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FOURTH AMENDMENT RIGHTS AND THE EXCLUSIONARY RULE IN THE TWENTY-FIRST CENTURY: 2000-2016

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FOURTH AMENDMENT RIGHTS AND THE EXCLUSIONARY RULE IN THE TWENTY-FIRST CENTURY: 2000-2016

INTRODUCTION

The Fourth Amendment: Why We Have It and Why It's Important:

> "The right of the people to be secure in their homes, houses, papers and effects, against unreasonable search 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 Founders added the Fourth Amendment to the Bill of Rights, as part of the federal Constitution, because of their experiences as colonists under British rule. The British used the threat and reality of random, suspicionless searches to control and intimidate the colonists. The British courts issued Writs of Assistance or General Warrants, which empowered governmental officials, including customs officials and tax collectors, to enter and search a person's property – a private home or a business - without any notice, without a reason, and without designating the materials sought, the precise location to be searched, or the persons to be seized.

The Fourth Amendment protects the people from the arbitrary exercise of governmental power by state agents, particularly law enforcement officers. When properly enforced, it protects against unreasonable governmental invasions of our property, our liberty and our privacy. Sixty-eight years ago, Supreme Court Justice Jackson explained the importance of the Fourth Amendment:

> "Uncontrolled search and seizure is the first and most effective weapon in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." (*Brinegar v. United States* (1949) 338 U.S. 160, 180-181.)

The Fourth Amendment guarantees the right to be free from unreasonable search and seizure but does not specify how that right is to be enforced. Thus, starting in 1914, the United States Supreme Court formulated the exclusionary rule. If the conduct of government officials is shown to violate the Fourth Amendment, the exclusionary rule requires that evidence obtained as a result of such conduct must be suppressed; it cannot be used in the criminal trial of the individual who was subject to the illicit search or seizure. The justices who formulated the exclusionary rule, and those who dissented from later cases limiting its application, recognized that the rule is absolutely necessary to effectuate Fourth Amendment rights. If illegally seized evidence is not excluded from criminal trials, the Fourth Amendment guarantee is an empty promise.

Every time that the Supreme Court limits the reach of the exclusionary rule by insisting that its only purpose is to deter future police misconduct, and that it should only be applied when that deterrent effect outweighs the social costs (particularly allowing "the guilty" to go free"), the Court deals a blow to our Fourth Amendment rights. Justice Brennan recognized this in his dissent from *United States v. Leon*. He stated that in our zealous efforts to combat crime, it is all too easy for government officials to seek expedient solutions. Limiting or abandoning the exclusionary rule, and the consequent "relaxation of Fourth Amendment standards seems a tempting, costless means of meeting the public's demand for better law enforcement". But as a society, we would pay a heavy price for such expediency, as it has long been recognized that the Fourth Amendment restricts the exercise of unrestrained power by the police and the government. (See *United States v. Leon* (1984) 468 U.S. 897, 959-960.)

Although the courts mostly see cases in which law enforcement officers have found incriminating evidence during a search, enforcement of Fourth Amendment rights and the deterrence of unreasonable searches and seizures protect all citizens, not just those who have committed crimes. Police officers frequently stop and search people, particularly people of color and persons who reside in certain urban neighborhoods, without finding anything. And yet these intrusions restrain individual liberty, invade privacy and engender fear, resentment and humiliation.

In order to determine how best to protect and defend the rights of our clients and all Americans to be free from unreasonable searches and seizures in the months and years ahead, we must look to the Fourth Amendment decisions of the recent past - the first 17 years of the 21st Century -- to discern the state of the law and evident trends.

Fourth Amendment Decisions of the U.S. Supreme Court in the 21st Century

For the first 17 years of this century, from 2000 through 2016, we have had a conservative Supreme Court. Until February 13, 2016 (when Justice Scalia passed away), the Court has consisted of five conservative justices and four liberal justices. Since Justice Scalia passed, there have been only eight justices - four conservatives and four liberals. Soon we will have another conservative justice, who is not likely to be a Fourth Amendment supporter, and additional conservatives may be appointed in the next few years, as Justices Ginsburg and Kennedy are over 80, and Justice Breyer is 78 years old.

Here are the justices who have sat on the Supreme Court from 2000-2016[1]:

October 2000 through September 2005:
C: Rehnquist (CJ), O'Connor, Scalia, Kennedy, Thomas
L: Stevens, Souter, Ginsburg, Breyer

October 2005 through January 2006:
C: Roberts (CJ), O'Connor, Scalia, Kennedy, Thomas
L: Stevens, Souter, Ginsburg, Breyer

January 2006 through August 2009:
C: Roberts (CJ), Scalia, Kennedy, Thomas, Alito
L: Stevens, Souter, Ginsburg, Breyer

August 2009 through August 2010:
C: Roberts (CJ), Scalia, Kennedy, Thomas, Alito
L: Stevens, Ginsburg, Breyer, Sotomayor,

August 2010 through February 2016:
C: Roberts (CJ), Scalia, Kennedy, Thomas, Alito
L: Ginsburg, Breyer, Sotomayor, Kagan

February 2016 through present:
C: Roberts (CJ), Kennedy, Thomas, Alito
L: Ginsburg, Breyer, Sotomayor, Kagan

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[1] Conservative justices are identified by "C"; liberal justices by "L". These designations are based on apparent judicial philosophy and not on the political orientation or attitudes towards civil liberties of the president who appointed the justice. Justice Stevens was appointed by President Nixon and Justice Souter by President G.H.W. Bush

Generally speaking, conservatives (true libertarians excepted) tend to be more concerned with providing law enforcement officers with the tools to promote “law and order” and “national security” than with protecting civil liberties and privacy. Liberals often strive to prevent concerns about order and security from seriously eroding First and Fourth Amendment rights. However, upon surveying 30 Fourth Amendment cases decided by the Supreme Court from 2000 through 2017, the results are not fully what one would expect from a conservative court.

Upon reading and analyzing 26 twenty-first century decisions dealing with substantive Fourth Amendment rights, I found 11 cases, identified as "gains", in which the Court extended or re-affirmed Fourth Amendment protections. In many of these cases, conservative justices joined the majority, while liberal justices occasionally dissented. (In particular, Justice Scalia joined the majority in 10 of these 11 pro-Fourth Amendment decisions and wrote the majority opinion in three of them.)

In 14 of these cases, "setbacks", the Supreme Court eroded Fourth Amendment protections to give more leeway to law enforcement officers to detain, arrest and search (particularly without a warrant). Only three of these cases were 5-4 decisions, with all conservative justices in the majority and the liberal justices dissenting. Each of the liberal justices joined the majority in at least one of these decisions, three of which were unanimous. (Justice Breyer sided with the majority in seven of the 14 cases eroding Fourth Amendment rights.)

One case, decided 5-3 by the eight-justice court in 2016, had a neutral effect. (See *Birchfield v. North Dakota* (2016) 136 S.Ct. 2160 [the Fourth Amendment permits a compelled warrantless breath test for a drunk-driving arrestee, but not a compelled warrantless blood draw; the blood draw requires a warrant or case-specific exigent circumstances].)[2]

In the four cases addressing the application of the exclusionary rule, the news for Fourth Amendment advocates was all negative. In each of these cases, the Court extended exceptions to the exclusionary rule and narrowed the circumstances in which incriminating evidence resulting from unconstitutional searches or seizures would be suppressed. In every case curtailing the use of the exclusionary rule, all of the conservative justices were in the majority.

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[2] *Birchfield*, and all other decisions referenced in this Introduction are discussed in detail in these materials.

Substantive Fourth Amendment Decisions Advancing or Diminishing Fourth Amendment Rights

In these materials, I provide summaries of 26 Fourth Amendment decisions dealing with the following issues: 1) Technology and the Fourth Amendment; 2) Reasonable Suspicion for a Detention; 3) Detentions Based on Anonymous Tips; 4) Traffic Stops of Passengers; 5) Arrests for Minor Offenses During Traffic Stops; 6) Searches of Arrestees and Their Vehicles; 7) Drug-Sniffing Dogs; 8) Home Searches - Warrantless Entries Based on Exigent Circumstances; 9) Home Searches - Consent by Co-Occupants; 10) DUI Arrests - Warrantless Blood and Breath Tests; 11) School Searches; and 12) Parole Searches.

Decisions Protecting Fourth Amendment Rights

Regarding the 11 decisions from 2000 through 2016 which re-affirmed or extended Fourth Amendment protections, four were unanimous, with all five conservative justices joining the four liberals: *Florida v. J.L.* (2000) 529 U.S. 266 [an uncorroborated anonymous tip does not provide reasonable suspicion for a stop and frisk][3]; *Brendlin v. California* (2007) 551 U.S. 249 [a passenger is detained during a traffic stop] *United States v. Jones* (2012) 565 U.S. 400 [attachment and use of a GPS tracking device constitutes a search]; *Riley v. California* (2014) 134 S.Ct. 2473 [officers generally need a warrant to search cell phone data incident to an arrest].

The majority opinions in the 11 pro-Fourth Amendment decisions were not all written by liberal justices. As noted, Justice Scalia wrote three of them. (*Kyllo v. United States* (2001) 533 U.S. 27 [police use of a thermal-imaging device to measure the amount of heat emanating from a home is a search]; *Florida v. Jardines* (2013) 133 S.Ct. 1409 [bringing a drug-sniffing dog onto the porch of a home is a search]; *United States v. Jones* (2012) 565 U.S. 400 [attachment and use of a GPS tracking device constitutes a search].) Chief Justice Roberts wrote one. *(Riley v. California* (2014) 134 S.Ct. 2473 [officers generally need a warrant to search cell phone data incident to an arrest].

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[3] *Florida v. J.L.* is the only unanimous 21st Century pro-Fourth Amendment decision filed when Chief Justice Rehnquist and Justice O'Connor were on the Court, before Chief Justice Roberts and Justice Alito joined.

Here is the breakdown of justices who authored the majority opinions in these 11 cases advancing Fourth Amendment rights:

Justice Scalia - 3
Justice Souter -3
Justice Ginsberg - 2
Justice Stevens - 1
Justice Sotomayor - 1
Chief Justice Roberts - 1

In addition to the four unanimous decisions, the other seven pro-Fourth Amendment decisions had at least one conservative justice join the majority decision. In these 11 cases, here is the breakdown of conservative justices who joined the majority opinions, including the opinions they wrote. The second number refers to the number of dissents written by each justice in the pro-Fourth Amendment decisions. (Remember that there are sometimes multiple dissents in a single case):

Justice Scalia -10/1[4]
Justice Thomas - 7/4
Justice Kennedy - 6/1
Chief Justice Roberts - 5/1
Justice Alito - 4/3
Chief Justice Rehnquist - 1
Justice O'Connor - 1

In these 11 pro-Fourth Amendment cases, here is the breakdown of liberal justices who dissented from the majority opinions:

Justice Breyer -3
Justice Stevens - 1

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[4] Justice Scalia dissented only from Justice Souter's majority opinion in *Georgia v. Randolph* (2006) [when one co-occupant consents to a warrantless search of a shared residence, but a physcially present co-occupants expressly refuses consent, the ensuing search is unreasonable as to the objecting co-occupant].

In these 11 decisions that advanced Fourth Amendment rights, there are several themes:

> 1) The justices recognized that technological changes provide law enforcement with new means of intruding into Fourth Amendment rights and that Fourth Amendment analysis must adjust accordingly to protect privacy. (*Kyllo v. United States* (2001) 533 U.S. 227 [use of a thermal imaging device to measure heat emanating from a home constitutes a search]; *United States v. Jones* (2012) 565 U.S. 400 [attachment and use of a GPS tracking device constitutes a search]; *Riley v. California* (2014) 134 S.Ct. 2473 [officers generally need a warrant to search cell phone data incident to an arrest].
>
> 2) The justices rejected interpretations of their prior decisions as promulgating per se rules permitting police officers to search irrespective of the individual circumstances. (*Arizona v. Gant* (2009) 556 U.S. 332 [officers may not search the passenger compartment of a vehicle following the arrest of a recent occupant; they may only search when the arrestee is unsecured at the time of the search or when evidence of the arrest crime might reasonably be found in the passenger compartment]; *Missouri v. McNeely* (2013) 133 S.Ct. 1552 [the natural dissipation of alcohol in the bloodstream does not present a per se exigency in every case following a DUI arrest].)
>
> 3) The Court was concerned with the indiscriminate use of drug-sniffing dogs on the porch of a home (*Florida v. Jardines* (2013) 133 S.Ct. 1409); or during a prolonged detention following a traffic stop. (*Rodriguez v. United States* (2015) 135 S.Ct. 1609.)

Decisions Eroding Fourth Amendment Rights

As noted above, in 14 of the 26 substantive Fourth Amendment cases discussed in these materials, the Court eroded protections against unreasonable search or seizures, in many areas. Three of these decisions were unanimous, so that all four liberal justices joined the five conservatives. (See *United States v. Arvizu* (2002) 534 U.S. 266 [innocent factors considered in combination by an experienced officer may provide reasonable suspicion for a detention]; *Brigham City, Utah v. Stuart* (2006) 547 U.S. 398 [officers may enter a home without a warrant when they reasonably believe that an occupant is seriously injured or imminently threatened with injury]; *Virginia v. Moore* (2008) 553 U.S. 164 [an officer may constitutionally arrest a person for a minor offense, even if the

arrest is proscribed by state law].)[5]

Only three of these cases cutting back on Fourth Amendment rights were decided by a 5-4 vote, with the five conservative justices in the majority and the four liberal justices dissenting. (See *Illinois v. Wardlow* (2000) 528 U.S. 119 [headlong flight in a high crime area provides reasonable suspicion for a detention]; *Hibbel v. Sixth District Court of Nevada* (2004) 542 U.S. 177 [state law may compel a detainee to disclose his name or be arrested]; *Florence v. Board of Chosen Freeholders of County of Burlington* (2012) 566 U.S. 318 [approving strip searches of arrestees who will be jailed with other inmates, without individualized suspicion, regardless of the nature of the crime of arrest].)

In these 14 cases, the majority opinions were mostly, but not all, written by the conservative justices. Conservatives wrote 12 of the opinions. Justices Stevens wrote the majority opinion in *Illinois v. Caballes* (2005) 543 U.S. 405 [a dog sniff performed on a vehicle during a lawful traffic stop is not a search], and Justice Souter wrote the majority opinion in *Atwater v. Lago Vista* (2001) 532 U.S. 318 [the Fourth Amendment permits a warrantless arrest for a minor offense, such as a seatbelt violation].

Here is the breakdown of the justices who authored the majority opinions in these 14 cases diminishing Fourth Amendment protections:

Chief Justice Rehnquist - 3
Justice Kennedy - 3
Justice Thomas - 2
Justice Alito - 2
Chief Justice Roberts - 1
Justice Scalia - 1
Justice Stevens - 1
Justice Souter - 1

[5] All three of these unanimous decisions were filed before Justices Sotomayor and Kagan joined the Supreme Court.

In these 14 cases cutting back on Fourth Amendment rights, here is the breakdown of liberal justices who joined the majority opinions, including the opinions they wrote:

Justice Breyer - 7
Justice Ginsburg - 4
Justice Stevens - 3 (wrote 1)
Justice Souter - 3 (wrote 1)
Justice Kagan - 2
Justice Sotomayor - 1

Here is the breakdown of justices who wrote dissents to these 14 decisions restricting Fourth Amendment rights.:

Justice Stevens - 3
Justice Ginsburg - 3
Justice Breyer - 2
Justice Scalia - 2[6]
Justice Souter - 1
Justice O'Connor - 1[7]
Justice Sotomayor - 1

[6] Justice Scalia wrote rather caustic dissents in *Navarette v. California* (2014) 134 S.Ct. 1683 [finding that an apparent eye-witness anonymous tip was sufficiently reliable to provide reasonable suspicion for a stop]; and in *Maryland v. King* (2013) 133 S.Ct. 1958 [approving programmatic DNA searches of arrestees charged with violent crimes and burglaries who are held in pre-trial custody]. In both cases, he was joined by three liberal justices, but not by Justice Breyer.

[7] Justice O'Connor wrote a strong dissent in *Atwater v. Lago Vista* (2001) 532 U.S. 318 [he Fourth Amendment allows a custodial arrest for a minor fine-only offense]. She was joined by three liberal justices. Justice Souter wrote the majority opinion.

In these 14 decisions diminishing Fourth Amendment rights, here are the major themes:

1) The Court made it easier for the government to prove reasonable suspicion to justify a detention. (*Illinois v. Wardlow* (2000) 528 U.S. 119 [headlong flight in a high crime area provides reasonable suspicion for a detention]; *United States v. Arvizu* (2002) 534 U.S. 266 [innocent factors considered in combination by an experienced officer may provide reasonable suspicion for a detention]; *Heien v. North Carolina* (2014) 135 S. Ct. 530 [reasonable suspicion may rest on a reasonable mistake of law].)

2) The justices authorized arrests for traffic violations and other minor fine-only offenses, even if the arrest are prohibited by state law. (*Atwater v. Lago Vista* (2001) 532 U.S. 318 [the Fourth Amendment permits a warrantless arrest for a minor offense, such as a seatbelt violation]; *Virginia v. Moore* (2008) 553 U.S. 164 [an officer may constitutionally arrest a person for a minor offense, even if the arrest is proscribed by state law].)

3) The Court authorized additional violations of an arrestee's reasonable expectation of privacy, without individualized suspicion. (*Florence v. Board of Chosen Freeholders of County of Burlington* (2012) 566 U.S. 318 [approving strip searches of arrestees who will be jailed with other inmates, without individualized suspicion, regardless of the nature of the crime of arrest]; *Maryland v. King* (2013) 133 S.Ct. 1958 [approving programmatic DNA searches of arrestees charged with violent crimes and burglaries, who are held in pre-trial custody].)

4) The justices continued their assault on the warrant requirement by expanding the exigent circumstances exception. (*Brigham City, Utah v. Stuart* (2006) 547 U.S. 398 [officers may enter a home without a warrant when they reasonably believe that an occupant is seriously injured or imminently threatened with injury]; *Kentucky v. King* (2011) 563 U.S. 452 [a warrantless home entry to prevent the destruction of evidence is allowed as long as the police do not create the exigency by engaging in or threatening to engage in conduct violating the Fourth Amendment].)

5) Deviating from previous precedents, the Court twice approved programmatic suspicionless searches for evidence of criminal wrongdoing. (*Samson v. California* (2006) 547 U.S. 843 [a suspicionless search of a California parolee for evidence that he committed a crime or violated parole is constitutional because of the

governmental interest in combating recidivism]; *Maryland v. King* (2013) 133 S.Ct. 1958 [DNA searches of Maryland arrestees allowed without individualized suspicion that analysis of the DNA will provide evidence of the arrest offense or other crime in order to determine if the arrestee is the unknown perpetrator of an unsolved crime that yielded DNA evidence][8].)

Four Decisions Continuing the Supreme Court's Assault on the Exclusionary Rule

During the first 17 years of the 21st Century, the Court decided four cases involving application of the exclusionary rule to suppress evidence discovered following officers' violation of the defendants' Fourth Amendment rights. In all four decisions, the majority (particularly all five conservative justices) indicated their dislike of the exclusionary rule as a remedy for Fourth Amendment violations, particularly because it allows criminals to go free merely because the officers conducted an unconstitutional search or seizure.

In the first case, the majority held that the exclusionary rule does not apply to any evidence seized from a home following unconstitutional entry without complying with knock-notice rules. (*Hudson v. Michigan* (2006) 547 U.S. 586.) In the next two cases, the majority expanded the good-faith exception to the exclusionary rule to fit new factual scenarios. (*Herring v. United States* (2009) 555 U.S. 135 [the officers conducting the search reasonably relied on information justifying the defendant's arrest that was false because of a police employee's negligent record-keeping error]; *Davis v. United States* (2011) 564 U.S. 229 [the officers conducted the search in reasonable reliance on unequivocal binding precedent, in effect at the time of the search, but subsequently overruled].) In the final and most recent case, the court applied the attenuation doctrine to hold that the officer's discovery of a valid, pre-existing arrest warrant during an unconstitutional traffic stop purged the connection between the illicit detention and the subsequent search incident to arrest which uncovered incriminating evidence. (*Utah v. Strieff* (2016) 136 S.Ct. 2015.)

In these four cases, the line-up of the justices in the majority and those who dissented is more consistent with expectations, compared to the cases involving substantive Fourth

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[8] The majority characterized this as a search for the arrestee's identity (including his unknown criminal history). However, Justice Scalia, in his dissent, convincingly argued that the primary purpose of this suspicionless search is to discover evidence of criminal wrongdoing and to solve crimes.

Amendment rights. All the conservative justices were in the majority in the four cases.[9] The first two cases, *Hudson* and *Herring* were 5-4 decisions, with the five conservative justices in the majority and the four liberal justices dissenting. *Davis* was a 7-2 decision, with Justice Kagan joining the majority opinion and Justice Sotomayor writing a concurring opinion, explaining that she felt compelled by precedent to join the majority. *Strieff*, decided by an eight-justice court after Justice Scalia's death, was a 5-3 decision, with Justice Breyer joining the four remaining conservative justices in the majority.

These are the justices that wrote the majority opinions and the dissents in these four cases limiting the application of the exclusionary rule:

Hudson v. Michigan: Majority opinion by Justice Scalia. Dissent by Justice Breyer
Herring v. United States: Majority opinion by Chief Justice Roberts. Dissents by Justice Ginsburg and Justice Breyer
Davis v. United States: Majority opinion by Justice Alito. Dissent by Justice Breyer
Utah v. Strieff: Majority opinion by Justice Thomas. Dissents by Justice Sotomayor and Justice Kagan. (Justice Breyer joined the majority in this case.)

