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**CHAPTER 2: SEARCHES AND SEIZURES: BASIC
CONCEPTS**

II. What Is A “Search?”

C. FACTORS IN *KATZ* ANALYSIS

2. ASSUMPTION OF THE RISK

a. Agents and Informants

Insert at page 121, after the end of QUESTION #3, the following:

4. Cal meets Bart at a local gas station and invites Bart back to Cal’s home specifically to purchase methamphetamine. Bart arrives at Cal’s home to make the purchase. Unbeknownst to Cal, Bart is working with police, who are waiting outside of Cal’s home for Bart’s signal that the transaction has occurred. After Bart gives the signal, officers enter Cal’s home, arrest Cal, and seize evidence of the illegal transaction. Does the *Katz* test help or hurt Cal’s subsequent assertion of a legitimate privacy interest in his home? How might the Court’s decisions in *Lewis* and *White* influence your answer? See *Pearson v. Callahan*¹ (noting underlying issue in lower courts was whether the Fourth Amendment is violated when police enter a suspect’s home without a warrant after the suspect admits a non-police confidential informant to purchase illegal drugs and, upon completion of the purchase, the confidential informant signals waiting officers outside the suspect’s home that the illegal purchase was made. The United States Supreme Court ultimately did not answer that question). Did Cal’s giving permission to Bart to enter Cal’s home constitute “consent,” even though it is “once-removed” from the homeowner, for the police to enter as well? (“Once removed” meaning that the homeowner, Cal, only gave *Bart* permission to

¹ See *Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808 (2009).

enter the home, but Bart now uses his new status as someone lawfully on the premises to invite the police to enter the home – an invitation that homeowner Cal himself never extended).

CHAPTER 3: SEARCHES AND SEIZURE: WARRANTS AND DETENTIONS

II. Executing the Warrant

C. TREATMENT OF INDIVIDUALS DURING WARRANT EXECUTIONS

Insert at page 282, just before Problem 3-4, the following:

More recently, the Court upheld officers' ordering the occupants of a home at which a search warrant was being executed to stand nude before the officers for a limited period of time. In *Los Angeles County v. Rettele*,² police investigating four African-American suspects in a fraud and identity-theft crime ring, one of which suspects had a registered 9-millimeter Glock handgun, obtained a valid search warrant to search two houses for the suspects and for documents and computer files, as well as searching the suspects themselves for these items. The affidavit filed in support of the warrant cited various sources to show that the suspects resided at one of the homes. These sources included Department of Motor Vehicle reports, mailing address lists, an outstanding warrant, and an internet telephone directory. What the affidavit did not say, and the affiant did not know, was that that house had been sold to Max Rettele, who had resided there for three months with his wife and seventeen-year-old son. The Retteles were White. When the officers executed the warrant and entered the bedroom with guns drawn, they ordered Rettele and his wife to get out of their bed and show their hands, but they protested that they were not wearing any clothes. When Rettele tried to put on sweatpants, they told him not to move. Both husband and wife stood up, while the wife unsuccessfully tried to cover herself with a sheet. After one or two minutes, Rettele was allowed to get a robe for his wife, and he was himself allowed to get dressed. Shortly thereafter, the police realized they had made a mistake, apologized, and left.

The Retteles filed a section 1983 civil suit alleging that the warrant was obtained in a reckless fashion and the search conducted in an unreasonable manner. The district court granted summary judgment for the defendants, finding the warrant and subsequent search reasonable and, in the alternative, that if any rights were violated, they were not clearly established ones, thus entitling the officers to qualified immunity. The Ninth Circuit reversed, finding that a reasonable jury could find a cause of action because, under the facts alleged, the affiant failed to conduct an ownership inquiry to discover the sale of the house three months earlier, African-

² 127 S. Ct. 1989 (2007).

American suspects were sought, but there was no evidence that African-Americans lived at that address, no crime requiring an emergency search was alleged, and the Retteles being required to stand naked at gunpoint could be found to have exposed them to an “unnecessarily painful, degrading or prolonged” search, causing an “undue invasion of privacy.” The Ninth Circuit also held that the rights involved were sufficiently well-established that any reasonable officer should have known that the search and detention were unlawful.

The Supreme Court sided with the district court’s grant of summary judgment to the defendants. The Court concluded that the officers had no way of knowing whether the African-American suspects might be elsewhere in the house, and people of different races can work together, live together, and commit crime together. The police believed that an armed suspect might be present, giving them authority to secure the scene. Furthermore,

The orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies. Blankets and bedding can conceal a weapon, and one of the suspects was known to own a firearm, factors which underscore this point. The Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach. The reports are replete with accounts of suspects sleeping close to weapons.³

Of course, added the Court, that does not mean that the police could unduly prolong their treatment of the Retteles, but they acted quickly here, allowing the Retteles to dress as soon as it was clear there was no threat. As for the harm done to the Retteles,

The Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty. Valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation may be real, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.⁴

Given that the Court found no Fourth Amendment violation, the Court did not reach the qualified immunity question. Justice Souter would have denied the writ of certiorari, while Justices Stevens and Ginsburg merely concurred in the judgment.

IV. ARRESTS

A. THE REQUIREMENT OF REASONABLENESS

1. SERIOUSNESS OF OFFENSE

³ *Id.* at 1993.

⁴ *Id.* at 1993-94.

Insert at page 301, immediately at the end of section 1 and before section 2, “LEVEL OF SUSPICION,” the following:

Recently, in a 9-0 decision, the Court relied upon *Atwater* to reverse a Virginia Supreme Court determination that suppression of evidence obtained illegally under state law violated the Fourth Amendment. In *Virginia v. Moore*,⁵ the defendant was arrested for a citation-only offense committed in the officer’s presence.⁶ A search purportedly incident to arrest led to the discovery of cocaine and, eventually, the defendant's conviction.⁷ The defendant’s motion to suppress was denied, and he was convicted of possession with intent to distribute cocaine.⁸ The Virginia Supreme Court reversed the defendant's conviction, given officers’ violation of Virginia’s “citation only” law, prohibiting arrest for this minor offense, and the lack of a Fourth Amendment “search incident to citation” exception.⁹ The Court, in a 9-0 decision, reversed the Virginia Supreme Court.¹⁰ The Court found that the arrest did not offend the Fourth Amendment, as governmental violations of state law do not thereby violate *federal* constitutional law, and any contrary rule would impose the harsh federal constitutional remedy of exclusion under the Fourth Amendment on a state that, while adopting a statute that barred arrest for this minor offense, did not provide for such an extreme remedy when an arrest nevertheless takes place.¹¹ (The statute was in fact silent about remedy.). Central to the Court’s decision was its insistence that the Fourth Amendment’s protection may not vary from “place to place.” Accordingly, the Court recited the following rule: “When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard the evidence and ensure their own safety.”¹²

Question: Is the Court right that the Fourth Amendment’s protections cannot vary from “place to place”? For example, police may not have free-floating probable cause to believe something bad happened. Instead, they must have probable cause to believe that a specific state or federal criminal law has been violated. Given that the criminal laws of the states vary so widely, the same conduct might provide probable cause to arrest in one state but not another. We will, moreover, soon see that the validity of “administrative searches” turns on the adequacy of local governmental regulations constraining police discretion, but these regulations will also vary across local governmental units. Likewise, we will study “inventory searches,” which can be done without probable cause and a warrant, but an inventory search first requires a valid seizure of the item (usually, but not always, a car), a seizure generally authorized by state or local statutes, again leading to local variation of a federal right. Is the Court implicitly overruling all these other doctrines? If not, what did the Court mean by its “place to place” statement, and does it make sense?

4. USE OF FORCE

⁵ 128 S. Ct. 1598 (2008).

⁶ *Id.* at 1601.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 1606.

¹¹ *Id.* at 1605-06.

¹² *Id.* at 1608.

Insert at page 306, immediately after conclusion of NOTES AND QUESTIONS #2, the following:

3. Assume that a police officer chases a speeding motorist who was clocked at 73 mph in a 55 mph zone and refuses to submit to the officer's show of authority when she activates her lights and sirens in reaction to the minor traffic offense. The chase continues with the fleeing speeder (who, as far as the police were aware, had no criminal record) driving upwards of 85 mph, weaving in and out of highway traffic, endangering other motorists, the chasing officer, and her colleagues who have joined the pursuit. The officer, in order to stop the speeder, purposely rams the back of his car, causing it to crash and rendering the speeding driver a quadriplegic. For the purpose of this question, assume that the pursuing officer's use of force constitutes a Fourth Amendment seizure. On these facts, is the ramming reasonable? Why? If the chase occurred on a rural stretch of unmarked road, would your answer change? What if it occurred in a major city, during rush hour? If, as a result of the ramming, the fleeing driver was killed, would that change your reasonableness analysis?

These questions arise in the context of the Court's recent decision in *Scott v. Harris*,¹³ where the Court determined that a law enforcement official may, consistent with Fourth Amendment reasonableness, "take actions that place a fleeing motorist at risk of serious injury or death" in order to prevent that flight "from endangering the lives of innocent bystanders."¹⁴ There, a Georgia county deputy pursued Harris after Deputy Timothy Scott clocked Harris's vehicle speed at 73 mph, a violation of the 55 mph limit.¹⁵ The deputy activated his lights and siren and followed Harris, who did not stop. A six mile, ten minute long, high-speed chase ensued. It involved a number of law enforcement officers and ended when Scott "applied his push bumper to the rear of respondent's vehicle," causing it to veer off the road and crash at the bottom of an embankment.¹⁶

The deputy received permission from his supervisor during the chase to employ a "Precision Intervention Technique" maneuver that would have resulted in the driver's vehicle spinning to a complete stop.¹⁷ The deputy decided, however, that the vehicle's speed made such a maneuver too dangerous. He chose instead to use the "push bumper" tactic, which caused the fleeing car to run off the road, careen down an embankment, and crash. As a result of injuries suffered in the crash, Harris was rendered a quadriplegic.¹⁸

Harris filed suit under 42 U.S.C.S. Section 1983 alleging that Scott's "push bumper" use of force was excessive, violating the Fourth Amendment's proscription against unreasonable seizures. Scott did not contest that his termination of the chase by ramming Harris's car

¹³ 127 S. Ct. 1769 (2007).

¹⁴ *Id.* at 1772.

¹⁵ *Id.* at 1772-73.

¹⁶ *Id.* at 1773.

¹⁷ *Id.* at 1773 n.1 (citation omitted).

