.[2] The act is among the best examples of how only some of criminal procedure law is distilled by courts from amendments to the Constitution. Recognizing that judicial regulation of electronic communication would be unpredictable and cumbersome, Congress engaged in robust debate and enacted a statute providing detailed rules that apply to law enforcement officers at the federal, state, and municipal levels.

As Justice Douglas noted in his concurring opinion in *United States v. U.S. District Court*, "the clandestine nature of electronic

eavesdropping" can result in "lawless wiretapping and 'bugging' of which [] victims are totally unaware." Justice Douglas thought it especially important that the judiciary enforce the Fourth Amendment's prohibition of unreasonable searches and seizures in cases of wiretapping, lest "the federal intelligence machine would literally enjoy unchecked discretion." In *Clapper v. Amnesty International*, a group of plaintiffs sought a declaration that provisions of the Foreign Intelligence Surveillance Act (FISA) were unconstitutional, as well as an injunction prohibiting certain surveillance. The government sought summary judgment on the ground that the plaintiffs lacked standing under Article III of the Constitution because they could not demonstrate that they personally had been surveilled (or would be surveilled) under the challenged statutory scheme. Under that theory, the plaintiffs would be unable to obtain a ruling on the merits. In essence, the government argued that because the plaintiffs were "totally unaware" of the details of the surveillance program, they could not challenge it.

Supreme Court of the United States

Clapper v. Amnesty International USA

Decided February 26, 2013 – 568 U.S. 398

Justice ALITO delivered the opinion of the Court.

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a, allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not "United States persons" and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court's approval. Respondents are United States persons whose work, they allege, requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under § 1881a. Respondents seek a declaration that § 1881a is unconstitutional, as well as an injunction against § 1881a-authorized surveillance. The question before us is whether respondents have Article III standing to seek this prospective relief.

Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under § 1881a at some point in the future. But respondents' theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be "certainly impending." And even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to § 1881a. As an alternative argument, respondents contend that they are suffering *present* injury because the risk of § 1881a-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that respondents lack Article III standing.

I

A

In 1978, after years of debate, Congress enacted the Foreign Intelligence Surveillance Act (FISA) to authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes. In enacting FISA, Congress legislated against the backdrop of our decision in *United States v. United States Dist. Court for Eastern Dist. of Mich.,* in which we explained that the standards and procedures that law enforcement officials must follow when conducting "surveillance of 'ordinary crime'" might not be required in the context of surveillance conducted for domestic national-security purposes.

In constructing such a framework for foreign intelligence surveillance, Congress created two specialized courts. In FISA, Congress authorized judges of the Foreign Intelligence Surveillance Court (FISC) to approve electronic surveillance for foreign intelligence purposes if there is probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power," and that each of the specific "facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power." Additionally, Congress vested the Foreign Intelligence Surveillance Court of Review with jurisdiction to review any denials by the FISC of applications for electronic surveillance.

In the wake of the September 11th attacks, President George W. Bush authorized the National Security Agency (NSA) to conduct warrantless wiretapping of telephone and e-mail communications where one party to the communication was located outside the United States and a participant in "the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist

organization." In January 2007, the FISC issued orders authorizing the Government to target international communications into or out of the United States where there was probable cause to believe that one participant to the communication was a member or agent of al Qaeda or an associated terrorist organization. These FISC orders subjected any electronic surveillance that was then occurring under the NSA's program to the approval of the FISC. After a FISC Judge subsequently narrowed the FISC's authorization of such surveillance, however, the Executive asked Congress to amend FISA so that it would provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism.

When Congress enacted the FISA Amendments Act of 2008 (FISA Amendments Act), it left much of FISA intact, but it "established a new and independent source of intelligence collection authority, beyond that granted in traditional FISA." As relevant here, § 702 of FISA, 50 U.S.C. § 1881a, supplements pre-existing FISA authority by creating a new framework under which the Government may seek the FISC's authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad. Unlike traditional FISA surveillance, § 1881a does not require the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power. And, unlike traditional FISA, § 1881a does not require the Government to specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur.

The present case involves a constitutional challenge to § 1881a. Surveillance under § 1881a is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment. Section 1881a provides that, upon the issuance of an order from the Foreign Intelligence Surveillance Court, "the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year ..., the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." Surveillance under § 1881a may not be intentionally targeted at any person known to be in the United States or any U.S. person reasonably believed to be located abroad. Additionally, acquisitions under § 1881a must comport with the Fourth Amendment. Moreover, surveillance under § 1881a is subject to congressional oversight and several types of Executive Branch review.

B

Respondents are attorneys and human rights, labor, legal, and media organizations whose work allegedly requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad. Respondents believe that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance under § 1881a. Specifically, respondents claim that they communicate by telephone and e-mail with people the Government "believes or believed to be associated with terrorist organizations," "people located in geographic areas that are a special focus" of the Government's counterterrorism or diplomatic efforts, and activists who oppose governments that are supported by the United States Government.

Respondents claim that § 1881a compromises their ability to locate witnesses, cultivate sources, obtain information, and communicate confidential information to their clients. Respondents also assert that they "have ceased engaging" in certain telephone and e-mail conversations. According to respondents, the threat of surveillance will compel them to travel abroad in order to have in-person conversations. In addition, respondents declare that they have undertaken "costly and burdensome measures" to protect the confidentiality of sensitive communications.

C

On the day when the FISA Amendments Act was enacted, respondents filed this action seeking (1) a declaration that § 1881a, on its face, violates the Fourth Amendment, the First Amendment, Article III, and separation-of-powers principles and (2) a permanent injunction against the use of § 1881a. After both parties moved for summary judgment, the District Court held that respondents do not have standing. On appeal, however, a panel of the Second Circuit reversed. The Second Circuit denied rehearing *en banc* by an equally divided vote. Because of the importance of the issue and the novel view of standing adopted by the Court of Appeals, we granted certiorari and we now reverse.