Considering these four decisions, along with multiple decisions since 1974, which have limited the application of the exclusionary rule to criminal trials and expanded the good-faith exception to the exclusionary rule, the majority of Supreme Court justices seem intent on curtailing and eventually eliminating the exclusionary rule, except, perhaps, in the most egregious cases of flagrant and purposeful Fourth Amendment violations. If or when we reach that point, individuals who are seized or searched in violation of their Fourth Amendment rights will need to rely on civil suits or police disciplinary proceedings to redress the violation of their Fourth Amendment rights – remedies that are unrealistic or unavailable for the average American.

This assault on the exclusionary rule is fueled the Supreme Court's insistence that the sole purpose of suppressing evidence in a criminal trial is to deter future police misconduct. Thus, the exclusionary rule should not be applied when the social costs of excluding the evidence outweigh any deterrence benefit. In fact, the Supreme Court justices who formulated the exclusionary rule between 1914 and 1969 believed that the rule was constitutionally mandated, and that its main purpose was to maintain judicial

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[9] For the first three cases, *Hudson, Herring* and *Davis*, that includes Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Thomas and Justice Alito. Justice Scalia had passed away by the time that *Streiff* was argued and decided.

integrity and assure that the government was not condoning or benefitting from law enforcement's unconstitutional conduct. They saw it as required to effectuate the Fourth Amendment's guarantees. In early cases, there was no reference to the deterrence rationale. In the mid-1970's when conservative justices and critics of the exclusionary rule gained control of the Supreme Court, they re-defined the purpose of the exclusionary rule. It was transformed into a judicially created remedy aimed solely at deterring police misconduct. Acceptance of that rationale has engendered a continuous stream of Court decisions limiting the reach of the exclusionary rule.[10]

As has been the case since 1970, liberal justices dissenting from decisions refusing to apply the exclusionary rule under various circumstances have continued to reiterate the rule's historical purposes and to note the real-world effects of allowing evidence discovered following a constitutional violation to be introduced at the defendant's criminal trial. The dissents written in *Hudson, Herring, Davis* and *Strieff* all make these important points, none more so that Justice Sotomayor's incredible dissent in *Strieff*. Indeed, Justice Sotomayor's dissent in *Strieff* should be required reading for all law students, lawyers, judges and judges, as well as all Americans who care about police conduct in these times.

Don't Forget to Read the Dissents

Where do we find the arguments needed to defend Fourth Amendment rights? We can certainly look to the majority opinions in the 11 twenty- first century cases protecting, re-affirming and extending the right to be free from unreasonable searches and seizures. However, as is always the case, some of the stronger language can be found in the justices' dissents to rulings diminishing these rights. Here are some dissents to read in the 14 cases enhancing police authority and limiting Fourth Amendment protections:

1) Justice Stevens's dissent in *Illinois v. Wardlow* (2000) 528 U.S. 119 [headlong flight in a high crime area provides reasonable suspicion for a detention], discussed the real-world effects of the majority's rule. He acknowledged the numerous possible innocent

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[10] For a further discussion of the evolution of the exclusionary rule in Supreme Court jurisprudence, see "THE RISE AND FALL OF THE EXCLUSIONARY RULE: CAN IT SURVIVE HUDSON, HERRING & BRENDLIN" by Kathryn Seligman (January 2010). Particularly, see Section C: "The Justification for the Exclusionary Rule: Changing Rationales Reflect Changing Attitudes". This set of materials is available in the Fourth Amendment Corner at www.fdap.org.

motivations for flight, even flight from the police. In particular, minorities living in high crime areas might flee because they reasonably believe that contact with the police could be dangerous.

2) Justice O'Connor also bemoaned the effects of the majority's ruling on average citizens in her dissent in *Atwater v. Lago Vista* (2001) 532 U.S. 318 [the Fourth Amendment permits a warrantless arrest for a minor offense, such as a seatbelt violation]. She noted that allowing police officers the discretion to make custodial arrests for minor fine-only offenses had "potentially serious consequences for the everyday lives of Americans" Such unbounded discretion carries with it grave potential for abuse. Because the police officer's subjective intent is irrelevant to Fourth Amendment analysis, the officer could wait to observe a simple traffic or equipment violation and then initiate a traffic stop and arrest the driver.

3) In Justice Sotomayor's dissent in *Heien v. North Carolina* (2014) 135. St. Ct. 530 [reasonable suspicion may rest on a reasonable mistake of law], she criticized the majority for departing from the bedrock principle that the law is definite and knowable. Giving officers license to detain individuals so long as they can attach "their reasonable view of the facts", even if mistaken, to "some reasonable legal interpretation that suggests a law has been violated" expands police officers' discretion to initiate detentions, even if based on pretext.

4) Justice Scalia's dissent in *Maryland v. King* (2013) 133 S.Ct. 1958 [approving programmatic DNA searches of arrestees charged with violent crimes and burglaries who are held in pre-trial custody] calls out the fallacy of the majority's holding that the state did not violate the Fourth Amendment when it conducted DNA searches of arrestees without any individualized suspicion that the DNA would provide evidence of the arrest offense or any other crime; the majority insisted that the state used the DNA only to "identify" the arrestee held in pre-trial custody by determining if he was the unknown perpetrator of a unsolved crime that had yielded DNA evidence. Justice Scalia insisted that the primary purpose of these DNA searches was not to "identify" the arrestees, but to discover evidence of criminal wrongdoing. Thus, pursuant to Fourth Amendment precedent, the state needed individualized suspicion.

5) Justice Ginsburg wrote important dissents in two cases: *Kentucky v. King* (2011) 563 U.S. 452 [a warrantless home entry to prevent the destruction of evidence is allowed as long as the police do not create the exigency by engaging in or threatening to engage in conduct violating the Fourth Amendment] and *Fernandez v. California* (2014) 134 S.Ct. 1126 [a co-occupant's express refusal of consent to enter a shared residence does not

bar entry when he has been removed from the premises one hour before another co-occupant consents]. In both cases, Justice Ginsburg forcefully criticized the majority for disregarding the warrant requirement, particularly when there is no showing that the officers lacked the time and the means to obtain a warrrant. Ginsburg noted that in this day and age, warrants can be obtained more easily and more quickly.[11] In *Fernandez v. California*, Justice Ginsburg quoted former Justice Jackson in stating that the warrant requirement – under which the police must obtain the approval of a neutral magistrate before they may arrest or search -- "ranks among 'the fundamental distinctions between our form of government where officers are under the law, and the police-state where they are the law'."

6) Justice Stevens, in his dissent in *Samson v. California* (2006) 547 U.S. 843 [a suspicionless search of a California parolee for evidence that he committed a crime or violated parole is constitutional because of the governmental interest in combating recidivism] criticized the majority for dispensing with the individualized suspicion requirement in a search that was not justified by special needs but conducted to uncover evidence of criminal wrongdoing. Stevens stated: "What the Court sanctions today is an unprecedented curtailment of liberty......The requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice and harassment."

[11] These same points were made by Justice Sotomayor in her majority opinion in *Missouri v. McNeely* (2013) 133 S.Ct. 1552 [the natural dissipation of alcohol in the bloodstream does not present a per se exigency in every case, following a DUI arrest], and by Chief Justice Roberts, in the unanimous opinion in *Riley v. California* (2014) 134 S.Ct. 2473 [officers generally need a warrant to search cell phone data incident to an arrest].

PART ONE

SUBSTANTIVE FOURTH AMENDMENT RIGHTS TWENTY-SIX SELECTED CASES FROM 2000 THROUGH 2016: GAINS AND SETBACKS[12]

I. Technology and the Fourth Amendment

(G) *Kyllo v. United States* (2001) 533 U.S. 27: Law enforcement use of a thermal-imaging device to measure the amount of heat emanating from a private home, as relevant to detecting marijuana cultivation inside the home, constitutes a search within the meaning of the Fourth Amendment.

5-4: Majority opinion by Justice Scalia, joined by Justices Souter, Thomas, Ginsburg and Breyer. Dissent by Justice Stevens, joined by Justices Rehnquist, O'Connor and Kennedy.

Law enforcement officers suspected that Kyllo was growing marijuana inside his home. Indoor marijuana growing requires the use of high-intensity lamps, which generate lots of heat. To determine whether the amount of heat emanating from the house was consistent with the use of such lamps, officers positioned themselves outside the home and used a thermal-imaging device to detect the amount of heat that was emanating from the walls and roof. Discovering that one wall and a portion of the roof were relatively hot compared to the rest of the home, they concluded that Kyllo was using high-intensity lamps to grow marijuana in a portion of the home. This information supported the issuance of a warrant authorizing a search of the home's interior where many marijuana plants were discovered.

Writing for the majority, Justice Scalia concluded that the use of the thermal-imaging device to detect heat emanating from the walls and roof of Kyllo's home constituted a residential search – an invasion into the home which revealed intimate details, even though the officers did not actually set foot inside. Kyllo's heat use was "information regarding the interior of the home that could not otherwise have been obtained without

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[12] Before the name of the case and the citation, the following abbreviations are used to indicate whether the case represents a step forward or a step backward for the protection of Fourth Amendment rights: (G) = a gain; (SB) = a setback; (N) = neutral. Of these 26 cases, I have identified 11 gains, 14 setbacks and one neutral case.

physical intrusion into a constitutionally protected area". It made no difference that the officers only used the data about excessive heat use in one part of the home to infer that he was growing marijuana. The information regarding heat use, obtained through thermal imaging, could also be used to discover intimate details, such as "at what hour each night the lady of the house takes her daily sauna and bath." The use of the device thus violated Kyllo's reasonable expectation of privacy in the interior of his home.

Justice Scalia recognized that technological changes provide police with new means of intruding into Fourth Amendment rights. "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 are there upon this power of technology to shrink the realm of guaranteed privacy."

In the dissent, Justice Stevens disagreed with the majority's holding, because inferences drawn from information in the public domain detected by "off-the-wall" surveillance are of a different constitutional magnitude than observations of private areas within the home made by "through-the-wall" surveillance. The use of the thermal imaging device revealed only data (excessive heat emanating from the walls) that the occupants knowingly exposed to those walking outside of their home, similar to traces of smoke or suspicious odors. Monitoring such emissions with "sense-enhancing technology" did not constitute a search of the home's interior.

(G) *United States v. Jones* (2012) 565 U.S. 400: Law enforcement's surreptitious attachment of a GPS tracking device to the underside of a vehicle, and the use of that device to monitor the defendant's movements in the vehicle on public streets for four weeks, constitutes a Fourth Amendment search.

9-0: Majority opinion by Justice Scalia, joined by Justices Roberts, Kennedy, Thomas and Sotomayor. Concurring opinion by Justice Sotomayor. Concurring opinion by Justice Alito, joined by Justices Ginsburg, Breyer and Kagan.[13]

Suspecting that Jones was engaged in drug trafficking, law enforcement officers obtained a warrant authorizing the placement of a GPS location tracking device on Jones's jeep. The officers installed the GPS device on the undercarriage of the jeep while

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[13] For a more detailed discussion of *United States v. Jones*, the three opinions and questions still to be resolved, see "TECHNOLOGY, PRIVACY AND THE FOURTH AMENDMENT: GPS LOCATION TRACKING AND CELL PHONE SEARCHES" by Kathryn Seligman (January 2015), available in the Fourth Amendment Corner at www.fdap.org

it was parked in a public lot. For the next 28 days, the officers used this device to track the movements of the jeep driven by Jones. The device recorded the jeep's locations and sent data to a government computer which connected Jones to a drug conspiracy.

To determine whether the attachment and use of the GPS tracking device constituted a search within the meaning of the Fourth Amendment, Justice Scalia, in the majority opinion, employed the traditional "trespass test" which determines whether law enforcement officers had physically entered or occupied private property for the purpose of obtaining information. If they did so, the intrusion constituted a search.[14] Scalia concluded that the officers trespassed on Jones's private property (the jeep) when they surreptitiously attached the GPS device to the vehicle's undercarriage and then used it to gather information on his movements while driving the vehicle for 28 days. The officer's installation and use of the GPS tracking device was analogous to an 18th century constable concealing himself in the subject's coach in order to track its movements and listen to occupants' conversations.

In his concurring opinion (joined by Justices Ginsburg, Breyer and Kagan), Justice Alito applied the modern test from *Katz v. United States* (1967) 389 U.S. 347, and concluded that the use of the attached GPS device to monitor Jones's movements for four weeks violated his reasonable expectation of privacy, and thus constituted a search. A person's Fourth Amendment rights would be violated by such long-term surveillance even if such monitoring had been accomplished without a physical trespass - i.e. if the police had used a GPS device installed on a vehicle prior to purchase. Location monitoring for a shorter period of time, which might previously have been achieved without GPS technology, would not necessarily qualify as a Fourth Amendment search.

Justice Sotomayor, in her concurring opinion, agreed with Justice Scalia that the officers' surreptitious attachment of a GPS device to Jones's vehicle constituted a trespass for the purpose of obtaining information. She also agreed with Justice Alito that the use of the

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[14] Fourth Amendment cases employed the trespass test from the time of the founders until the latter half of the 20th Century. Beginning with *Katz v. United States* (1967) 389 U.S. 347, the Court deviated from this property-based approach and held that the Fourth Amendment protects people, not places. The relevant question in assessing whether a police action qualified as a search was whether the officers violated the person's reasonable expectation of privacy. In the three *Jones* opinions, the justices debated whether the traditional trespass test survived Katz, and which test should be used to determine whether GPS installation and use constituted a search.

GPS device to monitor Jones's movements for four weeks violated his reasonable expectation of privacy. Under either theory, the officers conducted a search. Justice Sotomayor explained that in cases involving both long and short-term monitoring, GPS surveillance intrudes on the subject's reasonable expectations of privacy in her activities. GPS monitoring generates a comprehensive record of a person's movements, revealing details about her political, professional, religious and sexual associations - e.g. whether she visits a psychiatrist, a church or an abortion clinic.

(G) *Riley v. California* (2014) 134 S.Ct.2473: Law enforcement officers generally must obtain a warrant before they may search the data files of a cell phone seized from an arrestee at the time of arrest.

9-0 opinion authored by Chief Justice Roberts. Justice Alito wrote a concurring opinion[15]

Riley was stopped by a police officer for a traffic violation and ultimately arrested. During a search incident to arrest, an officer seized a "smart phone" from Riley's pocket. The officer immediately searched the cell phone's data files and noticed repeated references to a local gang. At the police station, about two hours after the arrest, another officer examined the data files and found videos indicating Riley's association with this gang as well as photos implicating him in a recent shooting. Riley was charged with crimes arising from the shooting incident and a gang enhancement.

In determining whether an officer must obtain a warrant to search the data files of an cell phone seized from an arrestee, Chief Justice Roberts acknowledged the need to assess whether the traditional search incident to arrest exception applies to a modern cell phone that stores vast quantities of private data – a digital record of nearly every aspect of the cell phone owner's life. Traditionally, in order to protect officer safety and prevent the destruction or concealment of evidence, an officer could conduct a warrantless search of personal property found on or near the arrestee or immediately associated with her person (e.g. a wallet or purse). Roberts concluded that even if a cell phone is found on an arrestee, it is not a personal effect that can be searched without a warrant. Because of the vast quantity of highly private information that can be stored in the cell phone's data files, it is not like a wallet; rather, it is a mini-computer that can be used as a phone. From viewing the call logs, e-mails, text messages, photos, videos,

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[15] For a fuller discussion of *Riley v. California* and the companion case of *United States v. Wurie*, see "TECHNOLOGY, PRIVACY AND THE FOURTH AMENDMENT: GPS LOCATION TRACKING AND CELL PHONE SEARCHES" by Kathryn Seligman (January 2015), available in the Fourth Amendment Corner at www.fdap.org

financial records, and downloaded internet sites stored on the cell phone, the officer could reconstruct the owner's private life. "Indeed a cell phone search could typically expose to the government far more than the most exhaustive search of a house."

Chief Justice Roberts acknowledged that requiring a warrant might impede law enforcement efficiency – i.e. the officer's ability to immediately access incriminating information from the cell phone's data files. However, "[p]rivacy comes at a cost." The warrant requirement merely delayed the search. In an exceptional cases, where the officers reasonably believed that they needed to immediately view the contents of an arrestee's phone to protect officer safety or prevent a crime, they could rely on exigent circumstances. A court would later determine whether the emergency justified the warrantless search in that particular case.

II. Detentions - Reasonable Suspicion

(SB) *Illinois v. Wardlow* (2000) 528 U.S. 119: Unprovoked headlong flight in a high crime area provides reasonable suspicion for a detention.

5-4: Majority opinion by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy and Thomas. Justice Stevens concurred in part and dissented in part, joined by Justices Souter, Ginsburg and Breyer.

Shortly after noon, eight police officers were in a four-car caravan patrolling an area known for heavy narcotics trafficking. The testifying officer could not recall if all the officers were in uniform (some were) or if the cars in the caravan were marked. As the caravan passed Wardlow, who was standing next to a building holding an opaque bag, he looked in the direction of the officers and fled. The officers watched Wardlow run through an alley, eventually stopping him on the street. He was pat-searched. Officers found a handgun and ammunition in Wardlow's bag.

The Court held that Wardlow's unprovoked flight upon noticing the police in a high crime area justified his detention. 1) An individual's presence in a high crime area is not sufficient, standing alone, to support a reasonable, particularized suspicion that the person is committing a crime. But it is a relevant consideration, along with other factors. 2) Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight "is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." The Court stated that the holding in *Wardlow* was consistent with its previous ruling in *Florida v. Royer* (1983) 460 U.S. 491. When an officer approaches an individual, he has the right to ignore the police and go

about his business. His refusal to cooperate cannot provide reasonable suspicion for a detention. “But unprovoked flight is simply not a mere refusal to cooperate.” Although there could have been innocent reasons for Wardlow’s flight, officers could detain him in order to resolve the ambiguity.

In his opinion, Justice Stevens concurred with the majority’s refusal to adopt the bright-line rule suggested by the government which would authorize the detention of anyone who flees at the mere sight of a police officer. Stevens also agreed with the majority’s rejection of the per se rule proposed by the defense – that flight upon seeing the police can never, by itself, justify an investigative stop. Stevens dissented because he did not believe that the totality of the circumstances in Wardlow’s case justified his detention.

Stevens discussed the diversity of possible motivations for an individual’s flight (e.g. a pedestrian may break into a run to catch a bus or to arrive at an appointment on time). But even if one flees because he sees the police, he may have an entirely innocent reason (e.g. fearing there is a crime scene nearby). Minorities, in particular, may have reasonable innocent reasons for running to avoid police contact. “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..... For such a person, unprovoked flight is neither ‘aberrant’ nor ‘abnormal’......”[T]he 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.”

(SB) *United States v. Arvizu* (2002) 534 U.S. 266: The observation of possibly innocent factors, considered in combination by an experienced officer, may provide reasonable suspicion for a detention.

9-0: Majority opinion for the unanimous court by Chief Justice Rehnquist. Concurring opinion by Justice Scalia.

Border Patrol Agent Stoddard was working at a checkpoint 30 miles north of the United States-Mexico border in Arizona, tasked with apprehending vehicles smuggling drugs and undocumented immigrants across the border. One afternoon, he learned that magnetic sensors had signaled the westbound passage of a vehicle along a rural back road commonly used by smugglers to circumvent border patrol checkpoints. Agent Stoddard drove to a location to intercept that vehicle and observed an oncoming minivan – a model often used by smugglers and the only vehicle on that road at that time. Agent Stoddard followed the minivan and decided to make a vehicle stop after observing the following: 1) There were five people in the minivan - an adult male driving,

an adult female in the passenger seat and three children in back. 2) The driver slowed down dramatically as he passed the border patrol agent. 3) The driver's posture was rigid and he did not look at Stoddard. 4) The knees of the children sitting in the backseat were unusually high, as though their feet were on some cargo on the floor. 5) After Stoddard started following the minivan, the children waved mechanically, as though they were being instructed. 6) The driver turned abruptly onto a road that would avoid the border checkpoint. 7) The minivan was registered to an address in an area notorious for smuggling. After stopping the van, Stoddard searched the vehicle and found marijuana.

Chief Justice Rehnquist held that *Terry v. Ohio* precludes a "divide and conquer" analysis where individual factors are considered in isolation from each other. The combination of the above-listed factors, along with the minivan's travel on a back road commonly used by smugglers to avoid border patrol, provided reasonable suspicion for the vehicle stop. Although many of these factors (e.g. the driver's deceleration and failure to look at the agent as he passed) could be innocent, seemingly innocent factors considered together can support a stop. The agent could consider them collectively, drawing on his own training and experience. He could draw inferences from the cumulative information that might elude an untrained person.

(SB) *Heien v. North Carolina* (2014) 135 S.Ct. 530: Reasonable suspicion, as required for a traffic stop or an investigatory stop, can rest on a reasonable mistake of law.

8-1: Majority opinion by Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito and Kagan. Concurring opinion by Justice Kagan, joined by Justice Ginsburg. Dissenting opinion by Justice Sotomayor.

While observing traffic on the interstate, Sergeant Darisse watched a Ford Escort pass by. Because the driver looked "very stiff and nervous", Darisse followed the Ford. When the driver of the Ford braked, only one of two brake lights illuminated. Believing that the faulty brake light violated North Carolina law, Darisse initiated a traffic stop. Vasquez was driving, and Heien (the owner of the car) lay across the rear seat. During the course of the stop, Sergeant Darisse became suspicious because Vasquez seemed nervous and Heien remained lying down. The two men gave inconsistent answers about their destination. Darisse asked if he could search the Ford, and both men consented. During the vehicle search, Darisse found a bag of cocaine. It was later determined that North Carolina law requires only one working brake light, so Heien's car was not in violation.