¹⁸ *Id.* at 1773.

constituted a "seizure."¹⁹ Instead, Scott moved for summary judgment, based on qualified immunity.²⁰

Scott's motion was denied. On interlocutory appeal, the Court of Appeals for the Eleventh Circuit affirmed, relying upon Harris's rendition of the facts, in accordance with the applicable standard of review for summary judgment denials. The circuit affirmed the district court, finding Scott's use of force could constitute excessive deadly force under *Tennessee v. Garner*,²¹ given that the extant law was "sufficiently clear to give reasonable law enforcement officers fair notice that ramming a vehicle under these circumstances was unlawful," as well as determining that a reasonable jury could find Scott violated Harris's Fourth Amendment right against unreasonable seizures.²²

Scott petitioned the Court for a writ of certiorari, which was granted. The Court reversed, holding Scott's actions reasonable under the Fourth Amendment, even though he "placed [Harris] at risk of serious injury or death." Key to the Court's determination was videotaped evidence of the chase that utterly discredited Harris's version of the facts. The tape was so compelling, the Court refused to apply the normal standard of judicial review²³ – which requires reviewing courts to adopt Harris's version of the facts. Instead, the Court considered reliance upon Harris's version of events inappropriate:

[r]eading the lower court's opinion, one gets the impression that respondent, rather than fleeing from the police, was attempting to pass his driving test. . . . The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase....²⁴

Additionally and given the videotape, the Court determined that it had to "slosh [its] way through the factbound morass of 'reasonableness,'" to determine whether Scott's ramming of Harris's car under the circumstances was constitutionally reasonable:

[s]o how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability

¹⁹ *Id.* at 1776.

²⁰ *Id.* at 1773.

²¹ *Id.* 471 U.S. 1 (1985).

²² *Id.* (citation omitted).

²³ Fed. Rule Civ. Proc. 56(c) requires that during a summary judgment motion, when there is a genuine issue of material fact, facts must be viewed in the light most favorable to the nonmoving party.

²⁴ *Id.* at 1775-76. There were no allegations or suspicions indicating that the videotape was altered, incomplete, or in any way unreliable. *Id.* at 1175.

of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.²⁵

Harris invoked the Court’s *Garner* analysis and preconditions for using deadly force, claiming that the ramming was an unreasonable use of deadly force. The Court rejected his claim, stating that “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute deadly force.”²⁶ Instead, *Garner* represents only an application of the Fourth Amendment’s reasonableness test to the use of a certain type of force in a certain type of situation. There, the use of deadly force was unreasonable; here, the Court determined that it did not matter: “[w]hether or not [the officer’s] actions constituted application of ‘deadly force,’ all that matters is whether [his] actions were reasonable.”²⁷

Under those circumstances, Scott’s termination of the chase with the level of force employed was found to be reasonable. The lower court decision was reversed and Scott was entitled to summary judgment.

V. STOP AND FRISK

B. DEFINING THE LEVELS OF INTERACTION

1. VOLUNTARY ENCOUNTERS VERSUS SEIZURES

Insert at page 332, at the end of §A. and before §B, immediately after the sentence “In practice, the frisk and the search may often lead to the same result, because the officer doing the *Terry* frisk can seize items meeting the requirements of the plain view doctrine described in a later chapter,” the following:

Keep in mind that although police need not offer additional cause to believe any occupant of a vehicle be involved in criminal activity to justify seizure of passengers during a traffic stop, “[t]o justify a patdown of the driver or a passenger during a traffic stop, however, just as in the

²⁵ *Id.* at 1778.

²⁶ *Id.* at 1777.

²⁷ *Id.* at 1778.

case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.”²⁸

Insert at 338, at the end of the page, the following:

If police conduct a traffic stop of a vehicle for an expired registration, are *passengers* “free to leave?” The Court had held in *Brendlin v. California* (discussed *infra*) that they are not. In *Arizona v. Johnson*,²⁹ the Court reaffirmed *Brendlin*’s reasoning on this point. In *Johnson*, police ordered Johnson, a passenger in a lawfully stopped vehicle, out of the car and conducted a *Terry* frisk upon his person. Justice Ginsburg, writing for a unanimous Court, questioned why the prosecutor characterized officers’ detention of Johnson as a consensual encounter, especially given that traffic stops effectively seize not merely the driver, but everyone in the vehicle:

[Officer] Trevizo ... never advised Johnson he did not have to answer her questions or otherwise cooperate with her.... Trevizo did not disagree when defense counsel asked in fact you weren’t seeking [Johnson’s] permission ...? As the dissenting [court of appeals] judge observed, consensual is an unrealistic characterization of the Trevizo-Johnson encounter: [T]he encounter ... took place within minutes of the stop; the patdown followed within mere moments of Johnson’s exit from the vehicle; beyond genuine debate, the point at which Johnson could have felt free to leave had not yet occurred.³⁰

The Court concluded that “a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will.”³¹ The *Johnson* Court also clarified *Brendlin*, emphasizing that where there was at least reasonable suspicion to stop a car, the *Terry* “stop” test was automatically met as to the car’s passengers. However, the *Terry* “frisk” test was not automatically met. Instead, the police had to have reasonable suspicion that the person frisked was herself armed and dangerous. A state appellate court had, contrary to the trial court’s position, resolved a suppression motion in the case unfavorably to Johnson on other grounds, so the United States Supreme Court, after so clarifying the law, remanded the case for resolution under the now-clarified rule.

In doing so, the Court also made clear that: (1) an officer’s inquiries into matters unrelated to the reason for the traffic stop (in this case, driving a car with a suspended registration) do not convert the encounter into something other than a lawful seizure, so long as such inquiries do not appreciably extend the stop’s duration (the officer here had noticed passenger Johnson’s wearing clothes consistent with Crips membership and carrying a scanner in his back pocket, scanners often being used when going about criminal activity, and so had asked Johnson to exit the car – the officer’s goal being to question Johnson about what gang he might be in; as soon as Johnson exited, the officer frisked him, finding and seizing a gun, later leading

²⁸ *Arizona v. Johnson*, ___ U.S. ___, 129 S.Ct. 781, 784 (2009).

²⁹ ___ U.S. ___, 129 S.Ct. 781 (2009).

³⁰ *Id.* at 787-88 (citations and internal quotation marks omitted). The Court cited its recent decision in *Brendlin v. California*, 551 U.S. 249, 255 (2007) (confirming driver and all passengers are effectively seized under the Fourth Amendment for the duration of a traffic stop).

³¹ *Id.* at 788.

to Johnson's being charged with, and convicted of, possession of a weapon by a prohibited possessor; all this occurred in mere moments); (2) accordingly, no new justification was needed for such inquiries, at least on the facts before the Court, thus making a frisk acceptable upon proof of individualized reasonable suspicion that the person frisked was armed and dangerous; and (3) "Officer Trevizo surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her."³² The Court also recognized that the Arizona Court of Appeals had assumed, without deciding, that Trevizo had reasonable suspicion that Johnson was armed and dangerous. Thus, on remand, the Arizona appellate court was free, if it chose, to reconsider the validity of that assumption.

Insert at page 342, just before NOTES AND QUESTIONS, the following:

The Court has also held that a purported *Terry* stop of a car is ordinarily a seizure not only of the car and its driver but of any passengers. In *Brendlin v. California*, two officers stopped a car to see if its temporary operating permit matched the car, even though one of the officers admitted that "there was nothing unusual about the permit or the way it was affixed." That officer recognized the front seat passenger as "one of the Brendlin brothers," one of whom, the officer recalled, had dropped out of parole supervision. The officer confirmed that Brendlin was a parole violator wanted on a warrant and called for backup. When backup arrived, the officer ordered Brendlin out of the car at gunpoint, declared him under arrest, and conducted a search incident to arrest, finding on his person an orange syringe cap and, upon a patdown of the driver, finding on his person syringes and a plastic bag of a "green leafy substance," leading to the driver's arrest. Upon searching the car, the officers found tubing, a scale, and other things used to produce methamphetamine. Brendlin was charged with possession and manufacture of methamphetamine and, after losing a motion to suppress on the grounds that there was neither reasonable suspicion nor probable cause for the stop, pled guilty, subject to appeal on the suppression issue. When the case reached the United States Supreme Court, the Court came down unanimously in Brendlin's favor. Under these circumstances, though not necessarily under all circumstances, Brendlin was unquestionably seized. Explained the Court:

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S. Ct. 3074, 49 L.Ed.2d 1116 (1976). An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an

³² *Id.* at 788.

objection from the officer that no passenger would feel free to leave in the first place.

...

It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.

The Court rejected arguments that the intent of the police mattered (it did not; the test is an objective one from the point of view of a reasonable passenger); that there was not an adequate show of authority aimed at the passenger (there was, for the reasons noted in the quote above); that Brendlin did nothing to show his submission to the police (under these circumstances, remaining seated, rather than running away, was a sufficient show of submission); and that cars having to slow down because this car was stopped would also be seized if the passenger – who was not the goal of the original stop – were considered seized, an absurd result (again, no reasonable driver who was slowed down or halted because of a traffic backup caused by another car’s being stopped by the police would perceive that the police were also seizing all the other cars in the resulting traffic jam). Moreover, any contrary rule would encourage police to stop cars without even reasonable suspicion, knowing that they could obtain evidence from the passengers without fear of suppression. Because the state conceded that it had no justifiable grounds for stopping the car, and because Brendlin, the passenger, was indeed seized at the moment the car was stopped, his seizure was illegal and all its fruits should therefore be suppressed.

2. STOPS VERSUS ARRESTS

Insert at 347, just before §C. , the following:

Keep in mind that although police need not offer additional cause to justify seizure of passengers during a traffic stop, “[t]o justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.”³³ So, for example, recall the facts of the Court’s recent decision in *Arizona v. Johnson*³⁴ (*see supra*). a member of Arizona’s gang task force had ordered Johnson, a passenger in a lawfully stopped vehicle (the driver’s registration had expired), out of the car and conducted a *Terry* frisk upon his person after noticing Johnson’s attire, conduct, potential ties to gang activity, and scanner.³⁵ A unanimous Court held that a *Terry* frisk of a passenger ordered to exit a lawfully stopped vehicle for further questioning would not violate the Fourth Amendment, if the officer reasonably concluded that Johnson could be armed and dangerous.³⁶

³³ *Arizona v. Johnson*, __ U.S. __, 129 S.Ct. 781, 784 (2009).

³⁴ *Id.*

³⁵ *See id.* at 784-85.

³⁶ *Id.*

CHAPTER 4: SEARCHES AND SEIZURES: WARRANT EXCEPTIONS

I. WARRANTLESS SEARCHES AND SEIZURES

B. SIX CATEGORIES OF WARRANTLESS SEARCHES & SEIZURES

1. SEARCHES INCIDENT TO ARREST

b. Application to Automobiles

Insert at page 378, immediately above NOTES AND QUESTIONS, and replacing the current NOTES AND QUESTIONS, the following:

In *Arizona v. Gant*,³⁷ the Court modified (or perhaps the Court might say it “clarified”) *Belton* and embraced much of Justice Scalia’s concurring opinion in *Thornton* to craft this two-part currently-governing rule: (1) *Chimel* and *Belton* authorize a search of a vehicle incident to a recent occupant’s arrest when the following is true: the arrestee is unsecured and within reach of the passenger compartment *at the time of the search*; accordingly, the fiction that an arrest of a recent automobile occupant automatically justifies a search incident to that arrest of the entire passenger compartment because, in theory, the recent occupant, though handcuffed and secured, still poses a danger to officers and evidence is no more; and (2) the entire passenger compartment of a vehicle of a current arrestee may be searched incident to arrest as well when it is “reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.”³⁸ If this last test is met, the search may proceed even if the arrestee is fully secured at the time of the search, thus posing no danger any longer to persons or evidence.