II

Article III of the Constitution limits federal courts' jurisdiction to certain "Cases" and "Controversies." "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue."

The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being

used to usurp the powers of the political branches. In keeping with the purpose of this doctrine, "[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." "Relaxation of standing requirements is directly related to the expansion of judicial power," and we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." Thus, we have repeatedly reiterated that "threatened injury must be *certainly impending* to constitute injury in fact," and that "[a]llegations of *possible* future injury" are not sufficient.

III

A

Respondents assert that they can establish injury in fact that is fairly traceable to § 1881a because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under § 1881a at some point in the future. This argument fails. [R]espondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts. [R]espondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending. Moreover, even if respondents could demonstrate injury in fact, the second link in the above-described chain of contingencies—which amounts to mere speculation about whether surveillance would be under § 1881a or some other authority—shows that respondents cannot satisfy the requirement that any injury in fact must be fairly traceable to § 1881a.

First, it is speculative whether the Government will imminently target communications to which respondents are parties. Section 1881a expressly provides that respondents, who are U.S. persons, cannot be targeted for surveillance under § 1881a. [R]espondents' theory necessarily rests on their assertion that the Government will target *other individuals*—namely, their foreign contacts.

Yet respondents have no actual knowledge of the Government's § 1881a targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under § 1881a. Moreover, because § 1881a at most *authorizes*—but does not *mandate* or *direct*—the surveillance that respondents fear, respondents' allegations are necessarily conjectural.

Second, even if respondents could demonstrate that the targeting of their foreign contacts is imminent, respondents can only speculate as to whether the Government will seek to use § 1881a-authorized surveillance (rather than other methods) to do so. The Government has numerous other methods of conducting surveillance, none of which is challenged here. Even if respondents could demonstrate that their foreign contacts will imminently be targeted—indeed, even if they could show that interception of their own communications will imminently occur—they would still need to show that their injury is fairly traceable to § 1881a. But, because respondents can only speculate as to whether any (asserted) interception would be under § 1881a or some other authority, they cannot satisfy the "fairly traceable" requirement.

Third, even if respondents could show that the Government will seek the Foreign Intelligence Surveillance Court's authorization to acquire the communications of respondents' foreign contacts under § 1881a, respondents can only speculate as to whether that court will authorize such surveillance. In the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.

We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors. Section 1881a mandates that the Government must obtain the Foreign Intelligence Surveillance Court's approval of targeting procedures, minimization procedures, and a governmental certification regarding proposed surveillance. The Court must, for example, determine whether the Government's procedures are "reasonably designed … to minimize the

acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." And, critically, the Court must also assess whether the Government's targeting and minimization procedures comport with the Fourth Amendment.

In sum, respondents' speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to § 1881a.

B

Respondents' alternative argument—namely, that they can establish standing based on the measures that they have undertaken to avoid § 1881a-authorized surveillance—fares no better. Respondents assert that they are suffering ongoing injuries that are fairly traceable to § 1881a because the risk of surveillance under § 1881a requires them to take costly and burdensome measures to protect the confidentiality of their communications. Respondents claim, for instance, that the threat of surveillance sometimes compels them to avoid certain e-mail and phone conversations, to "tal[k] in generalities rather than specifics," or to travel so that they can have in-person conversations.

Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. Any ongoing injuries that respondents are suffering are not fairly traceable to § 1881a.

If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear. Thus, allowing respondents to bring this action based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of respondents' first failed theory of standing.

IV

Respondents also suggest that they should be held to have standing because otherwise the constitutionality of § 1881a could not be challenged. It would be wrong, they maintain, to "insulate the government's surveillance activities from meaningful judicial review." Respondents' suggestion is both legally and factually incorrect. First, "'[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'"

Second, our holding today by no means insulates § 1881a from judicial review. As described above, Congress created a comprehensive scheme in which the Foreign Intelligence Surveillance Court evaluates the Government's certifications, targeting procedures, and minimization procedures—including assessing whether the targeting and minimization procedures comport with the Fourth Amendment.

Additionally, if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition. Finally, any electronic communications service provider that the Government directs to assist in § 1881a surveillance may challenge the lawfulness of that directive before the FISC.

We hold that respondents lack Article III standing. We therefore reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The plaintiffs' standing depends upon the likelihood that the Government, acting under the authority of 50 U.S.C. § 1881a, will harm them by intercepting at least some of their private, foreign, telephone, or e-mail conversations. In my view, this harm is not "speculative." Indeed it is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen. This Court has often found the occurrence of similar future events sufficiently certain to support standing. I dissent from the Court's contrary conclusion.

No one here denies that the Government's interception of a private telephone or e-mail conversation amounts to an injury that is "concrete and particularized." Moreover, the plaintiffs seek as relief a judgment declaring unconstitutional (and enjoining enforcement of) a statutory provision authorizing those interceptions; and, such a judgment would redress the injury by preventing it. Thus, the basic question is whether the injury, *i.e.,* the interception, is "actual or imminent."

Several considerations, based upon the record along with commonsense inferences, convince me that there is a very high likelihood that Government, *acting under the authority of § 1881a,* will intercept at least some of the communications just described. First, the plaintiffs have engaged, and continue to engage, in electronic communications of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept. These communications include discussions with family members of those detained at Guantanamo, friends and acquaintances of those persons, and investigators, experts and others with knowledge of circumstances related to terrorist activities. These persons are foreigners located outside the United States. They are not "foreign power[s]" or "agent[s] of ... foreign power[s]." And the plaintiffs state that they exchange with these persons "foreign intelligence information," defined to include information that "relates to" "international terrorism" and "the national defense or the security of the United States."