Chief Justice Roberts re-affirmed that "the ultimate touchstone of the Fourth Amendment is reasonableness......To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes by government officials." Searches and seizures based on reasonable mistakes of fact can be justified. "But reasonable men make mistakes of law too, and such mistakes are no less compatible with the concept of reasonable suspicion." To support a detention, the officer's mistaken understanding of the law must be objectively reasonable, and it was in this case. Although the specific provision of the North Carolina law requires only one working brake light, other subdivisions of the same section state that all originally equipped rear lamps or the equivalent must be in good working order, suggesting that if a vehicle comes with two brake lights, both must be functional.

In her concurring opinion, Justice Kagan emphasizes the limits of the Court's holding – the mistake of law must be objectively reasonable. The officer's subjective understanding of the law is irrelevant. Thus, the government cannot defend an officer's mistaken legal interpretation on the ground that the officer was unaware of or untrained in the law. The holding applies where – as in this case – the officer was interpreting a genuinely ambiguous statute.

In her dissent, Justice Sotomayor asserted that the majority's holding is unsupported by precedent or policy. She stated: "I would hold that determining whether a search or seizure is reasonable requires evaluating an officer's understanding of the facts against the actual state of the law......not an officer's reasonable misunderstanding about the law, but the law." In assessing whether there is reasonable suspicion for a detention, the emphasis has always been on the officer's interpretation of the totality of the facts and the inferences to be drawn from those facts, viewed through the lens of the officer's expertise, measured against a fixed legal standard. The notion that the law is definite and knowable sits at the foundation of our legal system. Departing from this tradition means further eroding the Fourth Amendment's protection. In *Whren v. United States* (1996) 517 U.S. 806, the Supreme Court held that an officer's subjective motivations do not render a traffic stop unlawful. But in *Whren*, the Court assumed that when an officer acts on pretext, that pretext would be the violation of an actual law. "Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation that suggests a law has been violated significantly expands this authority."

III. Detentions - Anonymous Tips

(G) *Florida v. J.L.* (2000) 529 U.S. 266: An anonymous tip that a described person standing at a specified location possessed a gun did not provide reasonable suspicion for a detention and frisk, because the criminal allegations were not adequately corroborated.

9-0 opinion authored by Justice Ginsburg. Justice Kennedy wrote a concurring opinion, joined by Chief Justice Rehnquist.[16]

An anonymous caller reported to the Miami-Dade police that a young black male wearing a plaid shirt was standing at a particular bus stop and carrying a gun. The call was not recorded, and nothing was known about the informant. Sometime after receiving the tip, two police officers were directed to respond. Six minutes later, the officers arrived at the designated bus stop and saw three black males standing at the bus stop. One of the three, later identified as 15-year-old J.L., was wearing a plaid shirt. Apart from the tip, the officer had no reason to suspect J.L. of illegal conduct. The officers did not see a firearm and J.L. made no threatening or unusual movements. One officer approached J.L., told him to put his hands up and frisked him; he seized a gun from J.L.'s pocket. A second officer frisked the other two males and found nothing.

Justice Ginsburg held that the officers lacked reasonable suspicion to stop and frisk J.L. Ginsburg noted that the officers' suspicion that J.L. was carrying a gun arose not from any observations that they made but solely from a tip by an anonymous caller. Ten years earlier, in *Alabama v. White* (1990) 496 U.S. 325, the Court had held than an anonymous tip supports a detention only when it is sufficiently detailed and includes predictive details of the subject's behavior that the police corroborate. Only then does the tip suggest inside knowledge of the asserted criminality and provide sufficient indicia of reliability to provide reasonable suspicion for a stop. The tip in J.L.'s case lacked "the moderate indicia or reliability present in *White*." The allegations of criminal behavior were not detailed and the tipster did not predict the subject's future actions. "The reasonable suspicion at issue here requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." It was not sufficient that the officer's observations corroborated the tipster's description of the subject, his

[16] For a more detailed discussion of Florida v. J.L. and other anonymous tip cases prior to 2007, see "WHEN DOES AN ANONYMOUS TIP PROVIDE REASONABLE SUSPICION FOR A STOP AND FRISK" by Kathryn Seligman and Jordan Jaffe (May 2007), available in the Fourth Amendment Corner at www.fdap.org

attire and his location. The officer did nothing to corroborate the anonymous informant's allegation of criminal conduct. One cannot assume the reliability of a truly anonymous tip. Because the informant has not revealed her identity, she could not be held accountable for a false tip and could lie with impunity.

Justice Ginsburg rejected the state's attempt to fashion a "firearm exception" which would allow an undetailed and uncorroborated tip alleging illegal gun possession to justify a stop and frisk, even if it was not shown to be reliable. This exception would be hard to limit. It would allow persons, for purposes of harassment, to anonymously and falsely assert that an individual was carrying a firearm. However, while dismissing this proffered exception, the Court suggested that some uniquely serious public safety concerns might allow a stop and frisk based on an insufficiently corroborated anonymous tip. "The facts of this case do not require us to speculate about the circumstances under which the danger alleged [e.g. a person carrying a bomb] might be so great as to justify a search without a showing of reliability."

In his concurring opinion, Justice Kennedy reasoned that the police might justifiably rely on a tip when the informant does not disclose his identity but, nevertheless, puts his anonymity at risk. This might happen, for example, if the tipster imparted her information to the officer in person, or when the tipster's phone call was recorded or could be traced to a particular phone, residence or location. If the informant is not truly anonymous, he or she may be held accountable for the information, discouraging lies, hoaxes and false reports.

(SB) *Navarette v. California* (2014) 134 S.Ct. 1683: An anonymous 911 call reporting that a driver had run the caller off the road, which was presumably based on the tipster's personal knowledge and supported an inference of drunk driving, was sufficiently reliable to provide reasonable suspicion for a stop.
5-4: Majority opinion by Justice Thomas, joined by Justices Roberts, Kennedy, Breyer and Alito. Dissent by Justice Scalia, joined by Justices Ginsburg, Sotomayor and Kagan.

The Humboldt County California Highway Patrol (CHP) office received and recorded a 911 call. The tipster reported that a 1988 Silver Ford pickup with a specified license plate number ran the reporting party off the roadway at a particular highway mile marker, and that the vehicle was last seen approximately five minutes before. The Humboldt County CHP dispatcher relayed this information to the dispatcher in Mendocino County, who broadcast this information to CHP officers at about 3:45 p.m. A CHP officer heading toward the reported vehicle responded. At 4:00 p.m., this officer passed the described

truck about 19 miles south of the original reported location; this was about 18 minutes after the 911 call was placed. The officer made a u-turn and pulled the truck over five minutes later. A second officer, who had heard the broadcast, arrived on the scene. As the two officers approached the truck, they smelled marijuana. They searched the truck and found 30 pounds of marijuana. They arrested the driver, Lorenzo Navarette and the passenger, Jose Navarette (the two defendants).

Justice Thomas did not rely on the possible "public safety exception" set forth in *J.L.* to justify the vehicle stop based on an anonymous tip. Rather, the majority held that the report that the truck ran the caller off the roadway had sufficient indicia of reliability to credit the tip, which provided reasonable suspicion for a stop. Several factors demonstrated that the tip's reliability: 1) The caller claimed eyewitness knowledge of the alleged dangerous driving. 2) Based on the distance the truck had traveled when the officer observed it about 18 minutes after the 911 call, the court could infer that the call was made right after the incident happened so that thee caller reported the event while still under the stress and excitement that it caused. 3) The caller used the 911 emergency system which now provides safeguards against making false reports; calls are recorded and callers can be identified.

Justice Thomas also found that the behavior the tipster reported – running her car off the roadway - supported a reasonable suspicion of drink driving. The fact that this brief recklessness could have had an innocent cause (e.g. a driver responding to an unruly child) did not defeat reasonable suspicion. Nor did it matter that the responding officer did not see any reckless driving conduct, indicative of intoxication, in the five minutes he observed the truck before pulling it over. The appearance of a marked police car would inspire more careful driving for a time.

In a scathing dissent, Justice Scalia characterized the majority opinion of serving 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 reckless driving necessarily supports a reasonable suspicion of drunkenness. There was no reason to credit the caller's report that the truck had run her off the road and many reasons to doubt it, starting with the fact that the tip was anonymous; the tipster likely believed she could lie with impunity, unaware that 911 calls may now be traceable. Moreover, the tip did not have sufficient indicia of reliability. The tipster did not provide predictive details of the truck driver's criminal conduct which could be corroborated. The fact that tipster was correct about the truck's location at a particular time merely indicated that she saw the truck; it did not verify her claim that the driver ran her off the road.

Justice Scalia also contended that the act of running the caller off the road – even if true – did not support a reasonable suspicion of drunk driving. The truck might have swerved to avoid an animal or a pothole, or the driver might have been momentarily distracted. "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." Moreover, the stop required reasonable suspicion of on-going driving while intoxicated, which was lacking in this case. "Not only, it turns out, did the police have no good reason *at first* to believe that [Navarette] was driving drunk, they had very good reason *at last* to know that he was not." Scalia emphasized that after spotting the described truck, the responding officer followed the vehicle for five minutes. During that time, Naverette's driving was irreproachable; he did not violate any traffic laws or make any maneuvers indicative of drunk driving. "Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference."

IV. Traffic Stops - Passengers

(G) *Brendlin v. California* (2007) 551 U.S. 249: Passengers, as well as the driver, are detained during a traffic stop, and passengers are entitled to challenge the constitutionality of the stop.

9-0: Majority opinion for the unanimous court by Justice Souter

Deputy Sheriff Brokenbrough noticed a parked car with expired registration tags. Checking with dispatch, the deputy learned that an application for renewal of registration was being processed. Later, Brokenbrough saw the same car and noticed it displayed a temporary operating permit which appeared valid. Nevertheless, he pulled the car over to verify that this permit matched the vehicle. The passenger was Bruce Brendlin whom Brokenbrough recognized as one of the "Brendlin brothers"; he knew one of the brothers was still under parole supervision. He ran a computer check and learned that Bruce Brendlin was a parole violator with an outstanding arrest warrant. The deputy then ordered Brendlin out of the car and arrested him, finding a syringe cap during a search incident to arrest. The deputy searched the car and found paraphernalia used to produce methamphetamine.

The parties agreed that Deputy Brokenbrough lacked reasonable suspicion to initiate a traffic stop. Thus, the only question was whether Brendlin, the passenger, was seized so that he could seek suppression of the evidence tainted by the unconstitutional stop. Justice Souter noted that an individual is detained when the officer restrains his freedom

of movement by force or a show of authority, to which he submits. The question is whether, in light of all the circumstances, a reasonable person would have felt free to leave or otherwise terminate the encounter. It had long been settled that the driver is detained during a traffic stop, but the question of whether passengers were also seized had never been decided. Applying the above test, Justice Souter concluded that "[a] traffic stop necessarily curtails the travel the passenger has chosen just as much as it halts the driver." All of the vehicle's occupants are subject to control by the officer's display of authority. Also, no reasonable passenger in a stopped vehicle would feel free to depart without police permission.

V. Traffic Stops - Arrests for Minor Offenses

(SB) *Atwater v. City of Lago Vista* (2001) 532 U.S. 318: The Fourth Amendment allows a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine.

5-4: Majority opinion by Justice Souter, joined by Justices Rehnquist, Scalia, Kennedy and Thomas. Dissent by Justice O'Connor, joined by Justices Stevens, Ginsburg and Breyer.

Atwater was driving her pick-up truck in Lago Vista, Texas, with her very young children in the front seat. None of them were wearing seatbelts as required by Texas law. Lago Vista Officer Turek observed the seatbelt violations and pulled Atwater over. After Atwater's friend arrived to take charge of the children, Officer Turek made a custodial arrest.[17] He handcuffed Atwater, placed her in the patrol car and drove her to the police station where she was booked and placed in a jail cell for an hour until she was released on bond. She ultimately pled no contest to a misdemeanor seatbelt violation and paid a fifty-dollar fine. This appeal arose out of an action pursuant to 42 U.S.C. § 1983, in which Atwater (the arrestee) sued the City of Lago Vista, it's police chief and Officer Turek, claiming that the arrest for a seatbelt violation violated her Fourth Amendment rights.

Atwater based her claim of a Fourth Amendment violation on "founding-era common law rules". She claimed that these rules forbade police officers to make warrantless misdemeanor arrests except in cases of "breach of the peace" - non-felony offenses "involving or tending toward violence." In a lengthy discussion, Justice Souter concluded

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[17] The arrest was authorized by a Texas statute which stated that if a vehicle is equipped with seatbelts, the driver and front-seat passengers must wear them. The statute authorized a police officer to arrest a person without a warrant for a violation of this seatbelt provision, although the officer could issue a citation in lieu of arrest.

that founding-era common law rules were not clear. The authority to arrest, under common law, may have extended to all misdemeanors. Certainly, many statutes historically permitted this broader authority, as do modern-day statutes in all 50 states.

Justice Souter also rejected Atwater's contention that when historical practice fails to conclusively resolve a Fourth Amendment claim, the court must strike a balance between individual and societal interests. Under this balancing test, a custodial arrest for a fine-only misdemeanor should be forbidden when the government shows no compelling need for immediate detention. Souter noted that such a balancing test, particularly on a case-by-case basis, is unnecessary when the "officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence." Under those circumstances, he may arrest the offender without violating the Fourth Amendment. Atwater's arrest satisfied constitutional requirements because Officer Turak had probable cause to believe she had committed the seatbelt offense in his presence.

In the dissent, Justice O'Connor forcefully criticized the majority's per se rule permitting officers to make a full custodial arrest for even the most minor fine-only traffic offense, as long as the officer has probable cause. "This rule is not only unsupported by our precedent, but runs contrary to the principles that lie at the core of the Fourth Amendment." A full custodial arrest is "the quintessential seizure", and when conducted without a warrant, it must be reasonable. Probable cause is a necessary but not sufficient condition for a warrantless custodial arrest. Because history is inconclusive as to whether the common law permitted such arrests for all misdemeanors, the Court must determine reasonableness by balancing the degree to which the police practice intrudes upon an individual's privacy against the degree to which it is needed for the promotion of a legitimate governmental interest. A full custodial arrest is a severe intrusion on an individual's liberty and privacy. Thus, it cannot be reasonable in every circumstance. Justice O'Connor 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 facts which reasonably justify a full custodial arrest.

Justice O'Connor noted that "[t]he per se rule that the Court creates has potentially serious consequences for the everyday lives of Americans", because such a broad range of conduct falls into the category of fine-only misdemeanors. When an officer initiates a traffic stop for a minor violation, based on probable cause, she has the discretion to issue a citation and let the person continue on her way or to arrest and search the driver. "[T]he majority gives officers unfettered discretion to choose [the latter] course without articulating a single reason why such action is appropriate." Such unbounded discretion carries with it grave potential for abuse. Because the officer's subjective motivations are

irrelevant to the Fourth Amendment analysis, “we must vigilantly ensure that the officers’ post-stop actions – which are properly within our reach - comport with the Fourth Amendment’s guarantee of reasonableness.”[18]

(SB) *Hibbel v. Sixth District Court of Nevada* (2004) 542 U.S. 177: An individual may be arrested for violating a state law requiring him to disclose his name during a lawful detention.

5-4: Majority opinion by Justice Kennedy, joined by Justices Rehnquist, O’Connor, Scalia and Thomas. Dissent by Justice Stevens. Dissent by Justice Breyer, joined by Justices Souter and Ginsburg.

The police detained Hibbel to investigate a report that he had assaulted a woman. Upon approaching Hibbel, the officer believed he was intoxicated. The officer asked Hibbel for identification eleven separate times, and each time, Hibbel refused to identify himself. After warning Hibbel that he would be arrested if he refused to comply, the officer arrested him for willfully obstructing the officer in the discharge of his lawful duty, specifically, the officer’s duty to ask the ask the detainee to identify himself.[19]

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[18] One month after *Atwater*, in a “Per Curiam” opinion in *Arkansas v. Sullivan* (2001) 532 U.S. 769, the Supreme Court made clear that it meant what it had said. The driver had been arrested, under Arkansas law, for speeding, driving without registration, carrying a roofing hatchet inside the car, and improper window tinting. (He had been stopped for speeding and the window tinting; the other violations were discovered during the traffic stop.) In addition to rejecting the Arkansas Supreme Court’s holding that this was an improper pretext arrest – the officer had a hunch that the driver was carring drugs – the Court affirmed the officer’s authority to take the driver into custody, under *Atwater*: “The Arkansas Supreme Court never questioned Officer Taylor’s authority to arrest Sullivan for a fine-only offense (speeding) and rightly so.” Justice Ginsburg filed a concurring opinion, joined by Justices Stevens, O’Connor and Breyer. Ginsburg noted that under the Court’s current case law, an officer who merely suspected criminal activity could wait for a driver to exceed the speed limit by one mile per hour, stop him, arrest him for speeding, and then conduct a full blown inventory search of the vehicle. Ginsburg hoped that if experience demonstrates “an epidemic of unnecessary minor offense-arrests,” the Court would reconsider its ruling in *Atwater*.

[19] The Nevada “stop and identify” statute authorizes officers to request that an individual identify himself, by providing his name, in the course a lawful investigative detention supported by reasonable suspicion of criminal activity. If the individual refuses

Justice Kennedy reiterated the Court's long held position that an officer may request the suspect's identification in the course of a lawful investigative detention in furtherance of important government interests – e.g. determining if the detainee has outstanding warrants or is on probation or parole. However, the issue in Hibbel's case was not whether an officer could request the detainee's identification in the course of a constitutional stop, but whether state law could require the suspect to disclose his name and subject him to arrest for failure to do so. Kennedy held that the state could do so, without violating the violating the Fourth or Fifth Amendment. Kennedy emphasized that as interpreted by the Nevada Supreme Court, the state's "stop and identify" law requires the detainee to give only his name; he does not have to give the officer a driver's license or any other written identification. Also, the statute states that the detainee "may not be compelled to answer any other inquiry of any police officer." The request for identification, authorized by the Nevada statute, "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop, [and] [t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity." An arrest for failure to identify would only be justified if the detention was constitutional – if the officer had, at the time of the request, a reasonable suspicion that the individual had committed a crime.

In his dissent, Justice Stevens stated that compelling a suspect to give his name, or be subject to arrest, violated the Fifth Amendment guarantee that no person shall be compelled to incriminate himself. As the Court had previously found, the Fifth Amendment protections apply in the context of *Terry* stops. Moreover, the forced statement at issue in this case – the provision of one's name - is testimonial as it is made in response to a question posed by an interrogating police office. Although a person's name may not be incriminating by itself, the Fifth Amendment's protection encompasses compelled statements that lead to the discovery of incriminating evidence.

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to tell the officer his name, he can be arrested. The Supreme Court noted that other states have similar "stop and identify" laws. In some states, a suspect's refusal to identify himself during a lawful detention is a misdemeanor offense or a civil violation. In other states, the detainee may decline to identify himself without penalty. California has no "stop and identify" statute. But pursuant to Vehicle Code section 40302(a), a police officer has the discretion to take into custody a person arrested for a non-felony Vehicle Code offense who fails to present "his driver's license or other satisfactory evidence of his identity for examination." (See *People v. McKay* (2002) 27 Cal. 4th 601.)

Justice Breyer wrote a separate dissent, joined by Justices Souter and Ginsberg, in which he reasoned that compelling a detainee to give his name, in response to police questioning violated the Fourth Amendment. According to Justice Breyer, it is a time-honored rule that police officers may pose questions to a suspect during a Terry stop, but he may not be compelled to answer, and his refusal to answer may not furnish the basis for an arrest. This includes questions as to one's identity. Breyer noted that the majority had provided no justification for eroding this clear rule.

(SB) *Virginia v. Moore* (2008) 553 U.S. 164: A law enforcement officer does not violate the Fourth Amendment when she makes an arrest, supported by probable cause, for a minor offense, even though the arrest is prohibited by state law.

9-0: Majority opinion for a unanimous court by Justice Scalia.
Concurring opinion by Justice Ginsburg.

Police officers in Portsmouth, Virginia, stopped a car driven by Moore. They had heard over the radio that a person known as "Chubs" was driving with a suspended license and the officers knew that Moore used that nickname. The officers determined the Moore's license was, in fact, suspended. They arrested him for misdemeanor driving on a suspended license. The officers searched Moore and found cocaine in his possession. Under Virginia's statutory law, driving on a suspended license is not an arrestable offense, except for designated reasons not applicable in this case; the officers should have issued Moore a summons to appear.

Justice Scalia stated: "In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and the common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." Upon making this investigation, Scalia found no historical evidence that those who ratified the Fourth Amendment intended to merely incorporate statutory law limiting searches and seizures. And even though history had provided no conclusive answer, Justice Scalia found no need to perform the traditional balancing test to determine reasonableness because the Supreme Court had previously declared, in a long line of cases, that when an officer has probable cause to believe a person has committed even a minor crime in his presence, an arrest is constitutionally reasonable. Although states were free to impose more stringent constraints on police authority to conduct searches and seizures, state law did not alter the Fourth Amendment. Because the arrest in Moore's case did not violate the Fourth Amendment, the search conducted incident to that arrest was constitutional.

Bonus Section: California Supreme Court Cases on the Right to Arrest for Minor Offenses and Searches Incident to Arrest

People v. McKay **(2002) 27 Cal. 4th 601, 605: A custodial arrest for a fine-only Vehicle Code offense is illegal but not unconstitutional. California law permits a custodial arrest if the person stopped for a Vehicle Code violation does not present a driver's license or other satisfactory documentary evidence of identification.**

6-1: Majority opinion by Justice Baxter, joined by Justices George (C.J.), Kennard, Chin, and Moreno. Concurring opinion by Justice Werdegar. Concurring and dissenting opinion by Justice Brown.