The first part of this test narrows *Belton*, as it was arguably later interpreted by the Court, by requiring that the risk of the recent occupant’s obtaining weapons or destroying evidence be a real one *at the time of the search*, not at the time of the arrest. The second part broadens *Chimel* and *Belton* by authorizing a search even under circumstances where there is no danger of the recent occupant’s grabbing weapons or destroying evidence if – and this may be an entirely new legal standard (more on this last point below) – there is “reason to believe” that evidence relevant to the crime of arrest will be found. This second part is limited to the “unique” motor vehicle context. Although the Court repeatedly, as to the second part of the rule, speaks of searching “the vehicle,” it seems still to be using this shorthand phrase to mean, “the passenger compartment of the vehicle,” and at least one dissenting Justice so read the majority opinion.³⁹

The facts of *Gant* itself illustrate the new rule. Based on an anonymous tip that a certain residence was being used to sell drugs, Officers Griffith and Reed knocked on the residence’s

³⁷ 129 S. Ct. 1710 (2009).

³⁸ *Id.* at 1714.

³⁹ *Id.* at 1726, 17331 (Alito, J., dissenting) (so describing the majority’s rule).

front door, which was answered by Gant. The officers asked to speak to the owner, but they left when Gant replied that the owner would return later. The officers conducted a records check, which revealed that Gant had his driver's license suspended and had an outstanding warrant for his arrest for driving with a suspended license.

When the officers returned to the residence, they found a man near the back of the house and a woman in a car parked in front of it and, upon arrival of a third officer, handcuffed both suspects (the man for providing a false name, the woman for possessing drug paraphernalia) and secured each in separate police cars, when Gant himself arrived by car. Gant got out of his car, shut the door, and met Officer Griffith about ten to twelve feet away from Gant's car. Griffith immediately arrested and handcuffed Gant. When backup officers arrived, they locked Gant in the backseat of their vehicle. Two officers then searched his car, one finding a gun, the other discovering a bag of cocaine in the pocket of a jacket on the backseat.

Gant was charged with possession of a narcotic drug for sale and possession of drug paraphernalia (the plastic bag containing the cocaine). He unsuccessfully sought to suppress the evidence at the trial level, arguing in part that the *Belton* search incident to arrest exception for motor vehicles did not apply because he posed no threat to the officers at the time of the search. At the suppression hearing, Officer Griffith, when asked why the search was conducted, answered: "Because the law says we can do it."⁴⁰

The Court agreed with Gant's argument, finding that the original fictional rules were inconsistent with the justifications for the *Chimel* and *Belton* decisions, namely, the need for a search of the grabbing area because of the danger posed of violence or evidence destruction, dangers that evaporate where, as in *Gant*, the offender is safely secured at the time of the search. The Court worried that many lower courts' broader interpretation of *Belton* as creating a police "entitlement" to search rather than an exception justified by *Chimel*'s twin rationales unmoored the doctrine from its underlying logic.

Indeed, Justice Stevens began the analytical portion of his opinion on behalf of the Court by stressing the "basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions'"⁴¹ – a rule not routinely recited by the Court (which in other opinions often takes reasonableness balancing as the starting point rather than articulating a presumptive rule against warrantless searches or ones lacking probable cause) or that is, according to some critics, honored in the breach. But Stevens' opinion took this "basic rule" seriously, narrowing the Court's interpretation of *Belton* to maintain the search incident exception's "narrow" and "well-delineated" status as an exception.

The State had argued, however, that, even without the twin *Belton* rationales applying, the broad interpretation given *Belton* by many lower courts should be adopted for different reasons: the bright-line nature of the rule (if you arrest a current or recent occupant, you can search the passenger compartment every time) aids sound law enforcement more than it invades the limited privacy interest in cars. The Court rejected this argument. First, said the Court,

⁴⁰ *Id.* at 1715.

⁴¹ *Id.* at 1716.

although one’s privacy interest in a car less than in a home, it is still substantial, and the permitted invasion of that interest is likewise substantial because the broad rule permits searching not only the passenger compartment but “every purse, briefcase, or other container within that space.”⁴² Giving the state such power for arrests involving mere traffic offenses “creates a serious and recurring threat to the privacy of countless individuals.”⁴³ Indeed, Stevens declared, “the character of that threat implicates the central concern underlying the Fourth Amendment – the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.”⁴⁴

Second, continued the Court, the state overestimates the clarity of its proposed rule, for lower courts have struggled with how close in time and space the occupant must be to the stopped vehicle at the time of the search and whether it continues to be reasonable if it is conducted after the suspect has been removed from the scene.

Third, the Court emphasized, the state was just wrong to suggest that a broad reading of *Belton* was needed to protect law enforcement safety and evidentiary interests. The Court’s narrower reading of *Belton* still permits a search incident whenever the dangers to physical safety or evidence are *real* ones. Moreover, the *Terry* stop and frisk doctrine, as interpreted in application to cars in *Michigan v. Long*, permits an officer search of a passenger compartment for weapons whenever there is “reasonable suspicion” to believe that anyone, arrestee or not, is dangerous and might gain immediate access to weapons in the car. Furthermore, if there was probable cause to believe that the car harbored evidence of criminal activity, a warrantless search of the car for weapons is permitted under the “auto exception” to the warrant requirement. Indeed, such searches can be done concerning offenses other than the offense of arrest. Additionally, should, for example, a house be nearby, the protective sweeps doctrine permits suspicionless, warrantless arrests of areas immediately adjacent to the place of arrest from which an attack might be launched and searches of other areas where there is reasonable suspicion to believe that a dangerous person might be hiding. The combination of these exceptions amply protected law enforcement’s interests, particularly in light of Scalia’s *Thornton* concurrence rule, which the Court also adopted.

Fourth, *stare decisis* deserved little weight, concluded the Court, especially given this situation’s easy distinction from the facts of earlier Court precedent in this area; the weak police reliance interests, given that other rules have not congealed into “routine practice” in a way that would make the new rules burdensome to the police; the “checkered history” of change, interpretation, and misinterpretation of the search incident to arrest rule for automobiles, which suggests the existence of no stable body of precedent anyway; and the twenty-eight years of experience with *Belton*, which has revealed “that articles inside the passenger compartment are rarely ‘within the area into which an arrestee might reach....’”⁴⁵

Yet, offering little explanation other than citing Scalia’s concurring opinion in *Thornton* as justification for doing so, the Court also adopted Scalia’s alternative and additional search

⁴² *Id.* at 1720.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 172

incident to arrest exception for motor vehicles – one that permitted searches where neither of the twin *Belton* rationales applied, namely, where there was reason to believe that evidence relevant to the crime of arrest might be found. That test, however, could not be met for most traffic violations and was not met in *Gant*. Other than the police seeing Gant drive while he lacked a license – and see him so drive they did – there simply was no other physical evidence needed to prove the crime of driving with a suspended license. Because no evidence “relevant to the crime of arrest” could exist, much less be found in the car, this newly-created test was not, therefore, met in the case before the Court.

Implicitly, the Court found that the police officers’ prior investigations of suspected drug sales at the residence where they found Gant was irrelevant to the search incident question because the offense of *arrest* – driving with a suspended license – had nothing to do with drugs. Moreover, it was unlikely that the anonymous informant’s tip about drug sales at a residence where Gant was found but did not own was adequate to establish probable cause to arrest him on a drug-related crime. Consequently, the police could not legally charge him with, and arrest him for, a drug offense – or, at least they could not do so at the time of arrest for the traffic violation. Under the Court’s new rule inspired by Scalia’s *Thornton* concurrence, however, the police could have searched the passenger compartment of Gant’s car for drugs even if they lacked a reason to fear that he would hurt them or destroy their evidence, so long as he police had “reason to believe” the drugs would be in the car. They simply lacked such a reason on the facts before the Court.

Justice Scalia,⁴⁶ in his concurring opinion, expressed his view that the first part of the Court’s rule invited police to leave crime scenes unsecured so that they retain the option of a passenger compartment search incident to arrest of a recent occupant. Accordingly, he would prefer to abandon the *Chimel/Belton* line of cases entirely, replacing them solely with the rule he articulated in *Thornton* (what we have called the second part of the *Gant* rule). But since no other Justice shared his view, rather than permit the broad interpretation of *Belton* to stand, thus permitting “plainly unconstitutional searches – which is the greater evil,”⁴⁷ Scalia joined the majority opinion.

Justice Alito,⁴⁸ joined by Chief Justice Roberts and Justice Kennedy as to Alito’s entire opinion, and by Justice Breyer for most of Alito’s opinion, dissented. The bulk of Alito’s opinion argued that, contrary to the majority’s claim, it was overruling, not merely clarifying, *Belton* and that *stare decisis* counseled against going down that road. Alito also maintained that the first part of the new rule would endanger officers by creating perverse incentives for them to leave scenes unsecured, and that the second part of the new rule would confuse law enforcement officers and judges for some time to come. Concerning the second part of the new rule, Alito queried why the test was “reason to believe” rather than “probable cause”; why, if there was “reason to believe” that evidence of crime was present, the search should be restricted to the crime of arrest; and why, if there was such reason to believe, the search should be limited to the passenger compartment. Alito also saw confusion arising from the majority’s failure to counsel officers

⁴⁶ *Id.* at 1724 (Scalia, J., concurring).

⁴⁷ *Id.* at 1725.

⁴⁸ *Id.* at 1726 (Alito, J., concurring).

about what to do if they arrest only one of several occupants, but the remaining occupants raise a risk of danger or evidence destruction.

Justice Breyer⁴⁹ wrote a separate dissent to emphasize the *stare decisis* grounds for his vote. However, he did not join Part E of Justice Alito’s dissenting opinion (the portion defending *Belton*’s reasoning), offering no explanation for this position.

The “reason to believe” language of part two of the new *Gant* rule is likely to worry commentators as well as the *Gant* dissenting Justices. The “reason to believe” phrase or its variants has occasionally appeared in a smattering of earlier opinions by the Court, sometimes as a synonym for probable cause, other times as a synonym for “reasonable suspicion.”⁵⁰ But the Court has most recently resurrected variants of the phrase in its exigent circumstances jurisprudence and now in *Gant*. At least one commentator worries that the Court is now inching toward a four-tier, rather than a three-tier, spectrum of justifications for searches and seizures, the four tiers being: (1) probable cause; (2) reasonable suspicion; (3) reason to believe; and (4) no suspicion.⁵¹

One final point of clarification. Although the *Gant* rule is now the law, we have given you background on the development of the search incident to arrest doctrine as applied to automobiles to enable you better to understand the *Gant* rule’s meaning. Moreover, the first part of *Gant* merely changes the old apparent *Belton* rule, which required assuming danger to officers and evidence *at the time of arrest* as justifying a relatively contemporaneous suspicionless, warrantless search of a passenger compartment, to a rule in which there must be a real risk of those events *at the time of the actual search itself*. Otherwise, prior case law applies. Furthermore, the *Gant* rule’s second part, which adopts Scalia’s *Thornton* concurrence, does not so much change prior law as add to it. Finally, it is plausible that some state courts will under their state constitutions invalidate searches done under part two of the *Gant* rule because doing so would provide more, not less, protection than the federal Constitution, and states are always free to add to federal constitutional rights under state constitutional equivalents.