Second, the plaintiffs have a strong *motive* to engage in, and the Government has a strong *motive* to listen to, conversations of the kind described. A lawyer representing a client normally seeks to learn the circumstances surrounding the crime (or the civil wrong) of which the client is accused. At the same time, the Government has a strong motive to conduct surveillance of conversations that contain material of this kind. And the Government is motivated to do so, not simply by the desire to help convict those whom the Government believes guilty, but also by the critical, overriding need to protect America from terrorism.

Third, the Government's *past behavior* shows that it has sought, and hence will in all likelihood continue to seek, information about alleged terrorists and detainees through means that include surveillance of electronic communications.

Fourth, the Government has the *capacity* to conduct electronic surveillance of the kind at issue. Of course, to exercise this capacity the Government must have intelligence court authorization. But the Government rarely files requests that fail to meet the statutory criteria. As the intelligence court itself has stated, its review under § 1881a is "narrowly circumscribed." There is no reason to believe that the communications described would all fail to meet the conditions necessary for approval. Moreover, compared with prior law, § 1881a simplifies and thus expedites the approval process, making it more likely that the Government will use § 1881a to obtain the necessary approval.

The upshot is that (1) similarity of content, (2) strong motives, (3) prior behavior, and (4) capacity all point to a very strong likelihood that the Government will intercept at least some of the plaintiffs' communications, including some that the 2008 amendment, § 1881a, but not the pre-2008 Act, authorizes the Government to intercept.

At the same time, nothing suggests the presence of some special factor here that might support a contrary conclusion. The Government does not deny that it has both the motive and the capacity to listen to communications of the kind described by plaintiffs. Nor does it describe any system for avoiding the interception of an electronic communication that happens to include a party who is an American lawyer, journalist, or human rights worker. One can, of course, always imagine some special circumstance that negates a virtual likelihood, no matter how strong. But the same is true about most, if not all, ordinary inferences about future events. Perhaps, despite pouring rain, the streets will remain dry (due to the presence of a special chemical). But ordinarily a party that seeks to defeat a strong natural inference must bear the burden of showing that some such special circumstance exists. And no one has suggested any such special circumstance here.

Consequently, we need only assume that the Government is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability that the Government will intercept at least some electronic communication to which at least some of the plaintiffs are parties. The majority is wrong when it describes the harm threatened plaintiffs as "speculative."

The majority more plausibly says that the plaintiffs have failed to show that the threatened harm is "*certainly impending*." But, as the majority appears to concede, *certainty* is not, and never has been, the touchstone of standing. The future is inherently uncertain. Yet federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place. And that degree of certainty is all that is needed to support standing here.

The Court's use of the term "certainly impending" is not to the contrary. Sometimes the Court has used the phrase "certainly impending" as if the phrase described a *sufficient,* rather than a *necessary,* condition for jurisdiction. On other occasions, it has used the phrase as if it concerned *when,* not *whether,* an alleged injury would occur. On still other occasions, recognizing that "'imminence' is concededly a somewhat elastic concept," the Court has referred to, or used (sometimes along with "certainly impending") other phrases such as "reasonable probability" that suggest less than absolute, or literal certainty. Taken together the case law uses the word "certainly" as if it emphasizes, rather than literally defines, the immediately following term "impending."

More important, the Court's holdings in standing cases show that standing exists here. The Court has often *found* standing where the occurrence of the relevant injury was far *less* certain than here. Moreover, courts have often found *probabilistic* injuries sufficient to support standing.

How could the law be otherwise? Suppose that a federal court faced a claim by homeowners that (allegedly) unlawful dam-building practices created a high risk that their homes would be flooded. Would the court deny them standing on the ground that the risk of flood was only 60, rather than 90, percent?

Would federal courts deny standing to a plaintiff in a diversity action who claims an anticipatory breach of contract where the future breach depends on probabilities? The defendant, say, has threatened to load wheat onto a ship bound for India despite a promise to send the wheat to the United States. No one can know for certain that this will happen. Perhaps the defendant will change his mind; perhaps the ship will turn and head for the United States. Yet, despite the uncertainty, the Constitution does not prohibit a federal court from hearing such a claim.

While I express no view on the merits of the plaintiffs' constitutional claims, I do believe that at least some of the plaintiffs have standing to make those claims. I dissent, with respect, from the majority's contrary conclusion.

Notes, Comments, and Questions

As the two previous cases indicate, the power of the executive to conduct electronic surveillance increases when the actions are authorized by Congress. While it may be that the President can lawfully order warrantless surveillance in some cases without congressional approval, executive power is more robust when implementing legislative directives, and it is weakest when defying a congressional prohibition. Students interested more generally in the interplay of executive power and legislation should review *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the "Steel Seizures" case), particularly the concurring opinion of Justice Jackson.

Justice Jackson wrote: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum." "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

Torture

It has long been the position of the United States government that torture is not only unlawful but is among the most terrible of crimes. During the presidency of Ronald Reagan, the U.S. signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as the "Convention Against Torture"), and Reagan urged the Senate to ratify the treating, writing:

"Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today."

The Senate eventually ratified the treaty, to which the United States remains a party. President Reagan did not break new ground for the United States in announcing the government's opposition to torture. Indeed, the U.S. military convicted several Japanese officials of torturing prisoners during World War II, and some of the convicts were executed. Even earlier, the Eighth Amendment—ratified in 1791—prohibited the infliction of "cruel and unusual punishments."