McKay was stopped by a Los Angeles County Sheriff for riding a bicycle the wrong way on a residential street, in violation of the California Vehicle Code. This infraction is punishable by a fine of up to $100. The officer asked the defendant for identification. He admitted he had no written I.D., but gave his correct name and birth date. He was arrested and taken into custody for not having satisfactory evidence of identification. (Veh. Code, § 40302(a).) In a subsequent search incident to the custodial arrest, the officer found a bag of methamphetamine in McKay's sock. California statutory law does not authorize an arrest for driving a bicycle on the wrong side of the street or most other minor Vehicle Code offenses. In fact, California statutes limit police officers' authority to arrest for minor fine-only offenses.

Justice Baxter, writing for the majority, followed the Supreme Court's decision in *Atwater v. Lago Vista*, to hold that when a California officer makes a custodial arrest for a minor fine-only Vehicle Code violation, based on probable cause, the arrest may violate state law, but it does not violate the Fourth Amendment.[20] Consequently, any evidence seized during a search incident to that arrest would not be subject to the exclusionary rule. [21] The only remedy for a Californian arrested in violation of state law would be to file a civil action against the arresting authorities for injunctive or other relief.

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[20] *McKay* was decided five years before the U.S. Supreme Court reached a similar conclusion in *Virginia v. Moore*, discussed above.

[21] After Proposition 8, California courts may not exclude evidence merely because it was seized in violation of state law. Exclusion is only required if that remedy is mandated by the federal Constitution as interpreted by the U.S. Supreme Court.

Judge Baxter alternatively held that the arrest was authorized by Vehicle Code section 40302(a). Under that section, a police officer has the discretion to take into a custody a person arrested for a non-felony Vehicle Code offense who fails to present "his driver's license or other satisfactory evidence of his identity for examination". According to the Court, McKay's verbal statement of his name and birthdate, statements subject to verification, did not qualify as "other satisfactory evidence of identity". Only documentary evidence of identity qualifies -- a document that is the "functional equivalent of a driver's license" (e.g. a state-issued identification card). As for other documentary evidence and all oral evidence of identification, the officer has discretion as to whether to accept the proffered evidence as "satisfactory". An officer's discretionary decision could only be challenged if it was based on invalid criteria, such as race, religion or other arbitrary classification. Baxter acknowledged that bicycle riders and pedestrians, unlike motorists, are not legally required to carry driver's licenses or documentary identification. However, McKay was not arrested for failing to carry written identification. He was arrested for violating the Vehicle Code, and at that point, he was required to produce satisfactory evidence of identity.

In her dissent, Justice Brown discussed the disparate impact of the majority's decision, giving police officers sweeping power to arrest and search, on persons of color: "Anecdotal evidence and empirical studies confirm that what most people suspect and what many people of color know from experience is a reality: there is an undeniable correlation between law enforcement stop-and-search practices and the racial characteristics of the driver". Justice Brown stated that although she did not know McKay's ethnic background, she would bet that he was not riding his bike a few doors down from his home in Bel Air or Brentwood – places where no resident would be arrested for riding 'the wrong way' on a bicycle whether he had his driver's license or not. Justice Brown cautioned that persons most impacted by decisions allowing pretextual stops and searches would lack the means to challenge these actions in civil harassment suits – they would barely have enough money to pay the traffic citation, much less afford an attorney. Justice Brown concluded that giving police officers the discretion to arrest whomever they chose for minor offenses and then conduct searches incident to arrest pushed past the boundaries of the Fourth Amendment.[22]

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[22] Janice Rogers Brown, a conservative jurist, is now a justice on the Court of Appeals for the D.C. Circuit, having been appointed by President George W. Bush.

***People v. Macebo* (2016) 1 Cal. 5th 1206: Law enforcement officers may not conduct a search incident to arrest, even with probable cause, if they do not make an actual custodial arrest. The exclusionary rule applies to the data files found during a pre-*Riley* search of the defendant's cell phone, because the police could not have reasonably relied on *People v. Diaz* as authorizing the search.**

7-0: Justice Corrigan wrote the majority opinion for a unanimous court

At 1:40 a.m., two Torrance police officers patrolling a residential neighborhood saw Macebo riding a bicycle 20 feet ahead of them. There were few, if any, cars on the street and Macebo was not driving erratically. Following Macebo with their headlights off for a distance of 50-75 feet, the officers observed him roll through a stop sign, a Vehicle Code infraction. The officers activated their patrol car's overhead lights and stopped Macebo. The officers questioned him regarding his name, destination and probation status. Macebo answered that he believed he'd been discharged from probation and that he had no probation officer. The officers did not check, at that time, to see if Macebo was actually on probation or whether he had a search condition. Macebo was never cited for his failure to stop at a stop sign. One officer pat-searched Macebo, finding nothing suspicious. Macebo denied he had anything illegal on his person but said "go ahead" when the officers asked if they could empty his pockets. They removed numerous items, including his cell phone. The officers never asked Macebo's permission to activate the phone or examine its contents but went ahead and searched the data files. The officer who searched the phone found a picture folder that contained images of under-aged girls. Macebo was then arrested for possession of those photos. After the arrest, an officer checked his computer and learned that Macebo was not on probation.

The trial court denied Macebo's motion to suppress evidence, finding that because Macebo could have been arrested for failing to stop at a stop sign, he was lawfully searched incident to arrest under the then-existing California Supreme Court authority of *People v. Diaz* (2011) 51 Cal. 4th 84 [holding that incident to a custodial arrest, police could search the data files on the arrestee's cell phone at the police station without obtaining a warrant]. The Court of Appeal affirmed. The court acknowledged that the holding of *Diaz* had been repudiated by the U.S. Supreme Court's decision in *Riley v. California* (2014) 134 S.Ct. 2473 [holding that the police must generally obtain a warrant before they search the contents of the arrestee's cell phone incident to the arrest].[23] Nevertheless, the court held that the good faith exception set forth in *Davis v. United*

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[23] *Riley v. California* is discussed earlier in these materials on pages 19-20.

States (2011) 564 U.S. 229, applied because the officers could have reasonably relied on the controlling authority of *Diaz* at the time of the search. (*Riley* was decided after the search of Macebo's phone .)[24]

Justice Corrigan summarized the conflicting holdings of *Diaz* and *Riley* (see above) and noted that *Riley* had overruled the holding of *Diaz* for California arrestees. The warrantless search of Macebo's cell phone data files clearly violated the rule of *Riley*. But even before *Riley*, the search would not have qualified as a "search incident to arrest" under *Diaz*, because in *Diaz*, the suspect was actually arrested, taken into custody and brought to the sheriff's station, where his cell phone's contents were searched. His arrest had been supported by probable cause before incriminating data was found on his phone. In the present case, Macebo was not arrested and taken into custody until after the officers searched his cell phone and discovered the incriminating photos.

Justice Corrigan emphasized that officers may not conduct a lawful search incident to arrest unless the suspect has actually been arrested, based on probable cause, and taken into custody. Only then can the police conduct a limited search incident to arrest to discover weapons and destructible evidence. They can do this in every case without particularized suspicion that the arrestee is actually armed or possesses such evidence. It is the fact of the arrest that justifies the search.

Justice Corrigan dismissed the prosecution's argument, relying on *Rawlings v. Kentucky* (1980) 448 U.S. 98, that before the officers searched Macebo's cell phone data, they could have arrested him for failing to stop his bike at a stop sign[25], and that the search of his cell phone was justified as "incident to arrest" even though the actual arrest (for another crime) followed. In *Rawlings*, the Supreme Court upheld the search of Rawlings's person as incident to his arrest, finding that it did not matter that the formal arrest actually followed after the search; the Court emphasized that the officers had probable cause to arrest Rawlings for a drug offense, based on his spontaneous admission of drug

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[24] *Davis v. United States* is discussed later in these materials on pages 71-73.

[25] Although California law does not authorize a custodial arrest for failing to stop one's bicycle at a stop light, the arrest would not violate the Fourth Amendment under the authority of *Atwater v. Lago Vista* (2001) 532 U.S. 318, *Virginia v. Moore* (2008) 533 U.S. 164 and *People v. McKay* (2002) 27 Cal. 4th 601.

ownership, before they searched him.[26] According to Corrigan, *Rawlings* does not apply to the circumstances in this case. The mere fact that the officers in the current case could have arrested Macebo for failing to stop at the stop sign did not justify a search "incident to arrest" of his cell phone data.

Justice Corrigan found it determinative that the officers did not, in fact, formally arrest Macebo and take him into custody for failing to stop his bike at the stop sign. Corrigan noted that in *Knowles v. Iowa* (1998) 525 U.S. 113, the Supreme Court held that officers could not search a person and his vehicle incident to the issuance of citation when they chose not to make an arrest. An officer stopped Knowles for speeding. Iowa law authorized the police to either issue a citation for speeding or arrest the offender and take him into custody. The officer chose to issue a citation but then searched Knowles's car, finding drugs, for which Knowles was arrested. The Court found the officer's failure to arrest Knowles for speeding was significant. The Court reasoned that the justifications for conducting a search incident to arrest are not present when the officer issues a citation and sends the driver on his way. Ten years after *Knowles v. Iowa*, the Court affirmed this reasoning, discussing *Knowles* in *Virginia v. Moore* (2008) 553 U.S. 164.

According to Justice Corrigan, *Rawlings* does not stand for the broad proposition that probable cause to arrest will always justify a search incident to arrest even if the arrest has not happened. If that were the rule, the Supreme Court (18 years after *Rawlings*) would have decided *Knowles* differently; the officer in *Knowles* had probable cause to arrest for the traffic infraction but elected not to do so. Once if was clear that an arrest for the infraction was not going to take place, the justification for a search incident to arrest was no longer operative. The rule of *Knowles* applies to Macebo's case. Although they could have done so, the officers did not arrest Macebo for failing to stop at a stop sign. Nor was there any indication they intended to do so. The data files on Macebo's cell phone were searched without a warrant, and the search was not justified by any exception to the warrant requirement, including as a search incident to arrest.

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[26] In *Rawlings*, police officers entered a home to serve an arrest warrant and discovered the subject of the warrant was absent. Nevertheless, the police detained the home's occupants, including Rawlings, after they smelled marijuana smoke and saw some marijuana seeds. While awaiting the issuance of a search warrant, the officers found drugs. Rawlings spontaneously admitted that the drugs were his, providing probable cause for his arrest. Officers then searched Rawlings, found a knife and immediately arrested him.

Thus, the incriminating photos found on Macebo's cell phones had to be suppressed unless a good faith exception to the exclusionary rule applied. Justice Corrigan provided a brief history on the good faith exception. Noting that the purpose of the exclusionary rule is to deter police misconduct and encourage officers to know the law, the U.S. Supreme Court has held that the suppression of evidence is not appropriate when the police officer in the field conducts a search in good faith reasonable reliance on: a warrant issued by a magistrate but subsequently invalidated (*United States v. Leon* (1984) 468 U.S. 897); a statute authorizing the search which was later found unconstitutional (*Illinois v. Krull* (1987) 480 U.S. 340); computerized data subsequently found incorrect due to a negligent clerical mistake made by a court employee or a police employee (*Arizona v. Evans* (1995) 514 U.S. 1; *Herring v. United States* (2009) 555 U.S. 135); or unequivocal binding precedent that was subsequently overruled (*Davis v. United States* (2011) 564 U.S. 229). Applying *Davis* to this case, no well-trained officer would have reasonably believed that *Diaz* allowed the cell phone search as a search incident to arrest, because the officers did not arrest Macebo for the traffic infraction. Applying the exclusionary rule in this case was consistent with the deterrence rationale, as officers should be required to have reasonable knowledge of what the law prohibits.

VI. Searches of Arrestees and Their Vehicles

(G) *Arizona v. Gant* (2009) 556 U.S. 332: Incident to the arrest of a vehicle occupant, officers may only search the vehicle's passenger compartment when the arrestee is unsecured at the time of the search or when it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle.

5-4: Majority opinion by Justice Stevens, joined by Justices Scalia, Souter, Thomas and Ginsburg. Concurring opinion by Justice Scalia. Dissent by Justice Alito, joined by Justices Roberts, Kennedy and Breyer, in part. Separate dissent by Justice Breyer.[27]

Acting on an anonymous tip that a designated residence was being used to sell drugs, Tucson police officers knocked on the front door. Gant answered the door and said the owner of the house would return later. The officer left and conducted a records check on Gant, learning that he had an outstanding arrest warrant for driving on a suspended license. When officers returned to the residence later that evening, they saw Gant driving

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[27] For a more detailed discussion of *Arizona v. Gant* and the search incident to arrest doctrine, see "THE EVOLUTION OF THE SEARCH INCIDENT TO ARREST DOCTRINE: *ARIZONA V. GANT*" by Kathryn Seligman (January 2011), available in the Fourth Amendment Corner at www.fdap.org.

a car into the driveway. When Gant got out of the car, the officers approached him and arrested him about 10-12 feet from the vehicle. He was handcuffed and placed in the backseat of the patrol vehicle. The two officers then searched Gant's car, finding a gun and a bag of cocaine in the backseat.

Writing for the majority, Justice Stevens re-examined the rule of *New York v. Belton* (1981) 453 U.S. 454, and limited the circumstances under which police could search the passenger compartment of a vehicle and all containers therein incident to the custodial arrest of a vehicle occupant, in light of the purposes for the search incident to arrest doctrine previously set forth in *Chimel v. California* (1969) 395 U.S. 752.[28] Commensurate with these purposes – to protect the arresting officers and safeguard evidence – the Court held 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". Henceforth, the police may only search the passenger compartment, following the arrest of a recent occupant: 1)when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or 2)when it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle. Thus, the Court rejected the "broad reading of Belton" which had improperly authorized a passenger compartment search every time the police arrested a recent vehicle occupant, even if the arrestee couldn't possibly gain access to the vehicle at the time of the search. Justice Stevens insisted that the Court was not overruling *Belton* but rejecting an overly broad interpretation of that 28-year old case. Reliance on stare decisis cannot "justify the continuance of an unconstitutional police practice" or application of a rule untethered from its rationale.

The majority held that the search of the vehicle's passenger compartment incident to an

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[28] In *Chimel*, the Court defined the scope of a search conducted by the police when they make a custodial arrest. In order to protect the police and prevent the destruction of evidence, an officer may search the person arrested to remove any weapons or evidence. An officer may also search the area within the arrestee's immediate control – the space into which he might reach to grab a weapon or evidence. In *Belton*, the Court considered the parameters of the "area within the arrestee's immediate control" when the arrestee had recently occupied a vehicle. Preferring a straightforward rule to guide police practice, the Court deemed the vehicle's entire passenger compartment to be an area into which the arrested occupant might reach to access a weapon or evidence. Consequently, upon arresting a vehicle occupant, officers could search the passenger compartment and any containers found therein.

occupant's arrest would also be allowed when the officers reasonably believed that evidence relevant to the crime of arrest would be found in the vehicle. This novel rule did not follow from *Chimel*, but it was advocated by Justice Scalia in his concurring opinion.

In his concurring opinion, Justice Scalia argued for abandoning the *Belton* rule, and replacing it with a rule permitting a vehicle search incident to arrest "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 had probable cause to believe had occurred." Scalia noted that when the police arrest a vehicle occupant, they have less intrusive and more effective means of ensuring officer safety and denying him access to weapons left in the car. They can order the arrestee away from the car, pat him down for weapons, handcuff him and secure him in the patrol vehicle. Scalia reluctantly joined the majority opinion, viewing it – as compared to Justice Alito's dissent – as the lesser of two evils.

In his dissent, Justice Alito criticized the majority for overruling the *Belton* rule without good reason. *Belton* had provided a workable rule, allowing a search of the passenger compartment of the vehicle the arrestee had recently occupied in every case. This rule was easy for police officers and judges to apply. The majority's new rule -- permitting the search of the passenger compartment only when it was within the arrestee's reach at the time of arrest -- reintroduced the sort of case-by-case, fact-specific decision-making that the *Belton* rule aimed to avoid.

(SB) *Florence v. Board of Chosen Freeholders of County of Burlington* (2012) 566 U.S. 318: It is reasonable to strip search all arrestees when they arrive at jail, prior to being detained with other inmates, even if they committed minor offenses and the correctional officers lack any individualized reasonable suspicion that the particular arrestee possesses weapons or contraband.
5-4: Majority opinion by Justice Kennedy, joined by Justices Roberts, Scalia, Alito, and Thomas (except as to Part IV). Concurring opinions by Chief Justice Roberts and Justice Alito. Dissent by Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan.

In 1998, Florence was arrested in Essex County, New Jersey, pled guilty to two minor crimes and was ordered to pay a fine in monthly installments. In 2003, he fell behind on his payments and failed to appear at a hearing. The court issued a bench warrant for Florence's arrest. Florence immediately paid the outstanding balance, but unfortunately, the warrant remained in the statewide computer database. Two years later, in Burlington County, New Jersey, Florence was arrested on the outstanding warrant. The officer took Florence to the county jail where he was subjected to a strip search, in accordance with

standard procedures, before being held in the general population for six days.[29] Florence was then transferred to the much large Essex County Correctional Facility. Upon arrival, according to the policies of that facility, Florence passed through a metal detector and was then subjected to a similar strip search. He was released the next day when his charges were dismissed. Florence sued jail administrators seeking relief under 42 U.S.C. § 1983, alleging that the strip searches violated his Fourth Amendment rights.

Justice Kennedy preliminarily noted that during these strip searches, the incoming jail detainees are not touched by the correctional officers. The officers visually inspect their naked bodies and may direct the arrestees to move or touch their own bodies and expose body cavities. To determine the reasonableness of mandating strip searches for all incoming detainees, including those arrested for minor offenses, Justice Kennedy balanced the governmental interest in institutional security against the invasion of the arrestee's personal rights. Kennedy focused almost entirely on the strong governmental interest in preserving order and assuring the safety of correctional officers, jail employees, other inmates and the new detainees. In addition to detecting weapons and contraband, strip searches enabled the correctional officers to detect lice, sources of infection, wounds needing treatment, and gang tattoos.[30]

Finally, Justice Kennedy explained why the majority was rejecting the exception to the blanket strip search policy proposed by Petitioner Florence – that for incoming detainees arrested for minor offenses, the officials could not conduct a strip search unless they had a reasonable suspicion that the arrestee possessed contraband or a weapon. Adopting such an exception would be bad policy and unworkable. "People detained for minor offenses can turn out to be the most devious and dangerous criminals." Experience shows that even minor offenders have tried to smuggle prohibited items into jail, or have been coerced to do so. Plus, it would be impractical to require correctional officials to

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[29] While he was disrobing in order to shower with a delousing agent, correctional officers checked him for scars, marks, gang tattoos and contraband. He was instructed to open his mouth, lift his tongue, hold out his arms, turn around and lift his genitals.

[30] Justice Kennedy emphasized that in light of these pressing security concerns, the Court had previously approved policies authorizing blanket searches of prison and jail inmates against Fourth Amendment challenges. Prior cases upheld stip searches of pre-trial detainees in federal prisons (*Bell v. Wolfish* (1979) 441 U.S. 520); a jail ban on contact visits (*Block v. Rutherford* (1984) 468 U.S. 576); and random searches of prison inmates' cells (*Hudson v. Palmer* (1984) 468 U.S. 517.)

make individualized assessments of the threats posed by individual detainees. Readily administrable rules are preferable to case-by-case determinations.

In the dissent, Justice Breyer concluded that an intrusive strip search of an individual arrested for a minor offense that does not involve drugs or violence is an unconstitutional search, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband. In applying the reasonableness balancing test, Justice Breyer acknowledged that officials in charge of maintaining security in jails or prisons have a very difficult task. However, in contrast to the majority opinion, Breyer emphasized the other side of the balance. “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 considering the institution’s health and safety concerns, Breyer did not believe those interests justified this substantial invasion of privacy for persons arrested for minor offenses. Upon intake, jail officials already employ procedures that can detect lice, infections, tattoos and contraband; they pat-search the incoming detainees, have them go through metal detectors, inspect their clothing, require them to take showers using delousing agents and observe the detainees in their underwear while showering. Studies show that only a minuscule amount of contraband has been found during strip searches. Many states prohibit suspicionless strip searches for all incoming detainees or for those arrested for minor offenses, with no negative effects on jail security.

(SB) *Maryland v. King* (2013) 133 S.Ct. 1958: The portion of the Maryland DNA Act mandating DNA searches of individuals arrested and charged with violent crimes and burglaries, who are then held in pre-trial custody, does not violate the Fourth Amendment.

5-4: Majority opinion by Justice Kennedy, joined by Justices Roberts, Thomas, Breyer and Alito. Dissent by Justice Scalia, joined by Justices Ginsburg, Sotomayor and Kagan.

In 2003 an armed man broke into a woman's home in Salisbury, Maryland, and raped her. The police were unable to identify or apprehend the assailant, but they did obtain from the victim a sample of the perpetrator's DNA. In 2009, King was arrested in Wicomico, Maryland, and charged with assault with a shotgun. As part of a routine booking procedure for qualifying violent offenses, his DNA sample was taken by applying a buccal swab to the inside of his cheek. This DNA was found to match the DNA taken in 2003 from the Salisbury rape victim. King was tried and convicted for the rape.

Preliminarily, Justice Kennedy discussed the relevant provisions of the Maryland DNA Act: 1) State law enforcement officials are required to collect a DNA sample, using a buccal cheek swab, from individuals arrested and charged with any of 24 designated "crimes of violence" or burglaries, including attempts. 2) The collected DNA sample is not analyzed to create an offender profile to be placed in the statewide DNA database until after arraignment when a judicial officer ensures that there is probable cause to detain the individual on a qualifying offense. 3) If the individual is not held over for trial or convicted of a qualifying offense, his DNA sample is automatically destroyed, and his profile is expunged from all databases.