NOTES AND QUESTIONS

1. Do you agree that the majority’s “reason to believe” phrase is a new level of justification different from “reasonable suspicion”? If yes, is it higher or lower than “reasonable suspicion”? What, if anything, would justify such a new tier, and when should it apply?
2. Note that even if “reason to believe” is a new tier, it is triggered by the “offense of arrest,” and arrest still requires probable cause. Was there probable cause to arrest *Gant* for possession or sale of drugs under the facts before the Court at the time of the arrest? What if, instead of an anonymous tip, the officers had received a tip from an ordinary citizen identifying himself and claiming that while at the residence noted in *Gant* for a dinner party, this citizen saw the residence’s owner – who was not *Gant* – sell cocaine to

⁴⁹ *Id.* at 1725 (Breyer, J., dissenting).

⁵⁰ See generally Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649 (2009) (making the arguments discussed in this paragraph of our text but as to recent pre-*Gant* case law).

⁵¹ See *id.* at 660.

someone (again, not Gant) at the party, although Gant was a guest? Would that create probable cause to arrest Gant on drug charges?

Even more strongly, what if, in the immediately preceding question, we instead were told in the citizen tip that Gant himself sold the drugs; would the police now have probable cause to arrest Gant on drug charges? If they did have probable cause to arrest him on drug charges, would they have “reason to believe” that his car contained drugs? Would it matter whether they told him they were arresting him for driving with a suspended license, although they had probable cause at the time to arrest him on a drug charge?

3. What if Gant had a passenger in the car but the police only arrested Gant; could they frisk the passenger? Detain her for questioning on the scene? Take her to the station? Search her person incident to arrest? Does it matter whether Gant was arrested for driving with a suspended license, as he was, or on a drug charge, as the hypotheticals in question number two above posit?
4. *Stare decisis*'s force usually turns on these factors: (1) Was there reasonable reliance on the existing rule by any class of persons or entities, and would they thereby be harmed by a sudden change in the law?; (2) Have relevant circumstances changed since the existing rule was adopted such that the rule's justifications no longer hold or no longer hold with such force?; (3) Has experience shown the rule to be unworkable?; (4) Have later cases been implicitly so inconsistent with the earlier precedent as to undermine its force?; and (5) Was the original precedent badly reasoned?⁵² Some Justices argue as well that *stare decisis* should generally have less force in constitutional law.⁵³

Given these factors, who do you think had the better argument on “overruling” *Belton* (if it was overruled), Justice Stevens or Justice Alito? Was *Belton* overruled? Modified? Clarified? Retained but more fully explained to reject misunderstandings of the precedent by lower courts? How do we distinguish among these things, if at all, and why should we care? How can the distinctions affect advocates' arguments before trial judges? Appellate judges?

5. Alito's opinion cites an empirical study showing that police almost always handcuff an arrestee and remove him to a secure place before conducting a search incident to arrest.⁵⁴ Alito concluded that this argued in favor of the broad reading of *Chimel/Belton* because the narrow reading adopted by the Court would mean that searches incident to arrest of an automobile's passenger compartment would rarely be justified and thus rarely occur. In other words, infrequency of searches of recent occupants of automobiles and of their passenger compartments incident to arrest was a bad thing. Do you agree? Can you argue that this empirical study cuts just the opposite way, that is, in favor of the majority rule?

⁵² See *Gant*, 129 S. Ct. at 1726, 1728-30 (Alito, J., concurring) (outlining the factors to consider in deciding whether to depart from *stare decisis*).

⁵³ See *id.* at 17244, 1725 (Scalia, J., concurring) (“Justice ALITO insists that the Court must demand a good reason for abandoning prior precedent. That is true enough, but it seems to me ample reason that the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results.”).

⁵⁴ See *id.* at 1725, 1730 n.1 (Alito, J., concurring) (citing Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 665).

c. Protective Sweeps

Insert at page 381, immediately before Problem 4-1, the following:

Question: Recall Cal and Bart in Chapter 2 (at page 121, question 4; see Fall 2009 Letter Update, *supra*). Assume that after police entered Cal's trailer home upon Bart's signal, officers searched Cal, the confidential informant, and two others who happened also to be inside Cal's trailer home. Officers retrieved from Cal's front pants pocket the marked currency Bart used to purchase the methamphetamines. Additionally, officers located a significant quantity of methamphetamines in Cal's home. Cal is subsequently charged with felony drug distribution: methamphetamine. Cal's defense counsel files a motion to suppress the drugs in the government's case against Cal. Would a trial judge find constitutional the officers' actions inside Cal's home under *Chimel*? *Buie*? Why?

5. "SPECIAL NEEDS" SEARCHES & SEIZURES

d. Recognized Areas of Special Needs

(III) DRUG TESTING

Insert at p. 411, immediately before the first full paragraph (a paragraph describing the *Skinner* case), the following:

But "[e]ven with the high degree of deference that courts must pay to the educator's professional judgment," school administrators can go too far in their judgments about searches of children, as evidenced by the Court's decision in *Safford v. Redding*,⁵⁵ which held that the strip searching of a thirteen year old's bra and panties for the forbidden (by school policy), over-the-counter drugs ibuprofen and naproxen, by school administrators violated the Fourth Amendment.⁵⁶

In *Safford*, middle school administrators received information from another student that Savana Redding had distributed school-prohibited, over-the-counter drugs to one of her schoolmates. Based on the information, the assistant principal summonsed Savana to his office, showed her an opened confiscated day planner, which contained, several knives, lighters, and a cigarette.⁵⁷ Savana admitted ownership of the day planner; however, she denied the items were hers, explaining that she had loaned the day planner to a friend.⁵⁸ The assistant principal then confronted Savana with four 400 mg. pills of ibuprofen and one 200 mg. naproxen pill.⁵⁹ Savana denied knowledge of the pills; she also denied giving the drugs to students. Savana agreed to

⁵⁵ 2009 U.S. LEXIS 4735, *23-24 (2009).

⁵⁶ *See id.* at *8-9.

⁵⁷ *See id.* at 9.

⁵⁸ *See id.*

⁵⁹ *See id.*

allow the assistant principal to search her backpack; he and an administrative assistant searched, but found nothing.⁶⁰

At that point the assistant principal instructed the administrative assistant to take Savana to the nurse's office to search her further for pills.⁶¹ The administrative assistant and the nurse asked Savana to remove her jacket, socks, shoes, and then her pants and shirt, which she did.⁶² She was finally told to "pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area."⁶³ No pills were found on Savana.⁶⁴ Her mother, April Redding, sued Safford Unified School District #1, the assistant principal, the administrative assistant, and the nurse, claiming that their "strip search" of her daughter violated her Fourth Amendment rights.⁶⁵

The Supreme Court agreed with April Redding, noting the reasonableness of the thirteen year old's expectation of privacy

[i]s indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be.

...

The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in T.L.O., that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place....The scope will be permissible, that is, when it is

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.* at *9-10.

⁶³ *See id.* at *10.

⁶⁴ *See id.*

⁶⁵ *Id.* at *9-10 (2009). Writing for the majority, Justice Souter noted that "[t]he exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it:"

The very fact of [Savana] pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Id. at *19.

“not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁶⁶

The intrusiveness of the administrators’ search troubled the Court’s majority, particularly considering the non-lethal, nearly innocuous nature of the offending, restricted substances: “nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear.” Moreover, because neither student who had implicated Savana did so while revealing this predilection, nor had the administrators located these or similar contraband in the underwear of students, the lack of such evidence “weigh[s] heavily against any reasonable conclusion that [Savana] presently had the pills on her person, much less in her underwear.”⁶⁷

What was missing in facts favorable to the school administrators was “any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that [Savana] was carrying pills in her underwear.” This lack “was fatal to finding the search reasonable.”⁶⁸ Citing *T.L.O.*, Justice Souter noted that even the well-meaning, properly motivated assistant principal here was, nevertheless, still limited by reasonableness, *i.e.*, those that require “the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.”⁶⁹ Given “the content of the suspicion,” the administrators’ search of Savana failed to match the degree of intrusion, given “the content of the suspicion.” There was “no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.”⁷⁰ Justice Thomas, who concurred in part and dissented in part, would have found the search constitutional, as a matter of law.⁷¹

Question: What if the assistant principal discovered banned (versus restricted) drugs in Savana’s day planner; would the Court’s analysis change? What if Savana’s day planner contained “Hemp Oil Gencaps”⁷² or a nearly empty bag of “Hemp Crunch”?⁷³ If you do not know, hemp (also most generally known as *cannabis sativa*) is the actual plant from which marijuana is derived and is gaining in popularity for its multiple, non-illicit uses in

⁶⁶ *Id.* at *19-21 (citations omitted).

⁶⁷ *Id.* at *22-23 (citations omitted).

⁶⁸ *Id.* at *23 (citations omitted).

⁶⁹ *Id.* at *24 (citations omitted).

⁷⁰ *Id.* at *21-22 (citations omitted).

⁷¹ *Id.* at *33 (Thomas, J., concurring in part and dissenting in part).

⁷² <http://everything.hemp.com/detail.aspx?PRODUCT=111> (last visited July 5, 2009).

⁷³ <http://everything.hemp.com/detail.aspx?PRODUCT=302http://everything.hemp.com/detail.aspx?PRODUCT=302> (last visited July 5, 2009).

manufacturing clothing, medicine, food, paper, and beauty products.⁷⁴ Might this information influence the Court’s analysis or the outcome? Why?

6. CONSENT

b. The Requirement of Authority or Apparent Authority

(I) ACTUAL AUTHORITY

Insert at page 466, immediately before section (II) APPARENT AUTHORITY, the following:

5. Prior to the Court’s decision in *Randolph* and within several of the federal circuits, the doctrine of “consent once removed” applied. That doctrine authorized an undercover law enforcement officer’s entrance into a house at the express invitation of an individual with authority to consent to the officer’s entry. Such consent allowed the undercover officer an ability to enter, establish probable cause to arrest or search, and summons *other officers* for assistance.⁷⁵ The consent for the latter officers came, therefore, from the initial, undercover officer, not the house’s resident or owner, thus consent “once removed.”

However, what if the party authorizing law enforcement’s entrance into another’s home is not an undercover police officer, but a confidential informant? Recall Cal and Bart in Chapter 2 (at page 121; see Fall 2009 Letter Update, *supra*). Is there a constitutional basis upon which a court might distinguish Bart from an undercover police officer?⁷⁶ That question has just been decided by the Court and is discussed elsewhere in this Supplement.⁷⁷

Insert at 467, immediately before “c. Scope of Consent,” the following:

Might the doctrines of “assumption of the risk” and “apparent authority” inadvertently collude against a criminal defendant’s Fourth Amendment privacy interests? Absolutely, as evidenced by the Court’s recent decision in *Pearson v. Callahan*, where the Court was asked to determine whether qualified immunity extended to Utah police officers who relied upon the doctrine of “consent-once-removed” to justify the warrantless search of the home of an arrestee who sold methamphetamine to an undercover informant.⁷⁸ “Consent-once-removed” authorizes warrantless entry into a home “when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view.”⁷⁹ Callahan did not allow the informant in; instead, Callahan’s daughter let him inside their home.⁸⁰ How does this square with

⁷⁴ See, e.g. <http://www.thehia.org/> (detailing mission statement to, *inter alia*, represent the hemp industry and industrial uses of hemp), <http://www.hemp.org/mission.php> (discussing nonprofit organization’s efforts to “remove unjust cannabis prohibition” and “educate people about the medicinal and industrial uses of cannabis”); see also <http://everything.hemp.com/> (an online distributor of products derived from the hemp plant).