To be sure, agents of the United States have indeed tortured prisoners from time to time. During the Philippine-American War, for example, U.S. torture of Filipino captives was well documented.[3] Some of the police interrogations discussed earlier in this book involved torture (see Chapter 22 in particular). Nonetheless, American politicians and judges have widely denounced torture and have described its use by Americans as aberrant, unlawful behavior.

Soon after the attacks of September 11, 2001, however, certain high U.S. officials argued that the President had authority to order torture if—in the president's judgment—the torture would protect national security. Professor John Yoo of Berkeley Law, who wrote some of the formerly secret memoranda while working at the Department of Justice, is among the lawyers most prominently associated with the arguments. DOJ Office of Legal Counsel attorney Jay Bybee, now a judge on the U.S. Court of Appeals for the Ninth Circuit, issued another memo that defined torture quite narrowly—with the apparent purpose of allowing certain interrogation practices that had been previously barred as being a form of torture that could subject the interrogator to prosecution.

The Supreme Court has not had the opportunity to evaluate the arguments raised in the "torture memos" (or similar arguments raised elsewhere) and thereby to decide if U.S. officials may order the torture of detainees—whether under the authority of

legislation enacted pursuant to Article I of the Constitution, under the President's inherent powers under Article II, or through some other legal theory. Your authors—like President Reagan, Senator McCain, and the judges who tried war crimes cases after World War II—believe that torture always violates the law. We intimate no view, however, on how the Court would decide the matter were it squarely presented during a time of national panic.[4]

The "War on Terror"

As part of the government's effort to combat those responsible for the attacks of September 11, 2001—along with various other state actors and non-state actors associated in some way with the "War on Terror"—U.S. officials treated detainees in ways that would not be lawful for purposes of ordinary crime control. For example, José Padilla, an American citizen, was arrested in Illinois in 2002 and imprisoned as an "enemy combatant." In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Court considered whether the President has authority to jail Americans indefinitely, with no access to legal review of their detention, after declaring them "enemy combatants." By a vote of 5-4, the Court avoided deciding the question based on jurisdictional grounds. Padilla was eventually tried in a standard civilian court for crimes, including conspiracy to commit murder. He was convicted and is currently in federal prison.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court addressed the merits of a similar case when another U.S. citizen, Yaser Esam Hamdi, was accused of fighting in support of the Taliban. In a plurality opinion joined by three other Justices, Justice O'Connor wrote, "We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." Hamdi was subsequently released after agreeing to renounce his U.S. citizenship, and he was deported to Saudi Arabia.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court held that foreign nationals also had a due process right to contest their indefinite imprisonment in the U.S. detention camp in Guantanamo Bay, Cuba. The Court reaffirmed this principle in *Boumediene v. Bush*, 553 U.S. 723 (2008), holding that Congress could not divest federal courts of jurisdiction to hear such challenges brought by foreign nationals (thereby striking down Section 7 of the Military Commissions Act of 2006, Pub. L. 109-366).

A few other cases have shown a Supreme Court more hesitant to involve itself, and the judiciary more broadly, in the "War on Terror" debate. For example, in *Arar v. Ashcroft*, the U.S. Court of Appeals for the Second Circuit held a rare *en banc* hearing on whether a civil plaintiff (formerly detained as a suspected Al-Qaeda operative) could obtain relief related to his removal by the United States to Syria, where U.S. officials had reason to expect he would be tortured.[5] After the Second Circuit judges—who wrote five separate opinions—held that Arar could not recover, the Supreme Court denied certiorari.[6]

Along with *Clapper v. Amnesty International*, the detainee cases illustrate the complicated relationship between Congress, the executive, and the courts in setting national security policy. Executive officials can sometimes avoid judicial review by mooting cases (such as by moving Padilla to a civilian court), and the Court occasionally seems eager to avoid deciding important questions in this area. Sometimes, however, the Court is willing and able to assert its authority.

This book barely offers even a cursory review of this complicated area of law. Students should consider how much the law of ordinary criminal procedure—with its concerns for due process and its prohibitions on things like coerced confessions—can and should be part of the "War on Terror" or other issues of national security.

* * *

One Final Series of Questions

Before putting this book away, please return to the questions posed at the end of Chapter 6. We asked you to consider:

"If Americans better understood Supreme Court doctrine related to the Fourth, Fifth, and Sixth Amendments, do you think they would have more or less faith in the criminal justice system? Why?"

What do you think now?

We also asked:

"If you are unhappy with the state of policing, how might things be improved? If instead you think policing is going fairly well, to what do you attribute the discontent exhibited during the 2020 protests?"

Have your answers to these questions changed as you learned more about criminal procedure law?

A Thank You to Our Students

There is no next chapter for us to summarize here. Thank you for joining us on this tour of American criminal procedure law. We especially appreciate our Fall 2018 students at the University of Missouri School of Law for serving as the initial test subjects for this book.

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GLOSSARY

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Sample Word 1 | Sample Definition 1

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Footnotes

Notes

INTRODUCTION

Chapter 1

1. [Footnote by editors] This is no longer true. See further discussion following this opinion.

2. Don't take our word for it. Sir John Holt, the Lord Chief Justice of England, wrote in *Ashby v. White* (1703), "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." 14 St. Tr. 695, 92 Eng. Rep. 126, 136. Fans of Latin put it this way: "ubi jus ibi remedium."

3. *See* Prison Policy Institute, "States of Incarceration: The Global Context 2021," *at* https://www.prisonpolicy.org/global/2021.html.

4. *See* Bureau of Justice Statistics, "Correctional Populations in the United States, 2020" (March 2022, NCJ 303184).