The collection of the DNA by swabbing the inner tissues of the person's cheek is an intrusion into the human body and thus a Fourth Amendment search. The search is conducted without a warrant or individualized suspicion that the person's DNA will provide evidence of the arrest offense or of any other crime. Thus, to determine if the DNA search is reasonable for "this class of arrestees", the Court balanced the state interests advanced by the collection, analysis, and use of the DNA taken from these arrestees against their privacy interests. First, Justice Kennedy addressed the governmental interests, finding that the state has a strong interest in "identifying" arrestees who are held in custody pending trial on designated serious crimes. Identification entails more than determining the person's name and birth date. A person's previously unknown criminal history is a critical part of his identity. That unknown criminal history is discovered by comparing the person's DNA profile, stored in the database, to DNA profiles taken from unsolved crime scenes to ascertain if there is a match. This information is helpful for those charged with violent crimes who are held in prolonged pre-trial custody, as prior criminal history is relevant to decisions regarding jail placement and release on bail.

Second, Justice Kennedy addressed the degree to which the collection and analysis of the DNA from this class of arrestees violated their reasonable privacy expectations. Kennedy noted that the use of the buccal swab to collect the DNA is a brief and minimal intrusion. Also, individuals charged with violent crimes and detained in custody have reduced privacy expectations due to the imperatives of jail security. Justice Kennedy concluded that the state's legitimate interest in identifying the pre-trial detainee "so that the criminal justice system can make informed decisions concerning pre-trial custody" outweighs the minor intrusion of privacy caused by "a brief swab of his cheeks."

Justice Scalia began the dissent by stating a categorical principle, well-rooted in the history of the Fourth Amendment. Without exception, the Fourth Amendment forbids a search of a person for evidence of a crime without individualized suspicion. This applies

whether the search is supported by a warrant or by an exception to the warrant requirement. Scalia recognized that there is a “closely guarded category of constitutionally permissible suspicionless searches – special needs searches which must always be justified by concerns other than crime detection.” In this case, the majority’s holding rests on the truth of a single proposition: “that the primary purpose of these DNA searches is something other than simply discovering evidence of criminal wrongdoing....[T]hat proposition is wrong.” “The Court’s assertion that DNA is taken not to solve crimes, but to *identify* those in state custody, taxes the credulity of the credulous.” Identifying a person in custody does not mean looking for evidence of past criminal conduct; that is an investigation for evidence of criminal activity. King’s DNA was matched to DNA taken from the unsolved crime scene four months after he was arrested. It was the previously unidentified suspect who was identified, not the arrestee.

Justice Scalia warned of a slippery slope. If taking a person’s DNA and placing it in the national database is an effective method for solving cold cases, why limit the practice to persons arrested for serious and violent crimes? Why not take DNA from all arrestees or from people who fly in an airplane, apply for a driver’s license or attend public school? Finally, Scalia emphasized that it would have been permissible for the state to take King’s DNA afer he was convicted of assault. “So the ironic result of the Court’s error is this: The only arrestees to whom the outcome here will ever make a difference are those who have been acquitted of the crime of arrest (so their DNA could not have been taken upon conviction). In other words, [the Maryland Act] manages to burden uniquely the sole group to whom the Fourth Amendment’s protections ought to be most jealously guarded: people who are innocent of the State’s accusations.”

VII. Drug-Sniffing Dogs

(SB) *Illinois v. Caballes* (2005) 543 U.S. 405: A dog sniff performed on a vehicle during a legal traffic stop is not a search requiring separate justification, so long as the dog-sniff does not extend beyond the time necessary to issue a warning ticket and make ordinary inquiries incident to a traffic stop.

6-2: Majority opinion by Justice Stevens, joined by Justices O’Connor, Scalia, Kennedy, Thoms and Breyer. Dissent by Justice Souter. Dissent by Justice Ginsburg, joined by Justice Souter. Chief Justice Rehnquist took no part in the decision.

State Trooper Gillette stopped Caballes’s car for speeding on the highway. When Gillette radioed the dispatcher to report the stop, Trooper Graham, a member of the drug interdiction team, heard the transmission and immediately headed for the scene with his

drug-sniffing dog. When Trooper Graham arrived, the stopped car was on the shoulder, and Caballes was in the police vehicle. Trooper Gillette was writing Caballes a warning ticket. Trooper Graham walked his dog around Caballes's car, and it alerted at the trunk, indicating the presence of drugs. The troopers searched the truck and found marijuana. The stop lasted less than ten minutes.

Justice Stevens found that the traffic stop, based on probable cause of speeding, was lawful and not unduly prolonged. Stevens assumed that when Trooper Graham walked the dog around the exterior of the car, he had no information except that Caballes had been stopped for speeding, and thus, he had no objective suspicion of drug possession. Because a properly conducted dog sniff reveals only the presence of contraband inside the vehicle, it does not violate any reasonable expectation of privacy. Thus, it is not a Fourth Amendment search. The dog sniff of the exterior of the car is different than the use of the thermal-imaging device that was characterized as a search in *Kyllo v. United States* (2001) 533 U.S. 27, because the thermal-imaging device could detect both illegal marijuana growing and lawful activity within the house.[31]

In his dissent, Justice Souter stated: "[U]sing the dog for the purposes of determining the presence of marijuana in the car trunk was a search unauthorized as incident to the speeding stop and unjustified on any other ground." He noted that the majority had relied on *United State v. Place* (1983) 462 U.S. 696, for the proposition that a sniff by a narcotics-seeking dog is not a search. That conclusion was based, in part, on the assumption that "trained sniffing dogs do not err." In the 22 years since *Place* was decided, that assumption has proved inaccurate; drug-sniffing dogs are not infallible. Thus, the dog's alert does not necessarily signal hidden contraband, and opening the trunk or other private spaces will not necessarily reveal contraband. It may well reveal items legitimately meant to be kept private. Thus, the use of the drug-sniffing dog is analogous to the use of the thermal-imaging device that could detect intimate activities inside the home, which was found to be a search in *Kyllo v. United. States*. The search was not justified by the trooper's reasonable belief that Caballes was speeding.

In her dissent, joined by Justice Souter, Justice Ginsburg concluded that the police violated Caballes's Fourth Amendment rights when they conducted a dog sniff on his vehicle without cause to suspect any wrongdoing, other than driving six miles over the limit. Justice Ginsburg noted that the Court has found that a routine traffic stop is a brief

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[31] *Kyllo v. United States* is discussed earlier in these materials on pages 16-17.

encounter, analogous to a *Terry* stop rather than a formal arrest. With a *Terry* stop, an officer's actions must be justified at the inception and reasonably related in scope to the circumstances which justified the interference in the first place. In does not matter that the dog sniff did not unduly lengthen the duration of the stop justified by speeding. The limitation on the scope of the stop encompasses both the duration and the manner in which the seizure is conducted. The unwarranted and non-consensual expansion of the routine traffic stop into a drug investigation broadened the scope of the investigation in a manner that violated the Fourth Amendment. Moreover, the dog sniff subjected Caballes to the embarrassment and intimidation of being investigated for drugs on a public thoroughfare. Finally, Justice Ginsburg concluded that a dog sniff for explosives, involving security interests not presented here, would be an entirely different matter.

(G): *Florida v. Jardines* (2013) 133 S.Ct. 1409: Law enforcement officers' use of a drug-sniffing dog, which they bring onto to the front porch of a home, to investigate an unverified tip that marijuana was being grown in the home is a trespass upon the curtilage which constitutes a Fourth Amendment search.

5-4: Majority opinion by Justice Scalia, joined by Justices Thomas, Ginsburg, Sotomayor and Kagan. Kagan filed a concurring opinion, joined by Justices Ginsburg and Sotomayor. Dissent by Justice Alito, joined by Justices Roberts, Kennedy and Breyer.

Miami-Dade Police Detective Pedraja received an unverified tip that marijuana was being grown in Jardines's home. A month later, a surveillance team, including Detective Pedraja, was sent to Jardines's home. Upon arrival, Pedraja could not see inside the home as the blinds were drawn. Pedraja then approached the house, accompanied by Detective Bartelt, a trained canine handler and his drug-sniffing dog. Detective Bartelt had the dog on a six-foot leash. As the dog went onto the front porch of the house, he indicated that he'd sensed one of the drug odors he'd been trained to detect (including marijuana). After sniffing the base of the front door, the dog sat down, indicating that he had found the odor's strongest point. Based on this information, Pedraja obtained a warrant to search the residence. Marijuana plants were discovered during the search.

To determine whether the officers' and the drug-sniffing dog's investigation conducted on the home's front porch constituted a search, Justice Scalia applied the traditional "trespass test" , as he had the year before in the majority opinion in *United States v. Jones* (2012) 132 S.Ct. 945.[32] Under this test, a search occurs when the government obtains information by physically intruding on a constitutionally protected area, including

[32] *United States v. Jones* is discussed earlier in these materials on pages 17-19.

a person's home. The front porch is considered the curtilage – the area immediately surrounding and associated with the residence -- part of the house for Fourth Amendment purposes. Thus, the officers and the drug-sniffing dog conducted their investigation in a constitutionally protected area without a license to do so. A knocker on the front door is treated as an implicit license to visitors to approach the front door, knock promptly, and then wait to be received. However, residents do not issue an explicit or implicit license to officers to bring a drug-sniffing dog onto their front porch to explore the area around the home in hopes of discovering incriminating evidence. The actions of the officers and the dog in this case constituted a search.[33]

In her concurring opinion, Justice Kagan opined that the officers' use of the drug-sniffing dog on the front porch to detect incriminating odors inside the home was a Fourth Amendment search when considered under the *Katz* reasonable expectation of privacy test (*Katz* v. United States (1967) 389 U.S. 347), as well as under the trespass test. A drug-detection dog is a highly trained law enforcement tool, used to detect odors inside the home that the officers could not smell from outside. The police invaded Jardines's privacy expectations in his home when they used their trained canine assistant "to reveal within the confines of the home what they could not otherwise have found there." Justice Kagan stated that the finding that a search had occurred in this case was governed by the Court's earlier holding in *Kyllo v. United States* (2001) 533 U.S. 27.[34]

In the dissent, Justice Alito argues that the conduct at issue here was not a search under either test. By bringing a drug-sniffing dog up to the front porch of Jardines's home, the officers did not commit a trespass or invade Jardines's reasonable expectation of privacy. The law of trespass gives members of the public a license to use a walkway to approach the front door of a house and briefly remain there. This license is extended to persons –

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[33] Justice Scalia acknowledged that the Court had held in prior cases that canine inspections of luggage in an airport (*United States v. Place* (1983) 462 U.S. 696) or of the exterior of the car during a traffic stop (*Illinois v. Caballes* (2005) 543 U.S. 405) are not Fourth Amendment searches as they do not violate reasonable expectations of privacy under the test set forth in *Katz v. United States* (1967) 389 U.S. 347. The current case is distinguishable because the officers conducted the dog sniff by trespassing upon the home's curtilage. Thus, as in *United States v. Jones*, there was no need to employ the *Katz* test and determine whether the officers' investigation of Jardines's home violated his reasonable expectation of privacy.

[34] *Kyllo v. United States* is discussed earlier in these materials on pages 16-17.

welcome or unwelcome -- who intend to speak to an occupant, to those who may lawfully approach without intending to converse, and to officers who wish to gather evidence against an occupant by asking incriminating questions. The fact that Officer Bartelt brought a dog onto the porch did not negate that license. Dogs have long been used by the police. Their acute sense of smell, which may aid the police, is well known. Nor did the officer's and the dog's presence on the porch violate the occupant's reasonable expectation of privacy. A reasonable person understands that odors emanating from a house may be detected from locations open to the public, including the front porch and the area around the front door. "[A] reasonable person will not count on those odors remaining within the range that, while detectible by a dog, cannot be smelled by a human." Justice Alito noted that the majority failed to mention that while Officer Bartelt did not smell the odor of marijuana coming from the house, Officer Pedraja, who subsequently stood on the porch, noticed and identified the smell. (It is unclear if this was after the drug-sniffing dog had alerted to the odor.)

(G) *Rodriguez v. United States* (2015) 135 S.Ct. 1609: Absent reasonable suspicion, police may not extend a completed traffic stop in order to conduct a dog sniff.
6-3: Majority opinion by Justice Ginsburg, joined by Justices Roberts, Scalia, Breyer, Sotomayor and Kagan. Dissent by Justice Kennedy. Dissent by Justice Thomas, joined by Justices Alito and Kennedy (in part). Dissent by Justice Alito.

Just after midnight, Officer Struble observed a vehicle veer onto the shoulder of a Nebraska state highway and then jerk back onto the road – a violation of Nevada law – so he pulled the vehicle over. Struble, who had his trained drug-sniffing dog in the patrol car, approached the vehicle and spoke to Rodriguez, the driver, and Pollman, the passenger. Rodriguez explained he had swerved onto the shoulder to avoid a pothole. Struble then took Rodriguez's and Pollman's licenses to his patrol car and ran records checks, apparently finding no further reason to detain the two men. Struble called for a second officer and wrote Rodriguez a warning ticket for driving on the shoulder of the road. Struble returned to Rodriguez's vehicle, gave him the ticket and returned the documents. This was 20 to 22 minutes after Struble had pulled the vehicle over. Although the reason for the traffic stop was "out of the way", Struble did not consider Rodriguez "free to leave". Struble asked Rodriguez for permission to walk his dog around the vehicle. After Rodriguez refused, Struble ordered him to exit the vehicle to wait for the second officer. Five minutes later, the back-up officer arrived and Struble retrieved his dog and led him twice around the vehicle. The dog alerted to the presence of drugs eight minutes after Struble had issued the ticket to Rodriguez. A vehicle search revealed drugs.

Justice Ginsburg acknowledged that in *Illinois v. Caballes* (2005) 543 U.S. 405, the Court had held that a dog sniff conducted during a lawful traffic stop did not violate the Fourth Amendment. In Rodriguez's case, however, the stop had been prolonged beyond the time reasonably necessary to complete the duties related to the investigation of the traffic violation in order to conduct a dog sniff; thus, the officers' conduct was unconstitutional. When the police observe a traffic violation, they may pull over the vehicle and detain the occupants while addressing the violation that warranted the stop. Beyond determining whether to issue a traffic ticket, the officers may check the driver's license and vehicle registration and determine if the driver has outstanding warrants. They may also make unrelated inquiries and take measures related to officer safety (e.g. ordering the occupants out of the car) as long as these measures do not extend the duration of the stop beyond the time necessary to address the traffic violation that justified the stop in the first place. A dog sniff is a measure aimed at detecting evidence of criminal wrongdoing, unrelated to the purpose of the traffic stop. The officers cannot prolong the traffic stop to conduct a dog sniff unless they have independent reasonable suspicion of a crime other than the traffic violation. (The Court remanded the matter to the Eighth Circuit to determine if such reasonable suspicion existed in this case.)

In his dissent (joined by Justices Kennedy and Alito), Justice Thomas found that the majority opinion disregarded the rule of *Illinois v. Caballes*, because the stop was supported by probable cause and was executed in a reasonable manner. Officer's Struble's decision to wait for back-up before conducting the dog sniff was consistent with officer safety concerns. If officers can ask unrelated investigative questions and run warrant checks during a traffic stop, they should also be able to conduct dog sniffs if they do not unduly prolong the stop. The 29 minutes that elapsed from the time that the officer pulled Rodriguez over until the dog alerted for drugs was reasonable for a traffic stop. Moreover, Officer Struble had a reasonable suspicion of illegal drug activity, supporting any additional period of detention.[35]

[35] Justice Kennedy did not join this part finding reasonable suspicion. In his separate dissent, Justice Alito focused on his belief that Officer Struble had reasonable suspicion that the car contained drugs prior to the dog sniff.

VIII. Home Searches - Warrantless Entry Justified by Exigent Circumstances

(SB) *Brigham City, Utah v. Stuart* (2006) 547 U.S. 398: Police officers may enter a home without a warrant when they reasonably believe that an occupant is seriously injured or imminently threatened with such an injury.

9-0 opinion authored by Chief Justice Roberts, Concurring opinion by Justice Stevens.

At about 3:00 a.m., four police officers responded to a call regarding a loud party at a residence. Upon arriving at the house, they heard noises (thumping, crashing, and people yelling "get off me") indicating that a fight was happening within the residence. The noises seemed to be coming from the back of the house. After looking in the front window and seeing nothing, the officers went down the driveway to the backyard to investigate. They saw two juveniles drinking beer in the backyard. They entered the backyard and looked through the screen door and windows into the kitchen. There, the officers saw an altercation taking place. Four adults were attempting, with some difficulty, to restrain a juvenile. The juvenile broke free and swung his fist, striking one adult in the face and causing him to spit blood into the sink. The other adults were forceably pressing the juvenile up against the refrigerator. At this point, an officer opened the screen door and announced the police presence, but nobody heard or noticed. The officers entered the kitchen and again shouted out. As the occupants became aware of the police, the altercation ceased.

Chief Justice Roberts noted that although a warrant is generally required to enter and search a person's home, the exigencies of a situation may make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. "One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury." In determining whether such an exigency exists, the court must objectively assess the total circumstances; the officer's subjective motivation for the entry is irrelevant. Roberts, writing for a unanimous court, ruled that the officer's entry into the home in this case was plainly reasonable under the circumstances, as "the officers were confronted with ongoing violence occurring *within* the home." "[T]he 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." The role of the police officer includes preventing violence, not simply rendering first aid to those injured. The manner of the officers' entry into the kitchen was also reasonable.[36]

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[36] Three years later, in a "Per Curiam" opinion in *Michigan v. Fisher* (2009) 558 U.S. 45, the Supreme Court applied the emergency aid exception defined in *Brigham City*

(SB) *Kentucky v. King* (2011) 563 U.S. 452: A warrantless home entry to prevent destruction of evidence is allowed when the police do not create the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment.
8-1: Majority opinion by Justice Alito, joined by Justices Roberts, Scalia, Kennedy, Thomas, Breyer, Sotomayor and Kagan. Dissent by Justice Ginsburg.

Police officers set up a controlled buy of crack cocaine outside of an apartment complex, and Officer Gibbons watched the buy take place from an unmarked car in a nearby 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 urged them to hurry up and arrive before the suspect entered an apartment. Uniformed officers responded and ran to the breezeway. As they entered the breezeway, they heard a door shut and detected a strong odor of burnt marijuana. At the end of the breezeway, they saw two apartments but did not know which apartment the suspect had entered. (Officer Gibbons had radioed that the suspect ran into the apartment on the right, but the responding officers did not hear this report.) Because they smelled marijuana coming from the apartment on the left, they approached the door of that apartment. The officers banged loudly on the apartment's door and announced "police". As soon as they banged on the door, they could hearing people inside moving things around. Believing that drug-related evidence was about to be destroyed, the officers announced they were entering the apartment, kicked in the door, and went in. During a protective sweep and search of the apartment, they discovered marijuana, powder cocaine, crack cocaine and drug paraphernalia.

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to uphold the officer's warrantless entry into a home after they were called to investigate a disturbance at a residence. Upon arrival at the home, officers saw a truck in the driveway with its front window smashed and blood on the hood, damaged fenceposts along the side of the property, three broken house windows and glass still on the ground outside. Through a window, the officers could see Fisher inside the house; he was screaming and throwing things. They could see that Fisher had blood on his hand. Although the officers did not see Fisher throw any punches (as officers had observed in *Brigham City*), it was objectively reasonable for them to believe that the objects Fisher was throwing might have a human target, or that Fisher would hurt himself as he continued to rage. This was sufficient to invoke the emergency aid exception and permit the officers' warrantless entry into the residence.

Justice Alito began with a significant statement: "Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a search warrant [based on probable cause] must generally be secured." Exigent circumstances due to compelling law enforcement needs may justify a warrantless search of the home. These exigencies include– as relevant to this case – the need to prevent the imminent destruction of evidence. The "police-created exigency" doctrine provides an exception to the exigent circumstances rule. The police may not rely on the need to prevent the destruction of evidence when that exigency was created or manufactured by police conduct. To invoke this exception, the courts require something more than proof that fear of detection by the police caused the destruction of evidence. If that showing was sufficient, the exception would swallow the rule. Justice Alito held a police-created exigency occurs when the police engage in or threaten to engage in conduct that violates the Fourth Amendment and that causes subjects to destroy evidence. That did not happen in this case. The officers here banged loudly on the door and announced their presence, before they heard the sounds indicating that evidence was being destroyed. Their knock and notice complied with the Fourth Amendment.

Justice Alito found that police may rely on exigent circumstances to enter without a warrant, even if it was reasonably foreseeable that their act of knocking on the door and announcing their presence would lead drug suspects to destroy evidence. Finally, police need not seek a warrant as soon as they acquire probable cause. They can go ahead and knock and give notice in the hope that they will be able to speak to the occupants, gain consent to search or obtain more evidence before they apply for a search warrant.

In her dissent, Justice Ginsburg criticized the majority for disregarding the Fourth Amendment's warrant requirement: "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 evidence to a neutral magistrate, police officers may now knock, listen, then break down the door, never mind that they had ample time to obtain a warrant." Justice Ginsburg emphasized that exceptions to the warrant requirement must be few in number and carefully delineated. Thus, the exigent circumstances exception should "govern only in genuine emergency situations" when there is truly no time or opportunity to get a warrant. Police who could pause to gain the approval of a neutral magistrate may not dispense with the need to get a warrant by themselves creating emergency circumstances. The urgency must exist when the police come on the scene, not subsequent to their arrival, prompted by their own conduct. In the instant case, the drug seller's entry into the apartment building and the smell of marijuana provided probable cause for a warrant. Nothing made it impracticable for the police to post officers at the premises while they sought a warrant authorizing their entry.

IX. Home Searches - Consent by Co-Occupant

(G) *Georgia v. Randolph* (2006) 547 U.S. 103: When one co-occupant consents to the warrantless search of a shared residence, but a physically present co-occupant expressly refuses consent, the ensuing search is unreasonable as to the non-consenting co-occupant.

5-3: Majority opinion by Justice Souter, joined by Justices Stevens, Kennedy, Ginsburg and Breyer. Concurring opinions by Justice Stevens and Justice Breyer. Dissent by Chief Justice Roberts, joined by Justice Scalia. Dissents by Justice Scalia and Justice Thomas. Justice Alito took no part in the consideration or decision of the case.