⁷⁵ See *Callahan v. Millard County*, 494 F.3d 891, 896 (10th Cir. 2007) (citations omitted), *cert. granted*, *Pearson v. Callahan*, 128 S. Ct. 1702 (2008).

⁷⁶ The Court of Appeals for the 10th Circuit indicates that there is. See *Callahan*, 494 F.3d at 896 (“[w]e find the distinctions between an officer and an informant summoning additional officers to be significant”).

⁷⁷ See *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

⁷⁸ See *id.* at 813-14.

⁷⁹ *Id.* at 813.

⁸⁰ *Id.*

the Court's decision in *Georgia v. Randolph*⁸¹ (discussed in the Casebook at pages 460-65), particularly if the daughter granted entry that the father might have denied?

Callahan was subsequently convicted of possession and distribution of methamphetamine.⁸² The conviction was vacated. Callahan filed a federal lawsuit in the district court under 42 U.S.C. §1983, alleging that the officers' entry into his home violated the Fourth Amendment, in that "consent-once-removed" had not been accepted by the Tenth Circuit. The Supreme Court determined that because the officers' unlawfulness was not clearly established at the time they gained entry to his home, they were entitled to qualified immunity, given that the doctrine of consent-once-removed had gained acceptance in two states and in three federal courts of appeals.⁸³ However, the Supreme Court itself neither accepted nor rejected the consent-once-removed doctrine embraced by some of the lower courts. All that mattered was that the state of the law on the doctrine was not clearly established.

CHAPTER 7: SEARCHES AND SEIZURE: THE EXCLUSIONARY RULE

III. EXCEPTIONS TO THE EXCLUSIONARY RULE

A. THE GOOD FAITH EXCEPTION

Insert at page 602, immediately before the "Good Faith Exception Problems," the following:

Question: Decide whether the good faith exception applies to the following facts:

On November 17, 2003, the city clerk's office issued an arrest warrant for Bennie for failure to appear in court. Per usual arrest warrant procedure, the city clerk's office forwarded the arrest warrant to the county sheriff's department for execution. County sheriff's department staffers logged the warrant information into the office computer. Bennie's home bordered the boundary of three counties; accordingly, the county sheriff's department enlisted the help of the other two neighboring departments in serving the arrest warrant.

On February 2, 2004, the city clerk's office recalled the arrest warrant, which had been erroneously initiated and entered. The county sheriff's department physically removed the warrant from the department's files and returned the warrant to the city

⁸¹ 547 U.S. 103 (2006).

⁸² See *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 814 (2009).

⁸³ See *id.* at 822-23. According to the Court, law enforcement officers "are entitled to rely on existing lower court cases without facing personal liability for their actions. . . . [i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy. *Id.* at 823 (citation omitted).

clerk's office. Accordingly, as of February 2, 2004, there was no longer an outstanding warrant for Bennie's arrest.

Unfortunately, due to a breakdown that occurred someplace within the county sheriff's department, the department failed to update its computerized records when it acted on the city clerk's office recall order. As a result of this failure, the computer database that the county sheriff's department used for its active warrants did not reflect the city clerk's office recall. Instead, the computer database continued to indicate incorrectly that Bennie had an outstanding arrest warrant.

On July 7, 2004, Bennie visited a county impound office to reclaim her recently impounded car. Officer Sponsler recognized Bennie and decided to run a records check on her. Sponsler learned that Bennie had an outstanding warrant for her arrest; he asked that it be faxed to him; however, it could not be located. After a couple of phone calls between offices, the city clerk's office informed Sponsler that the warrant had been recalled. Meanwhile, Sponsler's partner, Officer Royster, followed Bennie, who had driven away. Royster affected a traffic stop and informed Bennie she was under arrest, based on a county warrant for her arrest. Bennie protested, was arrested immediately, and patted down. Royster found a small bag in her pocket that contained powder residue which tested positive for methamphetamine. Royster's search incident to arrest also uncovered an illegal handgun.

Should the evidence of Bennie's criminality be suppressed, given the government's recordkeeping errors? The Court decided a case on nearly identical facts in its most recent salvo on the good faith exclusionary rule debate.

That most recent salvo came in *Herring v. U.S.*,⁸⁴ where a five-justice majority held the exclusionary rule inapplicable in a situation in which police had not acted "culpably" despite the fact that they had arrested Herring on the basis of a law enforcement error. According to the majority, something more than simple negligence is needed before evidence can be excluded on the ground of a police error. Instead, police must act with at least gross negligence, or as a result of the "systemic negligence" of their departments. This seems to be a new standard, and it arguably imposes a significantly higher burden on defendants (assuming it is they, and not the prosecution, who will bear the burden of proof – a matter that is still unclear but that may follow from *Herring's* logic). Now, in order to gain the application of the exclusionary rule, the burdenholder must probably satisfy a two-part test, proving, first, that the individual police officers' error rose beyond simple negligence, or that the department or perhaps a relevant sub-unit of it, engaged in "systemic negligence"; and second, that, even if the first prong were met, excluding evidence would contribute to deterrence significantly enough to justify the social costs of exclusion.

A review of *Herring's* facts demonstrates the difficulty facing defendants. In that case, a county sheriff's employee had failed to update the sheriff's database to reflect the recall of a warrant for Herring's arrest. A police officer in a neighboring county relied on that database five months later to arrest Herring and, in the accompanying search incident to arrest, found drugs that were used to prosecute him. The Court observed that the employee's error was a matter of

⁸⁴ 129 S.Ct. 695 (2009).

“isolated negligence attenuated from the arrest,” and it held that the exclusionary rule did not apply, explaining that the rule “serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence,” and that the error in *Herring* did not “rise to that level.”⁸⁵

Aside from the additional burden it may impose on defendants, *Herring* has several interesting features. First, its emphasis on culpability seems to invite at least sometimes an analysis of subjective officer mental states. Although “gross negligence,” an objective mental state, may suffice, the Court also specifically stated that deliberate or reckless conduct, two at least partially subjective mental states, may suffice as well. In the past, the Court has purportedly favored almost entirely objective standards for good faith, seeking to avoid serious scrutiny of the mental states of individual government actors.

Second, the mention of “systemic negligence” undoubtedly will produce defense efforts to inquire into departmental practices. Courts will have to develop standards for discovery, perhaps requiring defendants to produce a “showing” of systemic negligence before enabling them to get discovery from police departments. If courts do not do so, or if the Supreme Court ultimately concludes that they lack authority to do so, then it will be extraordinarily difficult to avoid the application of the exclusionary rule on the grounds that systemic negligence showed the absence of good faith. Likewise, “gross negligence” and subjective mental states on the part of individual officers are much harder to prove than simple negligence, so, absent statutory, rule-based, or constitutionally-based arguments resulting in expanded discovery procedures, it will also be very difficult to prove that individual officers failed to act in good faith.

Third, *Herring*’s apparent logic was that the exclusionary rule should apply only if there is police culpability to punish *and* if exclusion’s deterrent value is worth its cost (the Court uses inconsistent language, some suggesting that “culpability” is just another word for “deterable,” or perhaps simply one factor relevant to the likely presence of effective deterrence,⁸⁶ other language expressly stating conjunctively that both culpability *and* deterrence justifying exclusion are required;⁸⁷ the authors of this casebook read the tenor of the opinion as a whole as more consistent with these latter, conjunctive statements.). To date, the good faith exception has been applied only to searches based on statutes specifically authorizing a warrantless search or on actual or apparent warrants doing so (e.g., the officer in *Herring* believed, but *incorrectly*, that a valid warrant existed that authorized the arrest). But if the Court is convinced that only culpable police conduct that is sufficiently “deterable” by exclusion should be subject to the exclusionary rule, then it is hard to see why the good faith exception should be so limited. If the exception is indeed one day extended to warrantless searches and seizures, then the “exception” will likely become the rule, that is, few Fourth Amendment violations will be in “bad faith,” so exclusion will in practice become a rarity, whatever may be said about it on paper.

⁸⁵ *Id.* at 702.

⁸⁶ *See id.* at 701 (“The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct.”).

⁸⁷ *See id.* at 702 (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, *and* sufficiently culpable that such deterrence is worth the price paid by the justice system.”).

Indeed, the Court cited as a critical analogy *Franks v. Delaware*,⁸⁸ which held that *the defense* has the burden of proving that the affiant lied or acted in reckless disregard of the truth in obtaining a warrant if a search or seizure resulting from the warrant is to be suppressed. Moreover, elsewhere this most recent term, the Court has emphasized that inadmissibility pursuant to the Fourth Amendment exclusionary rule is “not...automatic.”⁸⁹ We have said earlier in this text that the burden of proof that an exception to the exclusionary rule applies is usually on the prosecution,⁹⁰ but the tenor of the Court’s opinions increasingly criticizing or limiting the exclusionary rule might (or might not) signal that the Court is prepared to put the burden of proving the *inapplicability* of at least the good faith exception on the defense. If that comes to pass, the rarity of the exclusionary rule’s application is even more likely to become a reality, especially if the good faith exception is indeed extended to warrantless searches (some argue that suppression is already quite rare, but, even if this is so, the changes considered here would make suppression still more rare).

Fourth, and on the other hand, the *Herring* Court also repeatedly described both the culpability inquiry in other portions of the opinion, and the question of deterrence, as “objective” determinations, while citing and approving much of its earlier good faith exception case law. Such language may suggest that the Court is not departing from the specific holdings of its earlier good faith cases in any important way (for example, *Leon*’s listing of four situations that cannot constitute good faith). Nevertheless, the Court’s express introduction for the first time of the concept of “culpability”⁹¹ may suggest that, once roaming beyond the specific factual situations identified in its earlier good faith precedent, it may apply what seems to be a new test more rigorously, making it harder to extend the exception to new situations -- though the Court is likely to insist that its new and old precedent are indeed consistent. Furthermore, many commentators were convinced in the pre-*Dickerson* world that the Court would use that case to overrule *Miranda*. It did not. It may, therefore, turn out that, contrary to the suggestions in the first three points above, *Herring* will turn out to be less a radical departure from the past than a modest one, or perhaps even *Herring* might conceivably be limited to its facts.