5. *See* Sentencing Project, "Trends in U.S. Corrections."

6. *See* Bureau of Justice Statistics, "Prisoners in the United States" (December 2021, NCJ 302776).

7. *See* US Census Bureau, "Quick Facts."

8. For arrest data, see U.S. Dep't of Justice, "2019 Crime in the United States: Persons Arrested."

9. *See* Lara Bazelon, "A Mistake Has Been Made Here, and No One Wants to Correct It," *Slate* (Dec. 17, 2013).

10. *See* National Registry of Exonerations, "Kash Register."

11. *See* Richard Winton, "LAPD Settlements Soar as Officials Close the Books on High-Profile Lawsuits against Police Officers," *L.A. Times* (May 9, 2017) ("The Los Angeles Police Department paid nearly $81 million in legal settlements last fiscal year."); *see also* http://spreadsheets.latimes.com/lapd-settlements/ (database of settlements).

12. *See State ex rel. Koster v. Green* 388 S.W.3d 603, (Mo. Ct. App.2012); National Registry of Exonerations, "George Allen, Jr."

13. As of July 3, 2022. *See* https://www.law.umich.edu/special/exoneration/Pages/about.aspx

14. *See* Zusha Elinson & Dan Frosch, "Cost of Police-Misconduct Cases Soars in Big U.S. Cities," *Wall St. J.* (July 15, 2015).

15. *See* "How Chicago Racked Up a $662 Million Police Misconduct Bill," *Associated Press* (Mar. 20, 2016).

16. *See* John Byrne, "Aldermen to Consider Paying $6 Million to Settle Lawsuits Alleging Chicago Police Misconduct," *Chi. Tribune* (June 22, 2018).

17. *See* Mark Puente, "Undue Force," *Balt. Sun* (Sept. 28, 2014).

18. *See Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y 2013).

19. *See* Missouri Attorney General's Office, "Vehicle Stops Report."

20. Homicide is the best measure of crime rates. The definition has remained fairly constant over time (and from place to place), and homicide is generally noticed and recorded. Data for crimes such as rape and theft are far less reliable.

21. *See* Jeffrey Fagan & Daniel Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 Colum. L. Rev. 1235, 1260 (2017).

22. *See* FBI, "Crime in the United States 2016."

23. *See, e.g.*, Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. Econ. Perspectives 163 (2004); Adam Gopnik, "The Great Crime Decline," *New Yorker* (Feb. 12 & 19, 2018).

24. *See* Ben Trachtenberg, *Choosing a Criminal Procedure Casebook: On Lesser Evils and Free Books*, 60 St. Louis U. L.J. 543, 552 (2016) ("I hope authors and money can be found to create excellent, inexpensive books and thereby reduce the cost of legal education.").

25. 44 Am. L. Rev. 12, 16-17 (1910) ("Here the law in the books is settled and defined. The law administered is very different.").

THE FOURTH AMENDMENT

Chapter 2

1. [Court's footnote 3 in concurrence] The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.

Chapter 3

1. [Footnote 1 by the Court] "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." A pen register is "usually installed at a central telephone facility [and] records on a paper tape all numbers dialed from [the] line" to which it is attached.

Chapter 4

1. [Footnote 2 by the Court] The plurality's use of the FAA regulations as a means for determining whether Riley enjoyed a reasonable expectation of privacy produces an incredible result. Fixed-wing aircraft may not be operated below 500 feet (1,000 feet over congested areas), while helicopters may be operated below those levels. Therefore, whether Riley's expectation of privacy is reasonable turns on whether the police officer at 400 feet above his curtilage is seated in an airplane or a helicopter. This cannot be the law.

Chapter 5

1. [Footnote 7 by the Court] I should take care myself to reserve judgment about a possible case significantly unlike this one. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion. Suffice it to say here that what is a reasonable search depends in part on demonstrated risk. Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk.

Chapter 6

1. [Footnote 2 by the Court] Because probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking. Because unlawful entry is the only offense that the District and its officers discuss in their briefs to this Court, we likewise limit our analysis to that offense.

2. *See* Eric Black, "Driving While Black: GOP Sen. Tim Scott Tells of His Experiences," *Minn. Post* (July 14, 2016); Conor Friedersdorf, "The Senate's Only Black Republican Opens Up About Being Mistreated by Cops," *Atlantic* (July 15, 2016).

3. *See, e.g.*, David A. Harris, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters," 84 Minn. L. Rev. 265

(1999); *State v. Soto*, 734 A.2d 350 (N.J. Super. 1996); Consent Decree, *Wilkins v. Maryland State Police*, No. 93-468 (D.Md. Apr. 22, 2003).

Chapter 7

1. [Footnote by editors] We have removed the Court's Fifth Amendment analysis.

2. [Footnote 10 by the Court] Petitioner also suggests that the specific list of the documents to be seized constitutes a "general" warrant. We disagree. Under investigation was a complex real estate scheme whose existence could be proved only by piecing together many bits of evidence. Like a jigsaw puzzle, the whole "picture" of petitioner's false-pretense scheme with respect to Lot 13T could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little. The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession.

3. [Footnote 11 by the Court] We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

4. *See Banks* at 38, n. 5 (collecting cases).

5. *See* Radley Balko, "No-Knock Raids like the one against Paul Manafort are more Common than You Think," Wash. Post (Aug. 10, 2017).

6. [Footnote by editors] Balko is referring to drug crimes and illegal gambling—or, more generally, crimes with no apparent "victim."

7. Radley Balko, *Rise of the Warrior Cop* xi-xii (2013).

8. *Id.* at 183; *see also* Radley Balko, "How Little Rock's Illegal Police Raids Validate the Exclusionary Rule," Wash. Post (Oct. 19, 2018) (reporting routine issuance of no-knock warrants despite lack of any specific information in application about "why the suspect named in the warrant merited a no-knock raid").