Scott Randolph and his wife, Janet Randolph, separated when she left the marital residence to stay with her parents in Canada. Two months later, she returned to the residence with their son. Soon after, Janet called the police to report that Scott had taken their son away after a domestic dispute. When officers arrived at the Randolph residence, Janet told them that Scott was a cocaine user. Shortly after the police arrived, Scott returned and explained he had taken their son to a neighbor's house. Scott denied cocaine use and said that Janet abused drugs and alcohol. Janet repeated her claim and told the police there were "items of drug evidence" inside the residence. An officer asked Scott for consent to search the house, which he refused. The officer then asked Janet for consent to search, which she readily gave. She led the officers to a room she claimed was Scott's bedroom, where an officer noticed a section of a drinking straw with powdery residue – suspected cocaine. The officer left and obtained a warrant, returned to the house to search, and seized evidence of cocaine use.

Justice Souter acknowledged that warrantless home searches are constitutionally permissible when the police obtain the voluntary consent of an individual possessing actual or apparent authority over the premises, including a co-occupant of a shared residence. In *United States v. Matlock* (1974) 415 U.S. 164, the Court had held that the consent of a person who possesses common authority over a premises is valid as against an absent, non-consenting person with whom that authority is shared. But Randolph's case was different, because co-occupant Scott was present and expressly refused consent. Relying on shared social expectations, which underlie determinations of reasonableness, Justice Souter stated that a 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 and permit entry into the home to search for incriminating evidence. If a co-tenant wants to bring her housemate's criminal activity to light, she can deliver evidence to the police or tell them what she knows so that the officers can seek a

warrant. Of course, if the officer at the door suspects that the objecting co-tenant has harmed or is about to harm the consenting co-tenant or others in the home, he can enter pursuant to the exigent circumstances exception. Justice Souter emphasized that the Court was drawing a fine line: The rule barring entry into the home when one co-tenant objects while another consents applies only when the objector is "in fact at the door" and expressly denies permission. It does not apply when the potential objector is nearby but does not take part in the "threshold colloquy". The police need not take steps to find a potentially objecting co-tenant before acting on the permission they had already received, so long as there is no evidence that the police have removed the potentially objecting tenant from the entrance to avoid a possible objection.

In his concurring opinion, Justice Stevens noted that it had long been settled that in the absence of exigent circumstances, a government agent has no right to enter a home without a warrant. Every occupant of the home has a right protected by the common law and by the Fourth Amendment to refuse entry. An occupant may waive this constitutional right and consent to entry, but only if the consent is voluntary. The officer who seeks to enter should advise the occupant of that right. What advice should the officer give when met at the door by a man and woman who are apparently joint tenants or joint owners of the home? In the 18th century (and later), the advice would have been different than today, because the man had greater property rights than the woman, particularly if he was her husband, so his refusal to give consent would control. In today's world, as a matter of constitutional right, "the male and female are equal partners"; thus, each has a constitutional right which he/she may assert or waive.

Justice Breyer, in his concurring opinion emphasized the narrowness of the majority's holding – the objecting co-occupant must be present and expressly object to the officer's request to enter, as was true in the current case. Moreover, there must be no exigent circumstances justifying a warrantless entry.

The basic premise of Chief Justice Roberts's dissent is that a person has no reasonable expectation of privacy in information or property that she shares with others. By sharing, the person assumes the risk that this other individual might provide information to the police or consent to a search of the common areas of a shared home: "[W]e should acknowledge that a decision to share a private place, like a decision to share a secret or a confidential document, necessarily entails the risk that those with whom we share may in turn choose to share – for their own protection or other reasons - with the police." Roberts noted that if a person wants to ensure that his possessions will be subject to a search only with his personal consent, he is free to put these items in a private room, to which only he has access, or in a locked suitcase under his bed.

(SB) *Fernandez v. California* (2014) 134 S.Ct. 1126: The rule of *Georgia v. Randolph* does not apply when the objecting co-occupant has been arrested and removed from the premises before another co-occupant consents to the police entry into the home. The ensuing home search is reasonable.
6-3: Majority opinion by Justice Alito, joined by Justices Roberts, Scalia, Kennedy, Thomas and Breyer. Concurring opinions by Justice Scalia and Justice Thomas. Dissent by Justice Ginsburg, joined by Justices Sotomayor and Kagan

Fernandez, a member of the Drifters gang, attacked and robbed Lopez with the assistance of others. Los Angeles police officers Clark and Cirrito responded to a report of this crime and drove to an alley frequented by the Drifters. After being directed by a passing pedestrian, the officers observed a man run though the alley and enter a building; minutes later, they heard sounds of screaming and fighting coming from that building. The officers knocked on the door of the apartment from which the screams had been heard. Rojas answered the door; she was holding a baby and appeared to be crying and injured, as there was blood on her hand and shirt. She said she had been in a fight and that the only other person in the apartment was her four-year-old son. After Officer Cirrito asked Rojas to step out of the apartment so he could conduct a protective sweep, Fernandez appeared at the door in an agitated state. He said, "You don't have any right to come in here. I know my rights." Suspecting that Fernandez had assaulted Rojas, the officers removed Fernandez from the apartment, arrested him and transported him to the station. About one hour later, Officer Clark returned to the apartment and told Rojas that Fernandez had been arrested. Clark requested and obtained Rojas's consent to search the premises, where they found a knife, a shotgun and other incriminating evidence.

Justice Alito reiterated the rule from *United States v. Matlock* (1974) 415 U.S. 164, that the police may search a shared residence without a warrant when they receive the consent of a co-occupant who has actual or apparent authority. Alito noted that the Court had applied this rule in *Illinois v. Rodriguez* (1990) 497 U.S. 177, and upheld a residential search based on a co-occupant's consent even though another co-occupant was asleep in the apartment and could have been awakened. Finally, Alito acknowledged the exception set forth in *Georgia v. Randloph* (2006) 547 U.S. 103 – that a physically present co-occupant's express refusal of consent renders any subsequent search unreasonable as to him even if another co-occupant consents. Alito emphasized that the Court, in *Randolph*, went to great lengths to make clear that its holding was limited to situations in which the objecting occupant was present, preferably at the door. Justice Alito declined to apply the *Randolph* ruling to the facts of this case,

because Fernandez was not present at the door or even in the residence when Rojas consented to the officers' entry. He had been arrested and removed by that time.

Justice Alito rejected Fernandez's claim that his absence should not matter as it was caused by the police. This assertion was based on "dictum" in *Randolph* which suggested 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." Alito reasoned that irrespective of the officers' subjective motivation, their removal of Fernandez from the residence so they could speak with Rojas, the apparent victim, was objectively reasonable. Alito next rejected Fernandez's assertion that his earlier objection to the officer's entry into the apartment, made when he was standing at the door, remained effective until he withdrew that objection. This rule would be impracticable to enforce – e.g. would the police need to honor the removed occupant's objection for days, months, years?[37]

As she did in her dissent in *Kentucky v. King* (2011) 563 U.S. 452, Justice Ginsburg defended the importance of the Fourth Amendment's warrant requirement. She emphasized that in this case, the police could have readily obtained a warrant to search the shared residence after they had removed Fernandez from the scene and arrested him. She noted that the majority "does not dispute this, but instead disparages the warrant requirement as inconvenient, burdensome, entailing delay." Ironically, they made this stand just as warrants are getting easier and quicker to obtain. She reiterated a statement made by the Court in *Georgia v. Randolph*: "A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." Quoting Justice Jackson, Ginsburg stated the warrant requirement ranks among "the fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

Justice Ginsberg noted that this case called for a straightforward application of *Georgia v. Randolph*. Fernandez expressly objected to the officers entering the home he shared with Rojas, while he was physically present and standing at the door. The only difference from *Randolph* was that the police removed the objecting co-tenant, Fernandez, from the home and then came back an hour later to secure Rojas's belated consent to search the home for evidence incriminating Fernandez. *Randolph* did not suggest that the police could ignore this objection if they reappeared after the objector's arrest.

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[37] In concurring opinions, both Justice Scalia and Justice Thomas reiterated their belief that *Georgia v. Randolph* was wrongly decided.

X. DUI Arrests - Warrentless Tests for Blood Alcohol Concentration

(G): *Missouri v. McNeely* (2013) 133 S.Ct. 1552: During a drunk driving investigation, the natural dissipation of alcohol in the bloodstream does not present a per se exigency that justifies a warrantless blood test in every case. The government's right to test blood without a warrant must be determined on a case-by-case basis considering the totality of the circumstances.
5-4: Majority opinion by Justice Sotomayor, joined by Justices Scalia, Ginsburg and Kagan. Justice Kennedy joined in part and filed a concurring opinion. Chief Justice Roberts filed an opinion concurring in part and dissenting in part, joined by Justices Breyer and Alito. Separate dissent by Justice Thomas.

A Missouri police officer stopped McNeely's truck at about 2:00 a.m., after the officer saw him exceed the posted speed limit and repeatedly cross the center line. The officer noticed several signs indicating McNeely was intoxicated: bloodshot eyes, slurred speech and the smell of alcohol on his breath. McNeely told the officer that he had consumed a couple of beers; he performed poorly on field-sobriety tests. He declined to breathe into a portable device designed to measure his blood alcohol concentration (BAC). The officer arrested McNeely, and when he said he would refuse to provide a blood sample, the officer drove McNeely to a nearby hospital. There, the officer explained to McNeely that under state law, he would lose his driver's license for one year if he refused to submit voluntarily to the blood test. McNeely still refused. The officer directed a lab technician to take McNeely's blood, and his BAC measured as 0.154%, above the legal limit of 0.08%. Mc Neely's blood was taken about 27 minutes after the initial stop. The officer never sought a warrant to take McNeely's blood.

Justice Sotomayor noted that a blood test, a compelled physical intrusion beneath the skin to obtain a blood sample to use as evidence in a criminal investigation, is a search for which a warrant is required, even following arrest for driving under the influence (DUI). An exception to the warrant requirement that may apply in these circumstances allows an immediate search to prevent the imminent destruction of evidence. In assessing whether an officer faces an emergency that justifies acting without a warrant, the court must look to the totality of the circumstances in each case. The Court did just that in *Schmerber v. California* (1966) 384 U.S. 757, when it approved a warrantless blood test of a DUI suspect under the specific facts of that case.[38] Rather than examining

[38] Schmerber had suffered injuries in an car accident and was taken to a hospital to be treated. While he was receiving treatment, a police officer arrested him for DUI

the totality of the circumstances in McNeely's case, the state sought a per se rule for blood testing in drunk-driving cases. Because the alcohol level in a person's blood dissipates over time, the state proposed 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 a blood sample without a warrant." Writing for the majority, Justice Sotomayor rejected this per se rule, holding that the question of whether the dissipation of BAC presents an exigency justifying an immediate blood draw must be determined based on the facts of each case.

While acknowledging that the percentage of alcohol in a DUI suspect's blood decreases over time – at slightly different rates depending on individual characteristics – Justice Sotomayor reasoned that this does not present a per se exigency in every case. "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." Sotomayor emphasized that in the 47 years since *Schmerber* was decided, it has become easier and faster to get a warrant. Federal magistrates may now consider sworn testimony communicated remotely by phone, radio communication or other reliable electronic means. Nevertheless, particular circumstances – the lack of availability of a magistrate following a late-night arrest or unusual delays between the stop and the blood test - might constitute an emergency that justifies proceeding without a warrant. The totality of the circumstances in each case must be assessed in determining the reasonableness of conducting a warrantless blood test on a DUI suspect.

Chief Justice Roberts, joined by Justices Breyer and Alito, wrote an opinion concurring in part and dissenting in part. Roberts agreed with Justice Sotomayor's rejection of the state's proposed per se rule in favor of a totality of the circumstances approach. However, he criticized Sotomayor for offering little guidance to officers in the field. Roberts proposed an alternative rule, based on the common knowledge that the level of alcohol in the blood stream – essential evidence for prosecuting DUI crimes – dissipates

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and ordered a blood test over Schmerber's objection. The Court held that the warrantless blood test under those circumstances was permissible because the officer reasonably believed that he was confronted with an emergency in which the delay necessary to get a warrant threatened the destruction of evidence – proof of the percentage of alcohol in Schmerber's system which would diminish over time. In that case, additional delay occurred because the officers had to bring Schmerber to the hospital and investigate the crime scene before drawing blood.

further with each passing minute. Roberts stated: “In a case such as this, applying the exigent circumstances exception to the general warrant requirement of the Fourth Amendment seems straightforward: “If there is time to secure a warrant before blood can be drawn, the police must seek one. If an officer could reasonably conclude that there is not sufficient time to seek and receive a warrant, or he applies for one but does not receive a response before blood can be drawn, a warrantless blood draw may ensue.” Roberts emphasized that there is typically a delay between the moment a drunk driver is stopped and the time his blood can be drawn at a medical facility or police station. Also, the percentage of alcohol in the blood dissipates over time, at a known rate; it does not disappear all at once. Because of these facts, there may well be time to get a warrant, since “police can often request warrants rather quickly these days”.

In his dissent, Justice Thomas agreed with the state’s proposed per se rule. He noted that “[b]ecause the body’s natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance” in every case. Thus, once the police have probable cause to believe the driver is drunk, each passing minute eliminates probative evidence of the crime; they are justified in drawing blood without a warrant. According to Justice Thomas, the majority’s case-by-case rule will be difficult to administer in the field. The officer does not have the facts necessary to assess how much time can pass before too little evidence of intoxication remains. Nor could the officer anticipate how long it will take to obtain a warrant and do a blood draw.

(N) *Birchfield v. North Dakota* (2016) 136 S.Ct. 2160: Reviewing laws imposing criminal penalties for drunk-driving arrestees’ failure to submit to required breath and blood tests, the Court concluded that the Fourth Amendment permits a compelled warrantless breath test, as a search incident to an arrest for drunk driving, but not a warrantless blood draw.

5-3: Majority opinion by Justice Alito, joined by Justices Roberts, Kennedy, Breyer and Kagan. Justice Sotomayor filed an opinion concurring in part and dissenting in part, joined by Justice Ginsburg. Justice Thomas filed an opinion concurring in part and dissenting in part. (Decided by eight-justice Court after Justice Scalia’s death.)

After a state trooper observed behavior and symptoms indicating that Birchfield had driven while intoxicated, the trooper informed him of his obligation under North Dakota law to agree to a blood alcohol concentration (BAC) test. Birchfield consented to a roadside breath test which estimated that his BAC was 0.254% or three times the legal limit. The roadside breath test, conducted by an unsophisticated machine, was a preliminary screening test used to determine whether a further test should be given.

The trooper arrested Birchfield for DUI, and again advised him of his obligation under state law to undergo testing of blood or breath or face criminal penalties - mandatory fines or jail time. Birchfield refused to let his blood be drawn He pled guilty to a misdemeanor violation of the test refusal statute but argued that the Fourth Amendment prohibited criminalizing his refusal to submit to a test.[39]

Justice Alito noted that to punish and deter drunk driving, states have criminalized driving with a blood alcohol concentration (BAC) that exceeds a specified level. To determine the BAC of a DUI arrestee, a breath or blood test is required. Thus, states have long had "implied consent laws", whereby persons agree to submit to BAC tests as a condition of driving. These laws impose civil penalties for non-compliance, usually suspension or revocation of driving licenses. Recently, some states have concluded that these consequences are insufficient as drivers still refuse BAC tests. These states enacted laws imposing criminal penalties for refusing to undergo the required testing.

Justice Alito acknowledged that in *Missouri v. McNeely,* the Court considered whether exigent circumstances – the natural dissipation of alcohol in the blood - always justified a warrantless blood test and concluded that the determination of whether exigent circumstances excused the officers' failure to get a warrant must be determined on a case-by-case basis. Alito then considered whether a warrantless breath or blood test could be required for every drunk driving arrestee as a search incident to arrest. Breath and blood tests are searches. To determine if they are reasonable following every drunk-driving arrest, Justice Alito applied the balancing test. First, he considered the impact of breath and blood tests on individual privacy interests. Noting that the physical intrusion of requiring someone to blow into a machine is negligible, that such tests only capture the air that a person naturally exhales, and that breath tests are incapable of revealing

[39] Two other cases on which certiorari was granted were consolidated for argument before the Supreme Court: *Bernard v. Minnesota* and *Beylund v. North Dakota Department of Transportation.* In *Bernard v. Minnesota*, Bernard was arrested for DUI. At the police station, he was informed that under Minnesota law, he was required to submit to a BAC test; refusal to do so would result in non-criminal penalties (license revocation) and in criminal penalties including imprisonment and a substantial fine. Bernard declined to take a breath test and faced criminal charges for his refusal. In *Beylund v. North Dakota*, Beyland was arrested for DUI, taken to a nearby hospital, advised that North Dakota law requires a DUI test and that refusal would constitute a crime. Unlike Birchfield and Bernard, Beylund agreed to have his blood drawn and was found to have a BAC of three times the legal limit.

anything but the amount of alcohol in the subject's breath, Alito concluded that a breath test does not implicate significant privacy concerns. In contrast, a blood test requires piercing the skin; it is more intrusive and painful. Also, blood can be preserved and re-tested to extract information beyond a simple BAC reading (as can a DNA sample).

Against these distinct privacy interests, Justice Alito assessed the government's significant interest in protecting the safety of persons and property on the highways and in deterring drunk driving. Balancing these interests, Alito concluded that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but does not permit compelled warrantless blood tests as searches incident to arrest. If officers want to take blood to measure BAC, they must either seek a warrant, when there is sufficient time, or rely on exigent circumstances. The state may not impose criminal penalties for an arrestee's refusal to submit to a warrantless blood test, although they may impose civil penalties.

In her opinion, joined by Justice Ginsburg, Justice Sotomayor concurred with the portion of the majority opinion holding that the search incident to arrest exception to the warrant requirement did not permit warrantless blood tests of DUI arrestees. She dissented from the majority's conclusion that warrantless post-arrest breath tests were permitted in every case. Sotomayor stated, "Because no governmental interest categorically makes it impractical for an officer to obtain a warrant before measuring a driver's [BAC], the Fourth Amendment prohibits such searches without a warrant, unless exigent circumstances exist in a particular case." Essentially, Sotomayor believed that the rule promulgated in *Missouri v. McNeely* should also apply to breath tests.

She did not believe either blood or breath tests were lawful searches incident to arrest. Justice Sotomayor asserted that a case-by-case analysis which considers whether exigent circumstances excuse obtaining a warrant under the circumstances of the particular case, is better suited to assessing the reasonableness of breath tests administered to DUI arrestess, in contrast to the categorical search incident to arrest exception. In the case of breath tests – as with blood tests – there is usually ample time to obtain a warrant. The standard breath test to measure BAC is conducted after the arrestee is transported to the police station, usually 40 to 120 minutes after the arrest.

Justice Thomas also concurred and dissented in part. As he had stated in his dissent in *McNeely*, Thomas preferred a per se rule, allowing warrantless breath and blood tests to measure the BAC of arrested drunk drivers in every case under the exigent circumstances exception to the warrant requirement. "The Court was wrong in *McNeely* and today's compromise is perhaps an inevitable consequences of that error."

XI. School Searches

(G) *Safford United School District No. 1 v. Redding* (2009) 557 U.S. 364: A public school administrator's reasonable suspicion that a 13-year-old female student was distributing drugs did not justify a strip search under the facts of the case.
6-3: Majority opinion by Justice Souter, joined by Justices Roberts, Scalia, Kennedy, Breyer and Alito. Justice Stevens filed an opinion concurring in part and dissenting in part. Justice Ginsburg filed an opinion concurring in part and dissenting in part. Justice Thomas filed an opinion concurring in part and dissenting in part.

The individual who was strip searched was 13-year-old Savana Redding, a student at Safford Middle School. One week before the search, another student, Jordan, contacted Assistant Principal Wilson and told him that certain students were bringing drugs on campus, and that he'd gotten sick from pills he had received from a classmate. Jordan handed Wilson a white pill that had been given to him by a classmate named Marissa. The pill was Ibuprofen 400 mg, available only by prescription; it's possession on campus violated a school rule.[40] Assistant Principal Wilson called Marissa out of class. A day planner in her possession contained contraband items. Wilson took Marissa to his office, and a search of her pockets and wallet revealed a blue pill (an over-the-counter anti-inflammatory drug) and several white ones (Ibuprofen 400s). Marissa claimed that Savana had given her these pills. The assistant principal asked no follow-up questions. Assistant Principal Wilson then brought Savana to the office. He showed Savana the four white Ibuprofen 400s and the blue anti-inflammatory pill, and she said she knew nothing about them. Savana denied giving these types of pills to fellow students. Savana agreed to let Wilson search her belongings. After a female administrative assistant entered the office, they searched Savana's backpack, finding nothing. Savana was taken to the school nurse's officer for a search of her clothes. The nurse and the female assistant asked Savana to strip down to her underwear. They told her to pull her bra out and to the side and to pull out the elastic waistband of her underpants. As Savana did this, her breasts and pelvic area were exposed. No pills were found.[41]

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[40] Students' possession of prescription-only pills as well as some over-the-counter pain killers was banned under school rules without advance permission.