Justice Ginsburg, writing in a dissent joined by Justices Stevens, Souter, and Breyer, however, was not sanguine. Ginsburg insisted that the exclusionary rule, while serving deterrence, also served to avoid tainting the judiciary with “partnership in official lawlessness” and assured “the people – all potential victims of unlawful government conduct – that the government would not profit from its lawless behavior,” an assurance “minimizing the risk of seriously undermining popular trust in government.”⁹² Additionally, in an age of computers, Ginsburg thought it crucial to give police departments and their employees an incentive to get it right, an effort that would not be unduly expensive.

Simple negligence was the only standard that would do this effectively because any higher standard renders a remedy an “empty promise: How is an impecunious defendant to make

⁸⁸ 48 U.S. 154 (1978).

⁸⁹ *Kansas v. Ventris*, 129 S. Ct. 1841, 1845 (2009).

⁹⁰ See *infra* page 226.

⁹¹ We say “expressly” because one of us argued well before *Herring* that a culpability requirement was already implicit in the Court’s good faith jurisprudence. See Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483 (2006).

⁹² *Id.* at 704, 707.

the required showing? If the answer is that a defendant is entitled to discovery (and, if necessary, to an audit of police databases), ... then the Court has imposed a considerable administrative burden on courts and law enforcement.”⁹³ Civil remedies, insisted Justice Ginsburg, were also a fanciful remedy because of the substantial hurdles to recovery. Moreover, the risks of police errors were high, thereby most seriously impacting innocent persons, “ ‘wrongfully arrested based on erroneous information [carelessly maintained] in a computer database.’”⁹⁴ These costs, said Justice Ginsburg, were unacceptable: “ ‘The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base’ is evocative of the use of general warrants that so outraged the authors of our Bill of Rights.”⁹⁵

Moreover, puzzled Ginsburg, “[i]t is not clear how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police.”⁹⁶ For Ginsburg, the majority’s opinion represented nothing less than a further “erod[ing] of the exclusionary rule” that renders exclusion as a remedy for Fourth Amendment violations a mere “ ‘chimera.’”⁹⁷

Justice Breyer, joined by Justice Souter, wrote his own dissent too, merely to emphasize what he saw as the importance of the distinction between *police* recordkeeping errors and *judicial* ones, concluding that the exclusionary rule should apply to the former but not the latter. This bright line, Breyer insisted, would be “far easier for courts to administer than THE CHIEF JUSTICE’S case-by-case, multifaceted inquiry into the degree of police culpability.”⁹⁸

For a topical comparison of U.S. evidence suppression under *Mapp v. Ohio* with other nations’ treatment of law enforcement error, see Adam Liptak’s “U.S. Is Alone in Rejecting All Evidence if Police Err,” *The New York Times* (July 19, 2008), located at <http://www.nytimes.com/2008/07/19/us/19exclude.html?sq=dollree%20mapp&st=cse&scp=1&adxnlnx=1216985239-KE0N%20WchJbqVv7%20BZNU4Hg&pagewanted=all> (which also features booking photos of Dollree Mapp, Booker T. Hudson, and Bennie Herring).

IV. ALTERNATIVES TO THE EXCLUSIONARY RULE

A. FOURTH AMENDMENT VIOLATIONS

1. TORT REMEDIES

b. Section 1983

Insert at page 628, just before section “*c. Bivens Actions and Qualified Immunity*,” the following:

⁹³ *Id.* at 701.

⁹⁴ *Id.* at 705.

⁹⁵ *Id.* at 709.

⁹⁶ *Id.* at 710 n.7.

⁹⁷ *Id.* at 710.

⁹⁸ *Id.* at 710, 711.

It is difficult to exaggerate the importance of filing a Section 1983 lawsuit within the statute of limitations. This point is illustrated in *Wallace v. Kato*.⁹⁹ There, Chicago police arrested without probable cause fifteen year old Andre Wallace during the investigation of a fatal shooting in 1994, subjected him to hours of custodial interrogation without the benefit of counsel, and obtained the teen's signed confession. Wallace was tried, convicted, and sentenced to 26 years' imprisonment.

On direct appeal, the appellate court determined that the officers arrested Wallace without probable cause and in violation of his Fourth Amendment right against unreasonable seizures.¹⁰⁰ Ultimately, in 2001, the appellate court of Illinois concluded that the taint of the unconstitutional seizure was not sufficiently attenuated, making admission of the confession constitutionally improper. Wallace's criminal conviction was vacated and the case remanded. In 2002, prosecutors dropped all charges.¹⁰¹

In 2003, Wallace filed a Section 1983 lawsuit against the city of Chicago and several officers based on the unlawful arrest. The district court granted summary judgment for the defendants, which was affirmed by the Seventh Circuit. According to the courts, Wallace's lawsuit was time-barred. Specifically, the circuit court of appeals determined that Wallace's cause of action did not accrue when his conviction was vacated in 2002, but at the time of his 1994 arrest.

The Supreme Court affirmed. The Court determined that the statute of limitations began to run when Wallace first appeared before the examining magistrate and was bound over for trial on his underlying felony charge. The Court's rationale was based on application of both federal and state law, as well as common law treatment of the crimes of false arrest and false imprisonment.¹⁰² The Court announced that, however, the accrual date for a Section 1983 claim is a matter of federal law.¹⁰³ Under federal law, accrual occurs when the plaintiff has "a complete and present cause of action."¹⁰⁴

However, another consideration "ar[ose] from the common law's distinctive treatment of false arrest and false imprisonment," the common law causes of action most analogous to Wallace's Section 1983 claim.¹⁰⁵ Wallace's claim arose from his detention without legal process, *i.e.*, when he was arrested in 1994 without a warrant. The Court determined that the limitations period for a false imprisonment claim begins to run when the false imprisonment ends; after that, "any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself."¹⁰⁶ The Court did not find that Wallace's false imprisonment ended when he was released from custody after the charges

⁹⁹ 549 U.S. 384 (2007), 127 S. Ct. 1091 (2007).

¹⁰⁰ *Id.* at 1094.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1096.

¹⁰³ *Id.* at 1095.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1095.

¹⁰⁶ *Id.* at 1096.

against him were dropped, but when the legal process was initiated against him - when he was bound over for trial by the magistrate.¹⁰⁷

Since Wallace's claim accrued before he had been convicted, he argued that the Court's decision in *Heck v. Humphrey*¹⁰⁸ applied to his case. The Court disagreed, characterizing the requested application as a "bizarre extension of *Heck*."¹⁰⁹ The Court also refused to adopt a rule applying equitable tolling in cases where a false arrest claim accrued before the existence or setting aside of a conviction.¹¹⁰

Justices Stevens and Souter concurred in the Court's judgment that Wallace's action was time-barred.¹¹¹ However, they disagreed with the majority's reliance upon common-law tort analogies. Justices Breyer and Ginsberg dissented, arguing that equitable tolling should occur when a Section 1983 plaintiff reasonably claims that the government's unlawful behavior "was, or will be, necessary to a criminal conviction."¹¹²

Recently, the Court foreclosed plaintiffs' ability to bring Section 1983 actions and recover attorney's fees against police officers and municipalities for "false arrests," *i.e.*, full custodial arrests for "citation only" offenses. In a 9-0 decision, the Court reversed a Virginia Supreme Court determination that suppression of evidence obtained illegally under state law violated the Fourth Amendment. In *Virginia v. Moore*,¹¹³ the defendant was arrested for the misdemeanor offense of driving on a suspended license and in violation of Virginia's "citation only" law.¹¹⁴ As a result of the arrest, police effected a full custodial arrest and a search incident to arrest, which led to the discovery of cocaine and, eventually, the defendant's conviction of possession with intent to distribute cocaine.¹¹⁵ The defendant's motion to suppress was denied, and he was convicted.¹¹⁶ The Virginia Supreme Court reversed the defendant's conviction, given the officers' violation of Virginia's "citation only" law and the lack of a Fourth Amendment "search incident to citation" exception to the warrant "requirement."¹¹⁷ The Court, reversed and remanded to the Virginia Supreme Court, holding that the arrest did not offend the Fourth Amendment, as governmental violations of state law do not mandate the federal constitutional remedy of evidence exclusion.¹¹⁸

Insert at 628, n.75, immediately at the end, the following:

*See also Safford Unified School District #1, et al. v. Redding*¹¹⁹ (finding strip search of thirteen year old student's bra and panties for forbidden over-the-counter drugs by Safford

¹⁰⁷ *Id.*

¹⁰⁸ 512 U.S. 477, 114 S. Ct. 2364 (1994).

¹⁰⁹ *Id.* at 1098.

¹¹⁰ *Id.*

¹¹¹ *See id.* at 1101-02 (Stevens, J. and Souter, J., concurring in judgment).

¹¹² *See id.* at 1102-05 (Breyer, J., dissenting).

¹¹³ 128 S. Ct. 1598 (2008).

¹¹⁴ *Id.* at 1601.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1602.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1605-06.

¹¹⁹ 2009 U.S. LEXIS 4735 (June 25, 2009).

Unified School District #1 school administrators violated the Fourth Amendment). In *Safford*, the Court found the school district’s officials were entitled to qualified immunity “where clearly established law does not show that the search violated the Fourth Amendment.”¹²⁰ The Court, however, did not rule on the school district’s liability, as the Ninth Circuit failed to address that issue in its decision. Accordingly, the case was remanded “for consideration of the *Monell* [*v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978)] claim.”¹²¹

Insert at 629 immediately at the end of the text (after footnote 86) the following:

Recently, however, the Court revisited *Saucier*’s two-step test and concluded that although often appropriate, [it] should no longer be regarded as mandatory.”¹²² In *Pearson v. Callahan*, the Court was asked to determine qualified immunity of Utah police officers who relied upon the doctrine of “consent-once-removed” as legal justification for the warrantless search incident to arrest of a suspected dealer’s home in which he sold methamphetamine to a cooperating undercover informant voluntarily admitted.¹²³ Callahan was subsequently convicted of possession and distribution of methamphetamine; however, the Utah Court of Appeals vacated the conviction.¹²⁴ Callahan then filed a federal lawsuit in the district court under 42 U.S.C. §1983, alleging that the officers’ entry into his home violated the Fourth Amendment.¹²⁵ At the time of the officers’ entry, “consent-once-removed” had not been accepted by the Tenth Circuit.¹²⁶ Nevertheless, the district court granted summary judgment on behalf of the defendants, holding that the officers were entitled to qualified immunity, as they could have reasonably believed that “consent-once-removed” authorized their entry into Callahan’s home.¹²⁷ The Tenth Circuit reversed the district court’s decision (notwithstanding the other courts’ and circuits acceptance of “consent-once-removed”), finding that, under *Saucier*’s two-part test, the officers were not entitled to qualified immunity, as 1) Callahan had established a Fourth Amendment violation and 2) the officers’ unconstitutionality was clearly established.¹²⁸

In reversing the Tenth Circuit’s decision, the Court determined that because the officers’ unlawfulness was not clearly established, they were entitled to qualified immunity, given that the doctrine of consent-once-removed had gained acceptance in two states and in three federal courts of appeals “involving consensual entries by private citizens acting as confidential informants.”¹²⁹

¹²⁰ *Id.* at *24 (citing *Pearson v. Callahan*, 555 U.S. ___, ___, 129 S.Ct. 808 (2009)).

¹²¹ *Id.* at *27.