Chapter 8

1. [Footnote by editors] A Lawful Permanent Resident, also known as a "green card" holder, is a non-citizen authorized to live permanently within the United States.

2. *See* Devallis Rutledge, "Serving the Search Warrant," Police (Mar. 2, 2016).

3. *See* NYPD, Legal Bureau Bulletin, Vol. 43, No. 3 (Nov. 2013).

4. *See P.M. ex rel. Whitworth v. Bolinger*, No. 2:10-CV-04208-NKL, 2011 WL 5838406 (W.D. Mo. Nov. 21, 2011) (describing the search and its aftermath in detail).

5. *See* Brennan David, "Burton Touts Restrictive Policy," Colum. Tribune (May 11, 2010).

Chapter 9

1. *See Washington v. Chrisman*, 455 U.S. 1, 5-6 (1982).

2. [Footnote ** by the court] Part[] II-C of this opinion [is] joined only by Mr. Justice DOUGLAS, Mr. Justice BRENNAN, and Mr. Justice MARSHALL.

3. Jay-Z, "99 Problems," The Black Album (Roc-A-Fella Records 2003)

4. Caleb Mason, *Jay-Z's 99 Problems, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps*, 56 St. Louis U. L.J. 567, 581 (2012)

5. [Footnote 3 by the Court] We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

Chapter 10

1. This sort of search is sometimes abbreviated "SITA" for "Search Incident To Arrest." This book uses "SILA" to emphasize that only "lawful" arrests trigger the exception.

2. For opinions reviewing the relevant precedent in some detail and reaching opposite conclusions, *see, e.g.*, *People v. Cregan*, 10 N.E.3d 1196 (Ill. 2014) (allowing such a search); *id.* at 1210 (Burke, J., dissenting) (arguing the majority misread Supreme Court precedent).

Chapter 11

1. [Footnote by editors] We will consider these factors later in the semester, when studying the Court's regulation of interrogations pursuant to the Fifth, Sixth, and Fourteenth Amendments.

2. [Footnote by editors] The Court's decision in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), is discussed briefly in the notes following this case.

Chapter 12

1. [Footnote by editors] Valid consent would have justified entry even absent exigent circumstances. During post-conviction proceedings, the appellate courts decided that because they found exigent circumstances, they did not need to determine whether consent existed. Accordingly, only exigent circumstances was before the Court.

2. In a brief concurring opinion, Chief Justice Roberts noted that nothing in the Court's decision in *Caniglia* cast doubt on the prior holdings in *Brigham City* and *Fisher*.

Chapter 13

1. [Footnote by editors] Part II-C of Justice Sotomayor's opinion, which responds to the arguments raised by Chief Justice Roberts and is not reprinted here, had the support of only four justices. Justice Kennedy, who concurred in the result, wrote separately to argue that "this case does not call for the Court to consider in detail the issue discussed in Part II-C and the separate opinion by" Roberts.

2. [Footnote 1 by the Court] The state trial court never decided whether there was consent to the entry because it deemed decision of that issue unnecessary in light of its finding that exigent circumstances justified the warrantless arrest. For purposes of this decision, therefore, we assume that there was no valid consent to enter the petitioner's home.

3. *See* National Minimum Drinking Age Act of 1984, 98 Stat. 435; *see also South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding constitutionality of act).

Chapter 14

1. [Footnote by editors] "Border passes," also known as "border crossing cards," allow bearers entry into parts of the United States near the border for brief periods—less than 72 hours—and do not allow bearers to work.

2. [Footnote 17 by the Court] Of the 820 vehicles referred to the secondary inspection area during the eight days surrounding the arrests involved in [Martinez-Fuerte's case], roughly 20% contained illegal aliens. Thus, to the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint, that reliance clearly is relevant to the law enforcement need to be served. [W]e [have] noted that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor ...," although we held that apparent Mexican ancestry by itself could not create the reasonable suspicion required for a roving-patrol stop. Different considerations would arise if, for example, reliance were put on apparent Mexican ancestry at a checkpoint operated near the Canadian border.

3. [Footnote 4 in the opinion] Though today's decision would clearly permit detentions to be based solely on Mexican ancestry, the Court takes comfort in what appears to be the Border Patrol practice of not relying on Mexican ancestry standing alone in referring motorists for secondary detentions. Good faith on the part of law enforcement officials, however, has never sufficed in this tribunal to substitute as a safeguard for personal freedoms or to remit our duty to effectuate constitutional guarantees. ... Even if good faith is assumed, the affront to the dignity of American citizens of Mexican ancestry and Mexican aliens lawfully within the country is in no way diminished. The fact still remains that people of Mexican ancestry are targeted for examination at checkpoints and that the burden of checkpoint intrusions will lie heaviest on them.

4. Otay Mesa was the port of entry through which Manuel Flores-Montano's gas tank entered the United States.

Chapter 15

1. [Citation by editors] *United States v. Place*, 462 U.S. 696 (1983) (assigned for Chapter 5).

2. [Footnote by editors] *Terry v. Ohio*, 392 U.S.1 (1968), and *Michigan v. Long*, 463 U.S.1032 (1983) concern searches permitted under the "stop-and-frisk" doctrine, which we will cover later in the course.

3. The authors thank Rachel Mitchell, who raised this issue while enrolled in Criminal Procedure at the University of Missouri School of Law during fall of 2018.

Chapter 17

1. [Footnote 1 by the Court] As several witnesses testified at trial, the problem of "crack babies" was widely perceived in the late 1980's as a national epidemic, prompting considerable concern both in the medical community and among the general populace.