[41] Savana's mother filed suit against the Safford Unified School District, Assistant Principal Wilson, the female assistant and the nurse for conducting a strip search of Savana in violation of her Fourth Amendment rights. The school administrators claimed qualified immunity. A divided Ninth Circuit en banc panel found that the strip search was

Justice Souter reiterated that although a Fourth Amendment search generally requires probable cause, public school administrators need only reasonable suspicion to believe evidence of a crime or a school rule violation will be found in the place searched.(*New Jersey v. T.L.O.* (1985) 469 U.S. 325.) Under the facts of this matter, Assistant Principal Wilson had sufficient reasonable suspicion that Savana was carrying and distributing prohibited pills to justify a search of Savana's backpack and outer clothing. However, this reasonable suspicion did not justify a strip search.[42] Savana had both a reasonable expectation of privacy in the private areas of her body exposed to the school administrators' view. This was a particularly invasive search and "the content of the suspicion failed to match the degree of intrusion." Nothing in the facts reasonably indicated that the drugs were particularly harmful, that Savana was distributing large quantities of these drugs, or that Savana was carrying pills in her underwear. The search here was excessive in scope, not reasonably related to the circumstances justifying the intrusion; school administrators were not prohibited from strip searching students under any circumstances.[43]

Justice Stevens filed an opinion concurring in part and dissenting in part that was joined by Justice Ginsburg, and Justice Ginsburg filed her own concurrence and dissent. Essentially, both justices agreed that under the framework established by *New Jersey v. T.L.O.*, the humiliating strip search of 13-year-old Savana was excessive in scope and violated the Fourth Amendment. They dissented from the majority's holding that the school administrators were entitled to qualified immunity.

In his separate opinion, concurring in part and dissenting in part, Justice Thomas reached a conclusion opposite to that of Justices Stevens and Ginsburg. He concurred only with the majority's holding that the school administrators were covered by

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unjustified under the Fourth Amendment and that the proscription against subjecting students to these kinds of search was clear. Thus, a finding of qualified immunity was reversed for the assistant principal, who made the decision to conduct the search, but not for the nurse and the assistant.

[42] Justice Souter held that the search in this case – requiring Savana to pull out her underwear, exposing her breast and pelvic area - qualified as a strip search, because the school administrators were able to see private areas of Savana's body.

[43] Justice Souter ruled that the school administrators were entitled to qualified immunity, because established law did not clearly show that the strip search of a student violated the Fourth Amendment.

qualified immunity, but disagreed with the majority's "regrettable decision" that the administrator's search of Savana violated the Fourth Amendment. The majority's ruling granted judges sweeping authority to second-guess measures that school administrators took to ensure the safety and health of the students in their charge. Justice Thomas opined that the Court should return to "the common law doctrine of in loco parentis", under which they left it to the school administrators to decide how best to maintain order and discipline on their campuses. Particularly in the present day, schools should be empowered to decide how best to deal with school disorder caused by rampant drug use and violent crimes.

Justice Thomas agreed with the majority that the assistant principal had reasonable suspicion that Savana had violated a school rule – i.e. possession of drugs on campus without permission. And a search of Savana's underwear, like a search of her backpack and outer clothing, was reasonably related to the justification for the intrusion; the inside of Savana's underwear was certainly an area capable of concealing the pills that were the object of the search. Particularly, after the search of Savana's backpack turned up nothing, it was reasonable to assume she might have concealed the medications in a place she assumed no one would look. Justice Thomas also criticized the majority for promulgating an unworkable standard whereby the reasonableness of the underwear search depends on the seriousness of the harm prevented by the school rule.

XII. Parole Searches

(SB) *Samson v. California* (2006) 547 U.S. 843: A search of a parolee, conducted without individualized suspicion, does not violate the Fourth Amendment.

6-3: Majority opinion by Justice Thomas, joined by Justices Roberts, Scalia, Kennedy, Ginsburg and Alito. Dissent by Justice Stevens, joined by Justices Souter and Breyer.

Samson was on state parole in California following his conviction for being a felon in possession of a firearm. Like all California parolees, upon release from custody, he had agreed in writing "to be subject to search or seizure by a parole officer or other peace officer at any time of day or night, with or without a search warrant and with or without cause." (Pen. Code, § 3067(a).) San Bruno Police Officer Rohleder observed Samson walking down the street. Rohleder knew Samson was on parole and believed he had an outstanding warrant. The officer stopped Samson and learned from dispatch that Samson was on parole but didn't have a warrant. Based on Samson's status as a parolee subject to the mandatory search clause, Rohleder searched him and found drugs.

Writing for the majority, Justice Thomas found that California's parole search condition permitting officers to search without any individualized suspicion did not violate the Fourth Amendment. This was the first time that the Supreme Court approved a search for evidence of a crime (not a special needs search) that was not supported by probable cause or reasonable suspicion.[44] Justice Thomas noted that five years earlier, in *United States v. Knights* (2001) 534 U.S. 112, the Court had upheld a search of a California probationer's home based on reasonable suspicion of criminality and pursuant to his probation search condition.[45] In that case, the Court concluded the search was reasonable after balancing the probationer's diminished expectation of privacy against the government's substantial interest in combating recidivism and reintegrating probationers into the community. The Court approved the search because it was supported by reasonable suspicion, but it had not addressed whether a law enforcement search without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment.

Justice Thomas resolved the question left unanswered in Knights, in the context of a parole search. First, he noted that a parolee's expectation of privacy is even more diminished than that of a probationer, because parole "is more akin to imprisonment". Second, California has an strong interest in supervising parolees and deterring future crimes due to the overwhelming empirical evidence of their likely recidivism. At the time, California's large parolee population had a 68-70 percent recidivism rate – the highest in the nation. Justice Thomas concluded that a reasonable suspicion requirement would undermine the state's ability to effectively supervise parolees and protect the public. Thomas emphasized that California parolees were not without protection. California law prohibits arbitrary, capricious or harassing searches, and requires that the officer know the subject is on parole before conducting the search.

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[44] Justice Thomas declined to analyze this search as a consent search (based on the parolee's agreement to the search condition upon release from prison) or as a special needs search.

[45] Knights was released on probation subject to a condition that required him to submit his residence to a search by a probation or police officer without a warrant or reasonable cause. Days after Knights was placed on probation, police suspected he had been involved in arson and vandalism. Based on that suspicion and Knights's probation search condition, they searched his apartment and found incriminating evidence.

In his dissent, Justice Stevens stated: “What the Court sanctions today is an unprecedented curtailment of liberty.” For the first time, the majority held that a search supported by neither individualized suspicion nor special needs is reasonable. Stevens noted that “the suspicionless search is the very evil the Fourth Amendment was intended to stamp out”. Thus, individualized suspicion had been discarded only when programmatic searches are needed to further a special need (e.g. prison security, transit safety) divorced from the state’s law enforcement interest in gathering evidence of crime. In “special needs” searches, the Court had insisted upon safeguards designed to ensure fairness in application and protect against the state actors’ unfettered discretion. No such safeguards were provided in this case as a bulwark against arbitrary intrusions. California’s prohibition on arbitrary and harassing parole searches is not sufficient. “The requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice and harassment.”

Justice Stevens noted that the court dispensed with the individualized suspicion standard by treating parolees as equivalent to prisoners, having no legitimate expectations of privacy. The problem is that the Court approved suspicionless, programmatic searches of prisoners because of special “institutional” needs - the safety and security of inmates and guards. Those needs do not apply to parolees.

PART TWO

FOUR CASES EXPANDING EXCEPTIONS TO THE EXCLUSIONARY RULE

Hudson v. Michigan (2006) 547 U.S. 586: The exclusionary rule does not apply to evidence seized by police who entered the home following a knock-notice violation.

5-4: Majority opinion written by Justice Scalia, joined by Justices Roberts, Kennedy, Thomas and Alito. Concurring opinion by Justice Kennedy. Dissent by Justice Breyer, jointed by Justices Stevens, Souter and Ginsburg.[46]

The police obtained a valid warrant authorizing a search of Hudson's home. Upon arriving at the house to execute the warrant, the police announced their presence but only waited three to five seconds before entering the home through the unlocked front door – a knock-notice violation. The officers then searched the home and seized drugs and a loaded gun. Hudson was prosecuted for drug and gun possession.

Justice Scalia, no fan of the exclusionary rule, adopted a rare per se rule, holding that evidence seized following an unconstitutional knock-notice violation and entry into the home need not be excluded in any criminal case. Scalia acknowledged that the knock-notice rule – requiring law enforcement officers to announce their presence and provide residents with an opportunity to open the door before they enter – is both required by statute and commanded by the Fourth Amendment. There is a line, however, between the officer's unlawful "manner of entry" into the home and their subsequent search. The police, armed with a valid search warrant, have the right to search and seize described evidence despite the "preliminary misstep." Regardless of the illegal manner of entry, the police would have executed the warrant and discovered the evidence.

Justice Scalia reasoned that suppression of the evidence would not vindicate the interests protected by the knock-and-announce requirements: 1) to protect life and limb from any violence that might be provoked by an unannounced entry; 2) to avoid the

[46] For a more detailed discussion of *Hudson v. Michigan*, and its impact, see "THE RISE AND FALL OF THE EXCLUSIONARY RULE: CAN IT SURVIVE HUDSON, HERRING & BRENDLIN" by Kathryn Seligman (January 2010), available in the Fourth Amendment Corner at www.fdap.org.

destruction of property occasioned by a forcible entry; and 3) to protect privacy and dignity that might be adversely affected by a sudden, unexpected police entrance - "the right not to be intruded upon in one's nightclothes." These interests would not be served by excluding subsequently discovered evidence from trial.

Finally, applying modern exclusionary rule analysis, the deterrent effects of excluding evidence seized following a knock-notice violation would not outweigh the substantial social costs of suppression. These include not only the usual "cost" of excluding relevant incriminating evidence, but also costs specific to this context (e.g. causing officers to wait too long before entering a home, giving occupants time to arm themselves and destroy evidence). As for the deterrent effects, officers armed with lawful search warrants have little incentive to violate knock-notice as they do not want to endanger themselves and others by bursting in and provoking a violent response. There are other ways to deter knock-notice violations -- civil suits for damages and encouraging better police training and internal disciplinary procedures.

In his concurring opinion, Justice Kennedy made three points: 1) The majority's opinion limiting the exclusionary rule applies only to knock-notice violations. 2) The opinion should not be read as suggesting that violations of long-standing and constitutionally protected knock-notice rules are "trivial or beyond the law's concern," but violations can be addressed through police discipline and training. 3) The causal link between the unlawful manner of entry and the later search is too attenuated to allow suppression.

Justice Breyer, in his dissenting opinion, asserted that the majority "destroys the strongest legal incentive to comply with the Constitution's knock-notice requirements." Knock-notice rules regarding the manner of entry protect core Fourth Amendment values – the sanctity of one's home and the privacies of life. If the police know they can enter a home illegally without risking suppression of the evidence, they will have no reason to comply with these rules when a surprise entry would be tactically advantageous. Mechanisms other than the exclusionary rule do not effectively deter police misconduct. Civil law suits do not provide a reasonable disincentive, as these suits are expensive, time-consuming and not readily available. Justice Breyer criticized the majority for ignoring the Court's precedents: 1) the long line of cases affirming the historical importance of knock-notice requirements; and 2) cases recognizing that the exclusionary rule is essential to effectuate Fourth Amendment protections. In this case, the police did not reasonably rely on another's error or misjudgement – a defective warrant or a court employee's error. They knowingly or negligently violated constitutionally mandated knock-notice requirements.

***Herring v. United States* (2009) 555 U.S. 135: The exclusionary rule does not apply when the officers conducting the search and/or seizure reasonably relied on false information, justifying the officers' actions, and the falsity of the information resulted from a police employee's negligent record-keeping error.**
5-4: Chief Justice Roberts wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas and Alito. Dissent by Justice Ginsburg, joined by Justices Stevens, Souter and Breyer. Dissent by Justice Breyer, joined by Justice Souter.[47]

Investigator Anderson learned that Herring, who was "no stranger to law enforcement", had driven to the Coffee County Sheriff's Department to retrieve items from his impounded truck. Anderson asked the Coffee County warrants clerk to ascertain whether Herring had an outstanding arrest warrant in that county; he did not. Anderson then asked the Coffee County clerk to call the Dale County warrants clerk to see if Herring had an active warrant in that neighboring county. The Dale County clerk checked their computer database and discovered an active arrest warrant for failure to appear. This information was relayed to Investigator Anderson, who relied on the warrant to arrest Herring and search him, finding drugs and a gun. Within ten minutes after the arrest, the Dale County clerk ascertained that Herring's warrant had been recalled five months earlier. A sheriff's department employee had negligently failed to update the Dale County records, so the recalled warrant still showed as "active" on the computer system. Because Investigator Anderson lacked probable cause to arrest Herring and there was no active warrant, the arrest and subsequent search were unconstitutional. The question presented to the Supreme Court was whether the incriminating evidence discovered during that search should be suppressed.

In holding that the exclusionary rule should not apply in these circumstances, Chief Justice Roberts stressed that Investigator Anderson, who arrested and searched Herring, did nothing wrong. He reasonably believed, based on information he'd received from the Dale County warrants clerk, that Herring was subject to an active arrest warrant. The negligent error causing the improper arrest was made by an employee in the Dale County Sheriff's Department. The extreme sanction of exclusion should not apply because "the error was the result of isolated negligence attenuated from the arrest." As in previous cases defining the good-faith exception, the exclusionary rule should only

[47] For a more detailed discussion of *Herring v. United States*, and its meaning and impact, see "THE RISE AND FALL OF THE EXCLUSIONARY RULE: CAN IT SURVIVE HUDSON, HERRING & BRENDLIN" by Kathryn Seligman (January 2010), available in the Fourth Amendment Corner at www.fdap.org.

apply when: 1) it will result in "appreciable deterrence" of future Fourth Amendment violations by law enforcement officers; and 2)the benefits of deterrence outweigh the social costs, including "letting guilty and possibly dangerous defendants go free".

Fourteen years earlier, in *Arizona v. Evans* (1995) 514 U.S. 1, the Court had held that the exclusionary rule did not apply when an officer arrested and searched Evans in reasonable reliance on computer data indicating that he had an outstanding arrest warrant. That information was subsequently determined to be incorrect due to a clerical error made by a court employee; the employee had failed to comply with "standard procedure" to update the police computer data to delete the warrant after it had been quashed. In *Evans*, the Court emphasized that the mistake, relied upon in good faith by the arresting officer, was made by a court employee, who was not an adjunct to law enforcement. The exclusionary rule was designed to deter police misconduct, not mistakes by judicial officers or court employees. The court, in *Evans*, did not decide whether the good faith exception should apply if the error relied upon by the arresting officer was made by other police personnel. That question was answered in *Herring*.

In *Herring*, Chief Justice Roberts considered the culpability of the Sheriff's Department employee who did not change the Dale County computer data base to indicate that Herring's arrest warrant had been recalled. Roberts concluded that the record-keeping error resulted from "nonrecurring and attenuated negligence"; there was no indication that the error was deliberate or reckless or that such errors in Dale County's system were widespread. Under these circumstances, any marginal deterrence – i.e. encouraging police employees to take greater care in maintaining their computerized record systems – was not worth the cost of excluding reliable evidence from trial. Roberts noted that the negligent error here was "attenuated" from the police arrest and subsequent search; it was made by the police employee, not the arresting officer.

In her dissent, Justice Ginsburg made four points: 1) She criticized the majority's narrow view of the exclusionary rule, insisting that although its main objective is to deter police misconduct, that's not the rule's only purpose. It also assures that the government will not profit from the lawless behavior of its agents. 2) Civil suits and other remedies proposed to redress Fourth Amendment violations are not effective. 3) Excluding evidence seized as a result of negligent record-keeping by police employees would deter misconduct and encourage better maintenance of electronic data bases. 4) To determine if the police employee's error was deliberate, reckless or merely negligent, the courts will have to probe the person's mental state – usually an irrelevant inquiry in Fourth Amendment cases.

Davis v. United States (2011) 564 U.S. 229: When police officers conduct a search in reasonable reliance on binding appellate precedent in effect at the time of the search, the exclusionary rule does not apply even though the search is unconstitutional pursuant to a subsequent binding decision.

7-2: Majority opinion by Justice Alito, joined by Justices Roberts, Scalia, Kennedy, Thomas and Kagan. Concurring opinion by Justice Sotomayor. Dissent by Justice Breyer, joined by Justice Ginsburg.[48]

In 2007, during a traffic stop, police officers arrested the vehicle driver, Owens, for driving while intoxicated and arrested Davis, the passenger, for giving a false name to the police. Owens and Davis were arrested, handcuffed and placed in the back of separate patrol cars. The police then searched the passenger compartment of Owens's vehicle incident to these arrests and found a revolver inside the pocket of a jacket that belonged to Davis. Davis was prosecuted and convicted of possession of a firearm.

While Davis's appeal was pending before the Eleventh Circuit Court of Appeals, the Supreme Court decided *Arizona v. Gant* (2009) 556 U.S. 332, holding that incident to the arrest of a vehicle occupant, officers may only search the passenger compartment when the arrestee is unsecured at the time of the search or when it's reasonable to believe that evidence of the arrest crime might be found in the vehicle.[49] The Eleventh Circuit found that the search of the vehicle disclosing Davis's gun was unconstitutional under *Gant*, but declined to apply the exclusionary rule because binding precedent at the time of the search (2007) authorized the officers' actions. The Supreme Court agreed.

Justice Alito began his analysis by reviewing the "shift in our Fourth Amendment jurisprudence on searches of automobiles incident to arrest of recent occupants." Pursuant to *Chimel v. California* (1969) 395 U.S. 752, officers were empowered to search the arrestee's person and the area within his immediate control, incident to a lawful arrest. Twelve years later in *New York v. Belton* (1981) 453 U.S. 454, the Court held that when the police arrest a recent vehicle occupant, the area within the arrestee's

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[48] For a more detailed discussion of *Davis v. United States*, see *DAVIS V. UNITED STATES*: A RIGHT TO RETROACTIVITY WITHOUT A REMEDY: THE SUPREME COURT'S LATEST LIMITATION ON APPLICATION OF THE EXCLUSIONARY RULE, available in the Fourth Amendment Corner at www.fdap.org.

[49] For further explanation of *Arizona v. Gant*, and previous search incident to arrest cases, see pages 38-40, above.

immediate control includes the vehicle's passenger compartment. For the next 28 years, most appellate courts read *Belton* as having promulgated a per se rule permitting the police to search the entire passenger compartment, regardless of whether the arrested recent occupant was secured in a patrol car or within reaching distance of the vehicle at the time of the search. The Eleventh Circuit interpreted *Belton* in this manner, in *United States v. Gonzales* (11th Cir. 1996) 71 F.3d 819, 822. In *Arizona v. Gant*, the Supreme Court re-evaluated this rule in line with the purposes underlying the search incident to arrest exception to the warrant requirement; it held that *Belton* did not authorize a vehicle search incident to the recent occupant's arrest after the arrestee was secured and unable to access the interior of the passenger compartment. Justice Alito (who had dissented in *Gant*) saw *Gant* as creating a "new rule" contrary to the prevailing interpretation of *Belton* that officers and the courts, including the Eleventh Circuit, had followed for many years.

Justice Alito found that because Davis's conviction was not yet final when *Gant* was filed in 2009, the *Gant* rule applied retroactively to the search of Davis's jacket inside the vehicle's passenger compartment. Under *Gant*, the search of the passenger compartment was unconstitutional, because both Davis and the driver were secured in patrol cars at the time of the search. But Alito ruled that the evidence discovered during this unconstitutional search was not subject to the exclusionary rule.

Following precedents in the second half of the 20th Century defining a good faith exception to the exclusionary rule, Justice Alito reiterated that the exclusion of incriminating evidence discovered during an unconstitutional search is only warranted when suppression will yield "appreciable deterrence" which outweighs the "substantial social costs" of excluding "reliable trustworthy evidence bearing on guilt or innocence." In cases where the good faith exception has precluded exclusion of the evidence, the officer who conducted the search or seizure is not culpable. When officers search with "an objectively reasonable good faith belief that their conduct is lawful", the deterrent effect of excluding seized evidence is minimal and not worth the costs of suppression.

Applying this principle to Davis's situation, Justice Alito noted that the officers who searched the passenger compartment after Davis and Owens were arrested and secured in the patrol car reasonably relied on binding appellate precedent – the Eleventh Circuit's common interpretation of *Belton* – at the time of the search. There was no need for deterrence in this situation. On the contrary, similarly situated officers should be encouraged to learn the prevailing law and follow it.

In her concurring opinion, Justice Sotomayor explained that she was "compelled" to agree with the majority opinion due to precedents holding that "application of the exclusionary rule is unwarranted when it does not result in appreciable deterrence." Justice Sotomayor emphasized the narrowness of the majority's ruling. The *Davis* exception to the exclusionary rule should only apply when the officer who conducted the search relied on "unequivocal" binding precedent that was subsequently overruled. Suppression of evidence seized during an unconstitutional search might deter police misconduct – and the exclusionary rule should therefore apply – if the searching officer relied on unsettled precedent, or if case law (or other authority) did not specifically sanction the police action.[50]

Justice Breyer's dissent, joined by Justice Ginsburg, agreed with some of the majority's conclusions: that *Gant* defined a new rule of law; that the *Gant* rule applied retroactively to the post-arrest search of the car recently occupied by Davis; and that the search yielding the incriminating evidence was unconstitutional. However, Justice Breyer disagreed that the good-faith exception to the exclusionary rule should apply. Breyer criticized the majority for "leaving Davis with a right but not a remedy." Breyer characterized the majority's expansion of the good faith exception as watering down Fourth Amendment protections. Breyer claimed that the Supreme Court had historically denied suppression in the name of good faith "only a handful of times and in limited, atypical circumstances." In most cases where the police violate Fourth Amendment rights, they have arguably acted in good faith, as most of these searches resulted from carelessness and uncertainty, rather than intent or malice. If application of the good-faith exception depends solely on the culpability of the officer who conducts the search, it could be applied to any officer who believes in good faith that his search complies with some precedent, even if that precedent is not binding.

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[50] The California Supreme Court followed this reading of *Davis* in *People v. Macebo* (2016) 1 Cal. 5th 1206, when it held that the officers' reliance on *People v. Diaz* (2011) 51 Cal. 4th 84, to justify the pre-*Riley* search incident to arrest of Macebo's cell phone data, was not reasonable. *Diaz* did not justify a search incident to arrest under the facts, as the officers did not arrest Macebo for a traffic infraction and take him into custody. For further discussion of *People v. Macebo*, see pages 35-38, above.