¹²² *Pearson v. Callahan*, __ U.S. ___, 129 S.Ct. 808, 815 (2009).

¹²³ *See id.* at 813. “Consent-once-removed” authorizes warrantless entry into a home “when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view.” *Id.* at 814. Note that Callahan did not allow the informant inside his home; Callahan’s daughter let the informant inside. *Id.* at 813.

¹²⁴ *Id.* at 814.

¹²⁵ *Id.*

¹²⁶ *See id.* at 814.

¹²⁷ *Id.*

¹²⁸ *See id.* at 813. The Tenth Circuit’s decision “took no issue with application of the doctrine when the initial consent was granted to an undercover law enforcement officer, but the majority disagreed with decisions ‘that broad[e]n this doctrine to grant informants the same capabilities as undercover officers.’” *Id.* at 814 (citation omitted).

¹²⁹ *See id.* at 822-23. According to the Court, law enforcement officers “are entitled to rely on existing lower court cases without facing personal liability for their actions. . . . [i]f judges thus disagree on a constitutional question, it

That “consent-once-removed” had not been accepted by the Tenth Circuit was of no import (“[t]he officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on ‘consent-once-removed’ entries”¹³⁰), nor was the court’s adherence to the *Saucier* procedure. It is important to note that the Court itself neither accepted nor rejected the consent-once-removed doctrine.

In the Court’s rejection -- although the *Pearson* Court characterizes its decision as “relaxation”¹³¹ -- of *Saucier*’s mandate, Justice Alito, writing for the majority, cited criticism by lower court judges, Justices, and the “considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure.”¹³² Specifically, the Court determined that the two-step test fails to serve the purpose of qualified immunity when the test “forces the parties to endure additional burdens of suit – such as the costs of litigating constitutional questions and delays attributable to resolving them – when the suit otherwise could be disposed of more readily.”¹³³ In other words, “[a]dherence to *Saucier*’s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the ‘older, wiser judicial counsel not to pass on questions of constitutionality ... unless such adjudication is unavoidable.”¹³⁴ Relaxation of *Saucier*’s mandate allows lower court judges – those the Court deemed to be in the best position to do so -- to determine if, and how, *Saucier* “will best facilitate the fair and efficient disposition of each case.”¹³⁵

Absolute immunity has also been extended to cover prosecutors in a number of circumstances. Recently, In *John Van de Kamp v. Thomas Lee Goldstein*,¹³⁶ the Court considered how immunity applies where a prosecutor is engaged in certain administrative activities.

In 1980, Goldstein was convicted of murder after trial, sentenced, and incarcerated.¹³⁷ Eighteen years later, Goldstein filed a habeas corpus action in the Federal District Court for the Central District of California, claiming that he had been improperly convicted, based on the false testimony of aptly-named jailhouse informant, Edward Floyd Fink.¹³⁸ Fink not only gave the government useful testimony in Goldstein’s prosecution, but had done so in others.¹³⁹ In exchange for his useful testimony, the government gave Fink “testimony-related rewards:” reduced jail time.¹⁴⁰

is unfair to subject police to money damages for picking the losing side of the controversy. *Id.* at 823 (citation omitted).

¹³⁰ *Id.* at 813.

¹³¹ *Id.* at 822. In fact, the Court had directed the parties to address whether *Saucier* should be overruled. *Id.* at 815.

¹³² *Id.* at 817. “Where a decision has ‘been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,’ these factors weigh in favor of reconsideration.” *Id.* at 818 (citations omitted).

¹³³ *Id.* at 818 (citations omitted).

¹³⁴ *Id.*

¹³⁵ *Id.* at 813.

¹³⁶ ___ U.S. ___, 129 S.Ct. 855 (2009).

¹³⁷ *See id.* at 859.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See id.*

Prosecutors in the Los Angeles County District Attorney's Office knew of Fink and his usefulness.¹⁴¹ They were also aware of their office's role in securing less jail time in exchange for Fink's usefulness.¹⁴² Still, no one in the office disclosed this impeachment evidence information to Goldstein's defense attorney before or during trial.¹⁴³

Goldstein sued petitioners, John Van de Kamp and Kurt Livesay, the former Los Angeles County district attorney, and chief deputy district attorney under Section 1983, claiming, that the failure to disclose Fink's impeachment evidence – which the government was required to do, per *Giglio v. U.S.*¹⁴⁴ -- led to Goldstein's conviction.¹⁴⁵ An evidentiary hearing in the district court revealed that Fink had lied when he testified that he received no favorable governmental treatment when, in fact, he had. The district court determined that disclosure might have made a difference in Goldstein's trial and ordered either a new trial or Goldstein's release. As Goldstein had already served 25 years of his sentence, the state chose to release him.¹⁴⁶

In his Section 1983 claim, Goldstein sought damages for the office's chief supervisory attorneys' failure to train and supervise adequately its prosecutors and establish an information system about informants.¹⁴⁷ At Goldstein's trial, the trial deputy did not know of Fink's testimonial favors because the supervisors "failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information."¹⁴⁸ The supervisors claimed absolute immunity and moved for dismissal.¹⁴⁹ The district court denied the motion, as the charged conduct amounted to "administrative," not "prosecutorial," conduct and, therefore, fell outside the scope of the prosecutor's absolute immunity to Section 1983 claims.¹⁵⁰ On interlocutory appeal, the Ninth Circuit affirmed the District Court's "no immunity" determination.¹⁵¹

The Supreme Court disagreed. Even assuming, *arguendo* (as the Court did), that *Giglio* imposed training, supervision, or information-system management obligations on prosecutors like Goldstein's, the Court found that these government officials enjoy absolute immunity, akin to that enjoyed by those prosecutors they supervised.¹⁵² The Court could not (consistent with *Imbler's* concerns regarding line prosecutors) exempt discretionary supervisory decisions from absolute immunity. Supervisory decisions of the type challenged by Goldstein "necessarily require legal knowledge and the exercise of related discretion," even though they involve training and supervision generally or concerning the particular case in question. The Court posed the following hypothetical to make its point:

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ 415 U.S. 150, 154 (1972). In *Giglio*, the Supreme Court recognized the inherent danger in the use of "jailhouse snitches" and obligated the government to disclose whether testimonial favors are promised or given to those who provide useful prosecutorial testimony. In Goldstein, Fink lied about receiving testimonial favors

¹⁴⁵ *See Van de Kamp v. Goldstein*, ___ U.S. ___, 129 S.Ct. 855, 859 (2009).

¹⁴⁶ *See id.*

¹⁴⁷ *See id.* at 859.

¹⁴⁸ *See id.* at 861.

¹⁴⁹ *See id.* at 859.

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *See id.*

[s]uppose that Goldstein had brought such a case, seeking damages not only from the trial prosecutor but also from a supervisory prosecutor or from the trial prosecutor's colleagues -- all on the ground that they should have found and turned over the impeachment material about Fink. *Imbler* makes clear that all these prosecutors would enjoy absolute immunity from such a suit. The prosecutors' behavior, taken individually or separately, would involve "[p]reparation . . . for . . . trial," 424 U.S., at 431, n. 33, 96 S. Ct. 984, 47 L. Ed. 2d 128, and would be "intimately associated with the judicial phase of the criminal process" because it concerned the evidence presented at trial. *Id.*, at 430, 96 S. Ct. 984, 47 L. Ed. 2d 128. And all of the considerations that this Court found to militate in favor of absolute immunity in *Imbler* would militate in favor of immunity in such a case.

The only difference we can find between *Imbler* and our hypothetical case lies in the fact that, in our hypothetical case, a prosecutorial supervisor or colleague might himself be liable for damages *instead of* the trial prosecutor. But we cannot find that difference (in the pattern of liability among prosecutors within a single office) to be critical. Decisions about indictment or trial prosecution will often involve more than one prosecutor within an office. We do not see how such differences in the pattern of liability among a group of prosecutors in a single office could alleviate *Imbler's* basic fear, namely, that the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks. Moreover, this Court has pointed out that it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of primary importance." *Kalina*, 522 U.S., at 125, 118 S. Ct. 502, 139 L. Ed. 2d 471. Thus, we must assume that the prosecutors in our hypothetical suit would enjoy absolute immunity.¹⁵³

Given the Court's conclusion that supervisory prosecutors are immune when sued for their actions regarding a specific or particular trial, the outcome in the instant matter was obvious to the Court:

[o]nce we determine that supervisory prosecutors are immune in a suit directly attacking their actions related to an individual trial, we must find they are similarly immune in the case before us. We agree with the Court of Appeals that the office's *general* methods of supervision and training are at issue here, but we do not agree that that difference is critical for present purposes. That difference does not preclude an intimate connection between prosecutorial activity and the trial process. The management tasks at issue, insofar as they are relevant, concern how and when to make impeachment information available at a trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties. And, in terms of *Imbler's* functional concerns, a suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging

¹⁵³ *Id.* at 862-63 (emphasis in the original).

that a supervisor trained and supervised inadequately, on the other, would seem very much alike.¹⁵⁴

Accordingly, whither *Imbler* goes, so does *Goldstein*:

We conclude that the very reasons that led this Court in *Imbler* to find absolute immunity require a similar finding in this case. We recognize, as Chief Judge Hand pointed out, that sometimes such immunity deprives a plaintiff of compensation that he undoubtedly merits; but the impediments to the fair, efficient functioning of a prosecutorial office that liability could create lead us to find that *Imbler* must apply here.¹⁵⁵

c. *Bivens* Actions and Qualified Immunity

Insert at page 629, in n.84, immediately before the reference to *Groh v. Ramirez*, 540 U.S. 551 (2004), the following:

But see Pearson v. Callahan, 129 S. Ct. 808 (2009) (overruling *Saucier*).

CHAPTER 8: CONFESSIONS AND SELF-INCRIMINATION

II. CUSTODIAL INTERROGATIONS AND THE *MIRANDA* DOCTRINE

B. THE *MIRANDA* DECISION AND INTERPRETIVE CONTROVERSY

¹⁵⁴ *Id.* at 864. The Court handled separately, but not differently, Goldstein's claim that the Los Angeles County District Attorney's Office should have established a system that would have permitted line prosecutors to access information pertaining to testimony-related rewards. According to the Court, any differences "do not require a different outcome. Deciding what to include and what not to include in an information system is little different from making similar decisions in respect to training. Again, determining the criteria for inclusion or exclusion requires knowledge of the law." *Id.* Justice Souter explained that were this claim allowed, a court would still have to review the prosecuting office's legal judgments

not simply about *whether* to have an information system but also about *what kind* of system is appropriate, and whether an appropriate system would have included *Giglio*-related information *about one particular kind of trial informant*. Such decisions--whether made prior to or during a particular trial--are "intimately associated with the judicial phase of the criminal process." *Imbler*, *supra*, at 430, 96 S. Ct. 984, 47 L. Ed. 2d 128; see *Burns*, 500 U.S., at 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547. And, for the reasons set out above, all *Imbler's* functional considerations (and the anomalies we mentioned earlier, *supra*, at _____, 172 L. Ed. 2d, at 716-717) apply here as well.

Id. at 864 (emphasis in the original).