2. [Footnote by editors] In a footnote here, the Court listed the nine criteria, which included "No prenatal care," "Previously known drug or alcohol abuse," and "Unexplained congenital anomalies."

3. [Footnote by editors] The "special needs" doctrine has been invoked to permit searches "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." One example is public school searches. Another is the search of the home of someone on probation, which is covered in our next chapter.

Chapter 18

1. [Footnote by editors] Only three Justices joined Justice Kennedy in Part IV; that Part did not command a majority of votes. For the remainder of his opinion, four Justices joined Justice Kennedy, providing a majority.

2. The authors thank Clinton Sinclair for permission to include his story in this book.

3. For a discussion of how such zoning affects "nontraditional" families, see Rigel Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 Fla. L. Rev. 1401 (2016).

Chapter 19

1. [Footnote ** by the Court] THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice POWELL also join all but Part II-A of this opinion.

2. [Footnote by editors] Only Justices Stewart and Rehnquist signed on to Part II-A of the opinion.

3. [Footnote by editors] In two footnotes hanging from this paragraph, the dissent quoted from testimony indicating that, according to the officers, Mendenhall "was not free to leave" when officers asked her to accompany them to the office and to submit to a search of her person. In other words, had she tried to leave, officers would have detained her.

4. The authors thank former student Christopher Thompson for bringing this case to our attention.

5. [Footnote 1 by the Court] California conceded below that Officer Pertoso did not have the "reasonable suspicion" required to justify stopping Hodari. That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ("The wicked flee when no man pursueth"). We do not decide that point here, but rely entirely upon the State's concession.

6. [Footnote by editors] The Court reaffirmed this principle in *Torres v. Madrid*, 592 U.S. ___ (2020), holding that when police shoot a motorist with intent to restrain, the physical force involved in the shooting counts as a "seizure" even if the motorist escapes.

7. [Footnote by editors] The dissent's discussion of searches incident to lawful arrest is no longer accurate. See *Arizona v. Gant*, 556 U.S. 332 (2009) (Chapter 10).

Chapter 20

1. [Footnote by editors] Although the driving distance from LaGuardia airport to JFK is only about ten miles, those familiar with New York traffic realize that taking someone's luggage from one of those airports to the other is nearly certain to cause significant inconvenience.

2. [Footnote by editors] If the 20-minute stop was lawful, then the search of the vehicle was justified by the automobile exception because the odor of marijuana provided probable cause to believe drugs would be found.

3. [Footnote by editors] The Magistrate Judge found that detention for the dog sniff was not independently supported by individualized suspicion. Because the Court of Appeals did not decide this question, the Supreme Court did not address the question and wrote that it could be considered on remand.

INTERROGATIONS

Chapter 22

1. [Footnote 4 by the Court] Petitioner was mentally dull and "slow to learn" and was in the fifth grade when he became 15 years of age. Because of his age he was arbitrarily promoted to the seventh grade and soon thereafter quit school.

2. [Footnote 1 by the Court] How this could be so when the attorney's name, Tobias Russo, was concededly in the telephone book does not appear. The trial judge sustained objections by the Assistant District Attorney to questions designed to delve into this mystery.

3. [Footnote † by the Court] Justice MARSHALL, Justice BRENNAN and Justice STEVENS join this opinion in its entirety; Justice SCALIA joins Parts I and II; and Justice KENNEDY joins Parts I and IV.

4. [Footnote by editors] Note that Part III of the opinion is a dissent. Justice White would have preferred that "harmless-error" analysis never be allowed in cases involving the admission of involuntary confessions. But he could not obtain a majority for that position.

Chapter 24

1. For more on this theme, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003), and sources cited therein.

2. See *generally* Alec Karakatsanis, *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System* (2019) (discussing how "what is a crime" affects the lives of millions).

3. We are assuming for purposes of this discussion that critics of *Miranda* object only to impediments it places in the path of voluntary confessions, not involuntary confessions.

4. *See* Paul Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996).

5. *See id.* at 437-46.

6. *See* Stephen Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996).

7. *Id.* at 502.

8. *Id.* at 561.

9. *Id.*

10. *Id.* at 562.

11. *See* George C. Thomas III & Richard A Leo, *The Effects of* Miranda v. Arizona*: Embedded in Our National Culture?*, 29 Crime & Justice 203 (2002).

12. *Id.* at 246.

13. *Id.* at 247.

14. Benjamin A. Galatzer-Levy & Robert M. Galatzer-Levy, *Ordinary Police Interrogation in the United States: The Destruction of Meaning and Persons: A Psychoanalytic-Ethical Investigation*, 69 Am. Imago 57 (2012)

15. *Id.* at 68.

16. *Id.* at 73.

17. *See, e.g.*, Elizabeth Loftus, *Eyewitness Testimony* (1996); Douglas Starr, *Remembering a Crime That You Didn't Commit*, New Yorker (Mar. 5, 2015) (reviewing studies of how easily false memories can be implanted during questioning).

Chapter 25

1. [Footnote 7 by the Court] This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

Chapter 27

1. [Footnote 3 by the Court] During cross-examination by Mosley's counsel at the evidentiary hearing, Detective Hill conceded that Smith in fact had not confessed but had "denied a physical participation in the robbery."

2. [Footnote 7 by the Court] We thus need not decide Edwards' claim that the State deprived him of his right to counsel under the Sixth and Fourteenth Amendments.

Chapter 29

1. *See Arizona v. Roberson*, 486 U.S. 675 (1988) (Chapter 27).

2. *See* Akhil Amar, *Double Jeopardy Law Made Simple*, 106 Yale L. J. 1807 (1997).