***Utah v. Strieff* (2016) 136 S.Ct. 2056: The officer's discovery of a valid, pre-existing arrest warrant during an unconstitutional traffic stop attenuated any connection between the illicit detention and the subsequent arrest and search incident to arrest; thus, incriminating evidence found during that search need not be suppressed.**
5-3: Majority opinion by Justice Thomas, joined by Justices Roberts, Kennedy, Breyer and Alito. Dissent by Justice Sotomayor. Dissent by Justice Kagan. Justice Ginsburg joined both dissents. (Decided by eight-justice Court after Justice Scalia's death.)

An anonymous informant called the South Salt Lake City's police drug-tip line to report "narcotics activity" at a particular residence. Officer Fackrell investigated the tip, conducting intermittent surveillance of the home over the course of a week. Fackrell observed visitors frequently leave a few minutes after arriving at the house, raising his suspicion that occupants of the home were dealing drugs. Officer Fackrell watched Strieff exit from this home and walk towards a nearby convenience store. He did not know how long Strieff had been in the home. Fackrell detained Strieff and requested identification. Strieff gave the officer a Utah identification card. Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding warrant for a traffic violation. Officer Fackrell arrested Strieff on the warrant, searched him incident to arrest and discovered drugs. Strieff was prosecuted for unlawful possession of drugs. Throughout the proceedings in regard to the motion to suppress evidence, the state conceded that Officer Fackrell lacked reasonable suspicion for the stop, so that it was unconstitutional. However, the state asserted that the incriminating evidence should not be suppressed as the discovery of the valid arrest warrant attenuated the connection between the stop and the subsequent arrest and search.

Justice Thomas, writing for the majority, assumed without deciding that Officer Fackrell lacked reasonable suspicion to stop Strieff. In holding that the evidence found after the officers discovered the arrest warrant need not be excluded from Strieff's criminal trial, Justice Thomas emphasized the multiple exceptions to the exclusionary rule – circumstances under which the significant costs of excluding relevant evidence outweigh deterrence benefits. Thomas reasoned that the exception relevant to this case is the attenuation doctrine: Evidence is admissible when the connection between the unconstitutional police conduct and the evidence subsequently discovered is remote or has been interrupted by an intervening circumstances, so that suppression of the evidence would not deter the conduct violating Fourth Amendment rights.

Justice Thomas stated that the attenuation doctrine can apply to a case like this when the intervening circumstance is not an act of the defendant's free will but the officer's discovery of a valid-pre-existing arrest warrant. In accordance with *Brown v. Illinois*

(1975) 422 U.S. 590, Thomas evaluated three factors to determine if the arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug evidence on Strieff's person: 1) the temporal proximity between the unconstitutional conduct and the discovery of the evidence; 2)the presence of intervening circumstances; and 3) the purpose and flagrancy of the officer's misconduct. Justice Thomas concluded that the short time between the initial stop and the search weighed in favor of suppression, as Officer Fackrell discovered the drugs on Strieff only minutes after the unconstitutional stop. However, the other two factors supported a finding of attenuation and admission of the evidence.

The intervening circumstance in this case was the discovery of a valid arrest warrant. Once Officer Fackrell discovered this warrant, he was required by judicial mandate to arrest Strieff. The arrest was thus "a ministerial act that was independently compelled by the pre-existing warrant." After Fackrell arrested Strieff, he was undisputably authorized to search him incident to arrest. As for the third factor, Officer Fackrell's decision to stop Strieff to determine his connection to the suspected drug house was not supported by the requisite individualized reasonable suspicion, but it was not purposeful or flagrant. At most it was "an error of judgment". Because the officer did not know how long Strieff had been in the house before leaving, he should have asked Strieff whether he would speak to him instead of demanding that he do so. But this was not the kind of "purposeful or flagrant" Fourth Amendment violation that the exclusionary rule was designed to deter. "For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." There was no evidence that this particular unlawful stop was part of any systematic or recurrent police misconduct.

Justice Thomas concluded that the pre-existing arrest warrant was "a critical intervening circumstance that is wholly independent of the illegal stop". The discovery of the warrant broke the causal chain between the unconstitutional stop and the finding of the incriminating evidence on Strieff's person. Thus, that evidence was admissible. Finally, Justice Thomas dismissed the concern that because of the prevalence of outstanding arrest warrants in many jurisdictions, this holding would encourage the police to engage in "dragnet searches". He found that result unlikely because "such wanton conduct would expose police to civil liability." Moreover, if evidence of dragnet searches was presented, the application of the *Brown* factors could be different.

Justice Sotomayor wrote a remarkable dissent. Instead of a technical defense of Fourth Amendment precedents, she placed the majority's holding in a real world context. Justice Sotomayor explained: "The Court today holds that the discovery of a warrant for

an unpaid parking ticket will forgive a police violation of your Fourth Amendment rights." The police may now stop you on the street – even if you have done nothing wrong – demand your identification and check if you are one of the many people who have an outstanding traffic warrant. The officer can then arrest you on the warrant and search your person, hoping that something will turn up.

In this case, Officer Fackrell stopped Strieff without reasonable suspicion, hoping he'd learn whether drug activity was going on in the house Strieff had just left. He had no reason to believe Strieff was involved in that activity. The officer then discovered drugs by exploiting his own illegal conduct. He immediately ran a warrant check and his discovery of the outstanding warrant "could not have been unanticipated." The State of Utah lists over 180,000 misdemeanor warrants in its database The warrant check was part of the officer's illegal expedition for evidence in the hope that something might turn up. Thus, the drugs found on Strieff should be excluded.

Justice Sotomayor noted the majority's emphasis on the fact that Officer Fackrell did not purposely violate the Fourth Amendment. According to the majority, he acted negligently and made a "good faith" mistake. "But the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better." Officers prone to negligence may be the most in need of education. If officers are in doubt about what the law requires, the prospect of exclusion gives them an incentive to err on the side of constitutional behavior.

Justice Sotomayor also took issue with the majority's claim that the incident here was "isolated" and not part of any systematic or recurrent police misconduct. She emphasized that outstanding warrants are surprisingly common, as they are issued when a person with a traffic ticket misses a fine payment or a court appearance, as well as in other circumstances. The federal and state governments maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses.[51] In some localities, if the police make a stop and run a check, there is a good chance they will discover an outstanding warrant. (E.g., in Ferguson, Missouri, with a population of 21,000, a total of 16,000 people had outstanding warrants.) Although Justice Sotomayor did not doubt that most officers do not set out to break the law, that does not mean that illicit stops, followed by warrant checks are "isolated instances of negligence." Indeed, in some jurisdictions, police are trained to routinely run warrant

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[51] Justice Sotomayor, along with Justice Kagan in her separate dissent, provide many statistics showing how common it is for persons to have outstanding warrants.

checks on pedestrians they detain, regardless of individualized suspicion.[52]

In the final section of her dissent, Justice Sotomayor wrote for herself. (Justice Ginsburg had joined all previous sections.) In this final part, Sotomayor spoke eloquently about the indignity and intrusiveness of police stops, the ease with which police may legitimize their actions, the recent expansion of the right to elevate a detention into an arrest, even for minor offenses, and the many innocent people who are subjected to the humiliation of suspicionless stops and unconstitutional searches, particularly people of color. Justice Sotomayor's discussion referred to many of the recent Court decisions discussed in these materials. As far as I know this is the only Supreme Court opinion that quotes "The New Jim Crow" by Michelle Alexander, "Between the World and Me" by Ta-Nehisi Coates, "The Fire Next Time" by James Baldwin, and "The Souls of Black Folk" by W.E.B. Du Bois. Because I cannot do justice to Sotomayor's eloquence by paraphrasing, I am presenting this last section of her dissent in its entirety:

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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. *Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). That justification must provide specific reasons why the officer suspected you were breaking the law, *Terry,* 392 U.S., at 21, 88 S.Ct. 1868 but it may factor in your ethnicity, *United States v. Brignoni–Ponce,* 422 U.S. 873, 886–887, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), where you live, *Adams v. Williams,* 407 U.S. 143,

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[52] Moroever, according to Justice Sotomayor, the majority's holding disregarded the multiple purposes of the exclusionary rule: removing an incentive for the police to stop and search without proper justification, preventing courts from being party to illicit government invasions of citizens' constitutional rights, and denying the government the use of the fruits of their improper incursions into property and privacy.

147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), what you were wearing, *United States v. Sokolow,* 490 U.S. 1, 4–5, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), and how you behaved, *Illinois v. Wardlow,* 528 U.S. 119, 124–125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). 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. *Devenpeck v. Alford,* 543 U.S. 146, 154–155, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004); *Heien v. North Carolina,* 574 U.S. ——, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014).

The indignity of the stop is not limited to an officer telling you that you look like a criminal. See Epp, Pulled Over, at 5. The officer may next ask for your "consent" to inspect your bag or purse without telling you that you can decline. See *Florida v. Bostick,* 501 U.S. 429, 438, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). Regardless of your answer, he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." *Terry,* 392 U.S., at 17, 88 S.Ct. 1868. 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.' " *Id.,* at 17, n. 13, 88 S.Ct. 1868.

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." *Atwater v. Lago Vista,* 532 U.S. 318, 323–324, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). 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." *Florence v. Board of Chosen Freeholders of County of Burlington,* 566 U.S. ——, —— – ——, 132 S.Ct. 1510, 1514, 182 L.Ed.2d 566 (2012); *Maryland v. King,* 569 U.S. ——, ——, 133 S.Ct. 1958, 1980, 186 L.Ed.2d 1 (2013). 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. Chin, The New Civil Death, 160 U. Pa. L. Rev. 1789, 1805 (2012); see J. Jacobs, The Eternal Criminal Record 33–51 (2015); Young & Petersilia, Keeping Track, 129 Harv. L. Rev. 1318, 1341–1357 (2016). 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. A. Goffman, On the Run 196 (2014).

This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, *supra,* at 2068 – 2069, 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. See M. Gottschalk, Caught 119–138 (2015). But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, The New Jim Crow 95–136 (2010). 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. See, *e.g.,* W.E.B. Du Bois, The Souls of Black Folk (1903); J. Baldwin, The Fire Next Time (1963); T. Coates, Between the World and Me (2015).

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. See L. Guinier & G. Torres, The Miner's Canary 274–283 (2002). 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.
(*Utah v. Strieff* (2016) 136 S.Ct. at pp. 2069-2071.)

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Justice Kagan's dissent, also joined by Justice Ginsburg, is more traditional but also important. Justice Kagan accepted that the purpose of the exclusionary rule is to deter unconstitutional conduct, such as the illicit stop in this case which was unsupported by reasonable suspicion. "This case thus requires the Court to determine whether excluding the fruits of Officer Douglas Fackrell's unjustified stop of Edward Strieff would significantly deter police from committing similar constitutional violations in the future." Justice Kagan answered this question affirmatively.

As did the majority, Kagan analyzed the three factors of the attenuation doctrine, and concluded that they all favored excluding the evidence. First, as to temporal proximity, there was no substantial time lapse; the officer discovered the drugs on Strieff just

minutes after he made the unconstitutional stop. As the majority acknowledged, this factor supports suppression. Second, as to the purposefulness of Fackrell's misconduct, Justice Kagan failed to see the Fourth Amendment violation as an innocent mistake. "Fackrell's seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality." Officer Fackrell admitted that he had no basis for stopping Strieff except that he was seen coming out of the suspected drug house, and the officer wanted to find out what was going on inside that residence.

Third, as to whether Fackrell's discovery of the arrest warrant was an intervening circumstance that broke the chain between the stop and the evidence, Justice Kagan drew on analogous tort principles to assert that "a circumstance counts as intervening only when it is unforeseeable." Fackrell's discovery of the warrant was an eminently foreseeable consequence of stopping Strieff. The officer had testified that checking for an outstanding warrant was a routine procedure for South Salt Lake City officers after they have stopped a person and acquired identification. This practice is designed to find outstanding warrants. "And find them they will, given the staggering amount of warrants on the books."[53] Officers can expect checks to turn up outstanding warrants with fair regularity, and thus they do not qualify as unforeseeable intervening circumstances, so that factor also favors suppression.

Finally, Justice Kagan asserted that the majority's ruling actually creates an incentive for an officer to stop an individuals, even if he lacks sufficient reasonable suspicion, and then run a warrant check, knowing there is a good chance that the officer will discover an outstanding arrest warrant. The officer can then arrest and search, confident that any evidence discovered will not be suppressed.

[53] Justice Kagan backed this assertion with statistics - e.g. that California has 2.5 million outstanding warrants, corresponding to about 9% of the state's adult population.

Bonus Section: The California Supreme Court's Precursor to *Utah v. Strieff*: *People v. Brendlin*. (If the analysis and holding of *Strieff* sounds familiar to California attorneys, it is with good reason, as the California Supreme Court used the same reasoning to deny the exclusionary rule under analogous circumstances eight years earlier.)

> ***People v. Brendlin* (2008) 45 Cal. 4th 262: The officer's discovery of a valid, pre-existing arrest warrant during an unconstitutional traffic stop attenuated any connection between the illicit detention and the subsequent arrest and search incident to arrest; thus, incriminating evidence found during that search need not be suppressed.**
> 7-0: The majority opinion was written by Justice Baxter and joined by Justices George, Kennard, Werdegar, Chin, Moreno and Corrigan.[54]

Deputy Sheriff Brokenbrough noticed a parked car with expired registration tags. Checking with dispatch, the deputy learned that an application for renewal of registration was being processed. Later, Brokenbrough saw the same car and noticed it displayed a temporary operating permit which appeared valid. Nevertheless, he pulled the car over to verify that this permit matched the vehicle. The passenger was Bruce Brendlin whom Brokenbrough recognized as one of the "Brendlin brothers"; he knew

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[54] This is the third high court decision arising out of the prosecution of Bruce Brendlin and the second *Brendlin* opinion issued by the California Supreme Court. Brendlin was a passenger in a car stopped for an alleged registration violation. By the time the case got to the California Supreme Court, the state had conceded that the officer lacked reasonable suspicion for the stop. In the first *Brendlin* decision, filed in 2006, the California Supreme Court held that even if the traffic stop was unconstitutional, the defendant could not challenge it because passengers are not detained during a routine traffic stop. (See *People v. Brendlin* (2006) 38 Cal. 4th 1107.) The United States Supreme Court granted certiorari and reversed the California court, holding that a traffic stop subjects a passenger, as well as a driver, to a detention within the meaning of the Fourth Amendment. (*Brendlin v. California* (2007) 551 U.S. 249.) However, the high court remanded the matter back to the state court to determine if evidence seized following the unlawful detention, and relied on to prosecute Brendlin for drug crimes, should be suppressed. The U.S. Supreme Court's decision is discussed on pages 27-28, above. This third *Brendlin* opinion is the California Supreme Court's decision on remand from the U.S. Supreme Court.

one of the brothers was still under parole supervision. He ran a computer check and learned that Bruce Brendlin was a parole violator with an outstanding arrest warrant. The deputy then ordered Brendlin out of the car and arrested him on the warrant. The deputy found a syringe cap on Brendlin during a search incident to arrest. The deputy then searched the car and found paraphernalia used to produce methamphetamine.

The prosecution conceded that the traffic stop was not supported by reasonable suspicion. Following the U.S. Supreme Court's holding, the state also conceded that Brendlin, the passenger, was unlawfully detained. Moroever, the California Supreme Court agreed that "but for the unlawful traffic stop, [the officer] would not have discovered the outstanding warrant for [Brendlin's] arrest and would not have conducted the search incident to arrest that revealed the contraband." However, this but-for causation was not sufficient to mandate suppression of the evidence. The relevant question was whether the chain of causation from the illegal stop to the finding of the evidence was interrupted by an intervening circumstance (the valid arrest warrant) that purged the taint of the initial Fourth Amendment violation.

In determining that the taint was purged, Justice Baxter applied the three factors of the attenuation doctrine set forth in *Brown v. Illinois* (1975) 422 U.S. 590. The resulting analysis is quite similar to the majority's reasoning in *Utah v. Strieff* (discussed above). First, as to the temporal proximity of the unconstitutional conduct and procurement of evidence, Justice Baxter acknowledged that only a few minutes passed, supporting suppression. However, because the intervening circumstance – the discovery of the warrant - was not an act of the detainee made in response to the officer's illegal conduct, this factor is irrelevant or inconsequential. Second, the discovery of the outstanding arrest warrant was an independent intervening circumstance. It supplied the officer with legal authorization to arrest Brendlin and search incident to arrest.[55] The arrest and subsequent searches were based on the warrant and not on the illiict traffic stop.

Justice Baxter stated that the third factor - the flagrancy and purposefulness of the police misconduct - was the most important, as it is directly tied to the purpose of the

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[55] The majority's analysis in *Utah v. Strieff* is slightly different. Justice Thomas concluded that the discovery of Streiff's outstanding warrant required the officer to arrest him; the warrant did not merely authorize an arrest. This distinction may make a difference as courts continue to consider whether the discovery of a detainee's parole status or probation search condition purges the taint of an unconstitutional detention and the subsequent discovery of evidence found during a parole or probation search.

exclusionary rule which is to deter future constitutional violations by the police. The officer's illicit action in this matter – pulling the car over to investigate expired registration tags even though he had seen a presumably valid temporary operating permit and confirmed that a renewal application was being processed - was a minor Fourth Amendment violation, and there was no evidence that the officer invented a justification for the traffic stop in order to run a warrant check or to find an excuse to search the car. Thus, the exclusionary rule did not apply in this matter.

Following *Brendlin*, California Courts of Appeal have divided on whether an officer's discovery, after an unconstitutional stop, that a detainee is on probation with a search condition purges the taint between the illicit stop and the finding of the incriminating evidence during a subsequent search. In other words, is a probation search condition equivalent to an outstanding arrest warrant for the purposes of the attenuation analysis?

In *People v. Durant* (2012) 205 Cal. App. 4th 57, the court (First District, Division Five) held that even if the initial traffic stop was unconstitutional, the taint of the violation was attenuated by the officer's recognition of Durant as a person with a probation search condition, which occurred after the stop but before the search. The officers stopped a car when the driver failed to signal a left turn. Upon contacting the driver, they recognized Durant, whom they knew was subject to a probation search condition. An officer then searched Durant and found a handgun. Division Five declined to decide whether the officers had reasonable suspicion for the traffic stop, because even if the stop was unconstitutional, the officers knew that the driver, Durant, had a probation search condition prior to the search. Applying the *Brendlin* attenuation analysis, the court concluded that this was a sufficient independent intervening circumstance to purge the taint of any illegality. Thus, the gun did not need to be suppressed.

In contrast, in *People v. Bates* (2014) 222 Cal. App. 4th 60, the Sixth District refused to find that a probation search condition was the equivalent of an outstanding arrest warrant for purposes of the *Brendlin* attenuation analysis. In that case, officers suspected that the suspect who stole a person's cell phone might be a Black male named Marcus Bates. They learned that Bates was subject to a probation search condition and drove to the apartment complex where Bates lived, wanting to find him. One officer saw a car driving out of a nearby mobile home park and signaled for the car to stop, hoping that Bates might be in the vehicle. When the officer approached the car, he noticed that the back seat passenger was a Black male whom he did not recognize. After the officer asked all three of the car's occupants for identification, this passenger identified himself as Marcus Bates. He was taken out of the car and put in handcuffs. Bates moved to suppress all evidence obtained as a result of the illegal stop of the car. The Sixth District found that

the officer had stopped the car and detained the occupants and that this stop was unsupported by reasonable suspicion and thus unconstitutional; the officer did not reasonably suspect that any of the car's occupants had committed a crime and merely had a hunch that Bates might be in the vehicle.

The Sixth District rejected the prosecution's argument, relying on *Durant*, that Bates's probation search condition attenuated any taint from the illegal investigatory stop. The Court rejected the implicit assumption that a probation search condition was the equivalent of the arrest warrant present in *Brendlin*. The Sixth District emphasized that officers who have discovered a detainee's outstanding arrest warrant have a duty to arrest him. "A probation search condition, on the other hand, is a discretionary enforcement tool and therefore a less compelling intervening circumstance than an arrest warrant." To hold that the after-the-fact discovery of a probation search condition will sanitize any unlawful detention, without regard for the circumstances, would open the door to random vehicle detentions for the purpose of locating probationers with search conditions. Also, the Sixth District found that when the officer stopped the car in which Bates was traveling without any observation of possible wrongdoing, his Fourth Amendment violation was purposeful although not in bad faith. The Court concluded that the evidence obtained a result of the unconstitutional detention should be suppressed.

Despite this split of authority, the California Supreme Court seems reluctant to address whether a probation search condition discovered during an unconstitutional stop is the equivalent of an outstanding warrant for purposes of the *Brendlin* analysis. The Supreme Court denied a Petition for Review in *Bates*, in March 2014. Subsequently, in February 2015, the Court denied review of an unpublished decision following Durant. (*People v. McCullough* (2014 WL 6907370 [3rd Dist.].) And in March 2016, the Court also denied review in an unpublished opinion adopting the *Bates* analysis. (*People v. Briano* (2015 WL 9260723 [4th Dist., Div. 2],)

Essentially, *Utah v. Strieff* places the U.S. Supreme Court's seal of approval on the *Brendlin* ruling and may embolden prosecutors to seek to apply *Brendlin/ Strieff* beyond their facts. However, after *Strieff*, it might be easier to support the *Bates* holding that a probation search condition is not equivalent to an arrest warrant, as Justice Thomas emphasized that an officer who discovers an outstanding arrest warrant is required to arrest the subject. Also points made in the dissenting opinions by Justices Sotomayor and Kagan will be helpful in opposing extension of the attenuation analysis.