Chapter 30

1. [Footnote 11 by the Court] This is not to read a "custody" requirement, which is a prerequisite to the attachment of *Miranda* rights, into this branch of the Sixth Amendment. Massiah was in no sense in custody at the time of his conversation with his codefendant. Rather, we believe the fact of custody bears on whether the Government "deliberately elicited" the incriminating statements from Henry.

THE EXCLUSIONARY RULE

Chapter 31

1. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal L. Rev. 929, 951 (1965).

2. *See* William Yardley, "Dollree Mapp, Who Defied Police Search in Landmark Case, Is Dead," N.Y. Times (Dec. 9, 2014).

3. *See* Guido Calabresi, *The Exclusionary Rule*, 26 Harv. J. of L. & Pub. Pol'y 111, 112 (2003) (calling the rule "most responsible for the deep decline in privacy rights in the United States").

4. *See id.* at 113-18 ("I present this half-baked idea playing the role of an academic, rather than that of a judge"). Before being appointed to the U.S. Court of Appeals for the Second Circuit, Judge Calabresi was dean of Yale Law School.

5. *See* Yale Kamisar, *A Defense of the Exclusionary Rule*, 15 Crim. L. Bull. 5 (1979).

6. *See id.* at 5 n.4 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960))

7. *Id.* at 10-11.

8. *Id.* at 11.

9. *Id.*

10. *Id.*

11. *Id.* at 12.

12. *Id.*

Chapter 32

1. [Footnote by editors] *See Illinois v. Krull*, 480 U.S. 340, 348-49 (1987). We will review the "good faith" exception in greater detail in a subsequent chapter.

Chapter 35

1. *See Lego v. Twomey*, 404 U.S. 477 (1972).

2. *Id.* at 489.

3. *See Simmons v. United States*, 390 U.S. 377, 394 (1968).

4. *See, e.g.*, Fed. R. Evid. 609(a)(1)(A); Mo. Rev. Stat. § 491.050 ("any prior criminal convictions may be proved to affect [a witness's] credibility in a civil or criminal case").

5. *See* 42 U.S.C. § 1988(b); *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (affirming significant fee award in case involving Fourth Amendment violations)

6. *See, e.g.*, Scott Lauck, "What's a Sunshine Case Worth in Rural Missouri?," Mo. Lawyers' Weekly (Apr. 25, 2018) (describing

fee award of $85 per hour for victorious lawyers who sued sheriff's office under Sunshine Law for wrongfully withholding reports related to death of officer, and noting that defendant's outside lawyer was paid at higher rate).

7. *See, e.g.*, Kristine Guerra, "Innocent Black Man Dragged from Bed, Punched, Arrested—and Awarded $18 by a Jury," Wash. Post (Aug. 30, 2016).

8. *See, e.g.*, Tresa Baldas, "$37M awarded in Genesee Co. Police Beating Caught on Camera," Detroit Free Press (Nov. 6, 2016).

THE RIGHT TO COUNSEL

Chapter 36

1. The idea of applying *Gideon* only to cases at which a defendant faced a possible sentence of six months or more had its roots in cases about the right to trial by jury, which are discussed below.

2. *See* Celeste Bott, "Court Rules Public Defender Can't Appoint Missouri Governor as a Defense Attorney," St. Louis Post-Dispatch (Aug. 25, 2016).

IDENTIFICATIONS

Chapter 38

1. [Footnote by editors] *Escobedo*, which held that suspects have a right to counsel during interrogations under the Sixth Amendment, even before indictment or arraignment, is no longer good law on that point. For custodial interrogation before the right to counsel has attached, see *Miranda* and its line of cases. For questioning after the right to counsel has attached, see *Massiah* and its progeny.

2. [Footnote 9 by the Court] Bean took the stand and testified that he and petitioner found Shard's traveler's checks and Social Security card two hours before their arrest strewn upon the ground in an alley.

Chapter 39

1. [Footnote by editors] *Stovall v. Denno*, 388 U.S. 293 (1967), was decided on the same day as *Wade* and *Gilbert* and concerned a due process challenge to identification evidence. The Court stated that such challenges could succeed but that Stovall's specific challenge failed. The Court discussed the facts of *Stovall* further in Part II of this opinion.

Chapter 40

1. Although *Perry v. New Hampshire* (Chapter 39) was decided in 2012, it focused on the limited issue of third-party contributions to unreliable eyewitness identification (that is, behavior by non-state actors) and did not undertake a substantive or research-based review of the Court's prior eyewitness identification cases decided under the Due Process Clause.

2. [Footnote by editors] The *Henderson* court adopted much of the Special Master's report. Students interested in reading the report in its entirety can find it here: https://www.physics.smu.edu/pseudo/Eyewitness/NJreport.pdf.

3. [Footnote by editors] This presumption, made commonly by courts, might not survive scientific scrutiny.

CONFRONTING NEW CHALLENGES

Chapter 41

1. [Footnote 4 by the Court] These exceptions relate to certain activities of communication common carriers and the Federal Communications Commission, and to specified situations where a party to the communication has consented to the interception.

2. *See* 18 U.S.C. § 2515.

3. *See, e.g.*, Paul Kramer, "The Water Cure: Debating Torture and Counterinsurgency—a Century Ago," New Yorker (Feb. 25, 2008).

4. To understand our reticence, *see, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944); Richard Reeves, *Infamy: The Shocking Story of the Japanese American Internment in World War II* (2015); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489 (1945) (showing great courage and clarity, well ahead of most other scholars); *see also Debs v. United States*, 249 U.S. 211 (1919).

5. *See* 585 F.3d 559 (2009).

6. 130 S. Ct. 3409 (2010).

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