¹⁵⁵ *Id.* at 864-65.

3. AFFIRMING MIRANDA'S CONSTITUTIONAL STATUS

Insert at page 707, just before the heading, C. MIRANDA'S IMPACT," the following:

Note on the McNabb-Mallory Rule: In *Corley v. United States*,¹⁵⁶ the Court had to consider whether the same statute that the prosecution had argued in *Dickerson* had overruled *Miranda* also overruled the "McNabb-Mallory" rule. The common law had required an arresting officer to bring the defendant before a magistrate promptly. The rule's purpose was to prevent secret detentions while also informing the defendant of the charges against him. Several federal statutes came to embody this common law rule. In *McNabb v. United States*,¹⁵⁷ the Court, exercising its supervisory power over the federal courts, held that violation of this prompt "presentment" requirement would be subject to the exclusionary rule were any statements obtained from the defendant as a result of the delay. That exclusionary rule applied even to statements that were otherwise "voluntary." Shortly after *McNabb*, Congress pulled the various presentment statutes together in Federal Rule of Criminal Procedure 5(a), which mandated that an arresting officer "take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." The current version of Rule 5(a) is substantially similar. Thereafter, in *Mallory v. United States*,¹⁵⁸ the Court applied the *McNabb* exclusionary rule to a purported violation of Rule 5(a). The *Mallory* Court emphasized that "delay for the purpose of interrogation is the epitome of 'unnecessary delay.'"

In 1968, Congress passed 18 U.S.C. sec. 3501, in an effort to repeal *Miranda*. The *Dickerson* Court, of course, held that section 3501 failed in this endeavor because *Miranda* was rooted in the Constitution and thus could not be overruled by a statute. Subsection (a) was the one aimed at *Miranda* and had said, in essence, that voluntary confessions were admissible. But subsection (c) focused on *McNabb-Mallory*, declaring that in any federal prosecution "a confession made...by...a defendant therein, while such person was under arrest..., shall not be inadmissible solely because of delay in bringing such person before a magistrate judge...if such confession is found by the trial judge to have been made voluntarily...and if such confession was made... within six hours [of arrest]..." In *Corley*, the state argued that subsection (c) overruled the *McNabb-Mallory* exclusionary rule, a rule rooted in earlier, now rejected statutes, and in the supervisory power of the courts, thus not a constitutional rule and therefore not controlled by logic like that in *Dickerson*. The Court mostly disagreed, concluding that the statute had *modified* but not overruled *McNabb-Mallory*. The new rule was this: confessions obtained because of unnecessary delay in bringing an arrested defendant before a magistrate judge shall be inadmissible, even if voluntary, *if and only if* the delay exceeded six hours. The Court found its conclusion supported by the statute's express language (declaring that voluntary confessions may not be made inadmissible solely because of presentment delay of *under six hours*) and by the supporting legislative history.

Several points must be emphasized. First, remember that *McNabb-Mallory* is not a constitutional rule, thus at least arguably subject to later change by Congress and the Court. Second, for this same reason, the rule applies only to federal, not state, prosecutions. Third, even

¹⁵⁶ 129 S. Ct. 1558 (2009).

¹⁵⁷ 318 U.S. 2 (1943).

¹⁵⁸ 354 U.S. 449 (1957).

if there is a delay of over six hours, that does not automatically result in exclusion. The delay still must be “unnecessary,” most clearly including delay done for the specific purpose of thereby obtaining a confession.

III. THE SIXTH AMENDMENT RIGHT TO COUNSEL

C. THRESHOLDS: FORMAL CHARGE AND DELIBERATE ELICITATION

1. THE REQUIREMENT OF A FORMAL CHARGE

Insert at page 780, just above the first full paragraph, the following:

Recently, in *Rothgery v. Gillespie County, Texas*,¹⁵⁹ the Court held that the Sixth Amendment right to counsel attached at a post-arrest proceeding, entitled under Texas law an “article 15.7 hearing,” that combined the initial bail determination, the Fourth Amendment *Gerstein* prompt probable cause determination, and the first formal appraisal of the defendant of the accusations against him – so holding even though no prosecutor was present nor yet playing any role in the case. However, the Court emphasized that it was holding only that the hearing marked the start of “formal adversarial proceedings” but was not deciding whether that hearing was a “critical stage,” a term probably roughly meaning a “trial-like” confrontation at which counsel is needed to act as a “spokesperson or advisor,”¹⁶⁰ though the definition of the term “critical stage” is arguably ambiguous and contested.

The Sixth Amendment guarantees the accused the presence of counsel *only* at “critical stages” occurring after the right has “attached,” that is, after formal adversarial proceedings have begun. By not addressing the critical stage question, the Court has thus left open whether any Sixth Amendment guarantee of counsel’s presence applies at hearings akin to Texas’s article 15.7 hearing. *Miranda* rights probably do not apply at such hearings because the accused is not in a “police-dominated atmosphere” but rather involved in a public proceeding before a magistrate. Should the Court eventually hold that proceedings like Texas’s article 15.7 hearings are not critical stages, a defendant might find himself with neither Fifth nor Sixth Amendment protections for any statements that he makes at the hearing. He would be reduced to relying for suppression of any such statements on a Fourth Amendment fruit-of-the-poisonous tree argument (if there was a Fourth Amendment violation and if no exception to the exclusionary rule applies) or on the hard-to-prove due process involuntariness argument. *Rothgery* is discussed in more detail in this Supplement’s addition to chapter 10 (concerning eyewitness identifications) of the text.

D. INVOKING AND WAIVING SIXTH AMENDMENT RIGHTS

Insert at page 783, after the second sentence just above the below heading, and after deleting the current third sentence:

¹⁵⁹ 554 U.S. __ (2008) (slip op.).

¹⁶⁰ See *United States v. Ash*, 41 U.S. 300 (1973) (so defining “critical stage,” a term whose meaning is discussed in more detail in chapter 10 *infra*).

Many lower courts had until the recent decision in *Montejo v. Louisiana*,¹⁶¹ discussed shortly, held that invocation occurs whenever counsel enters an appearance, though not all courts agreed.

Insert at page 784, first full paragraph, first sentence (replacing the current first sentence):

In 1986, the Court held that once the *Massiah* right has been invoked, however, there may be no finding of waiver if the waiver was made in response to government-initiated interrogation.

Insert at page 784, after the first full paragraph and before the heading, “E. *Massiah*’s Offense-Specific Nature”:

But the Court recently overruled *Michigan v. Jackson* in *Montejo v. Louisiana*.¹⁶² There, Montejo had been arrested on robbery and murder charges, waived his *Miranda* rights, and ultimately confessed to the crime. At a hearing held within 72 hours, as required by Louisiana law, the court appointed counsel for the indigent Montejo, though Montejo had not himself requested counsel. Later that same day, two detectives asked Montejo to accompany them in an effort to locate the murder weapon. Montejo agreed, and, during the excursion wrote an apology letter to the victim’s widow, only meeting his defense lawyer upon returning to prison, a lawyer upset at interrogation of his client occurring during his absence. The letter was admitted at trial over Montejo’s objection, and he was convicted of first-degree murder and sentenced to death.

When the case reached the United States Supreme Court, the Court concluded that the *Jackson* rule had proven “unworkable.” Requiring defendants like Montejo actually to assert their rights to “invoke” them at preliminary arraignment seemed unfair because many states do not even ask an accused to do so but simply appoint counsel. Yet applying *Jackson* where a defendant has never affirmatively invoked his right also seemed inconsistent with *Jackson*’s rationale, which the Court described as “preclud[ing] the State from badgering defendants into waiving their previously asserted rights.”¹⁶³ “The effect of this badgering,” continued the Court, “might be to coerce a waiver, which would render the subsequent interrogation a violation of the Sixth Amendment.”¹⁶⁴ But, explained the Court, “it would be completely unjustified to presume that a defendant’s consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer.”¹⁶⁵ *Jackson* required something more affirmative to justify that presumption. If something more affirmative were shown, rather than engaging in a case-by-case assessment of voluntariness, *Jackson* created a bright-line rule ensuring the automatic exclusion of confessions resulting after Sixth Amendment rights-invocation, a purposely overly-broad rule to avoid even the possibility of badgering-induced waivers resulting in statements used to convict at trial.

But, concluded the Court, the cost-benefit calculus underlying *Jackson* tipped the balance against retaining the rule. Most importantly, the Court had already provided substantial overlapping protection in its *Miranda* jurisprudence. *Miranda* itself was a prophylactic (purposely overly-broad) rule designed to protect the privilege against self-incrimination. The

¹⁶¹ 556 U.S. ___ (2009) (slip op. May 26, 2009).

¹⁶² *Id.*

¹⁶³ *Id.* at 14.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 12-13.

Edwards rule requiring interrogation to stop upon assertion of the *Miranda* right to counsel was a second level of prophylaxis to protect the first level. *Minnick*'s bar on further questioning or seeking of a waiver until counsel was present (or until the suspect re-initiated the conversation) once the *Miranda* right to counsel was asserted was a third layer of prophylaxis. Three such layers, concluded the Court, are sufficient to prevent "badgered" waivers.

Granted, the Court conceded, *Edwards* applied only in the context of custodial interrogation while the Sixth Amendment right widely applies to all post-indictment interrogations. But, said the Court, these "uncovered situations are the *least* likely to pose a risk of coerced waivers." Indeed, "When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering."

Yet the costs of retaining the *Jackson* rule were, in the Court's eyes unacceptable, the principal cost being letting the guilty and dangerous go free under the exclusionary rule. The Court also rejected the argument that ending *Jackson* would render *Edwards* itself unworkable because courts will have to determine whether preliminary arraignment statements constituted *Edwards* violations. The Court said, for the very first time, that preliminary arraignment invocations of the *Miranda* right to counsel were *irrelevant* under *Miranda* and its progeny. "What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing."¹⁶⁶ *Jackson*'s rule thus no longer "pay[s] its way," and, given its young age (just over two decades old) and the absence of significant reliance interests, combined with the rule's unworkability, the force of *stare decisis* was limited. Accordingly, the rule lives no more.

However, the Court remanded to offer Montejo the opportunity to raise an *Edwards* claim, finding that he may not have done so because of *Jackson*'s broader protection. In doing so, the Court stressed that a valid *Miranda* waiver may also constitute a valid Sixth Amendment waiver, and there is no reason for treating waivers differently based solely on whether the defendant was in fact represented or not at the time.

Justice Stevens, joined by Justices Ginsburg, Souter, and Breyer, dissented.¹⁶⁷ Stevens relied primarily on two concepts. First, he insisted that if *requesting* a lawyer constituted an invocation of Sixth Amendment rights, then surely *having* a lawyer surely must be treated in the same fashion because the existence of the lawyer-client relationship is at the core of what the fullest protection of Sixth Amendment rights is all about. Second, said Stevens, *Jackson*'s purpose was *not* to prevent police badgering waivers but rather to "protect the unaided layman at critical confrontations with his adversary" by "giving him 'the right to rely on counsel as a 'medium' between him[self] and the State.'"¹⁶⁸ *Edwards*, decided under the Fifth Amendment, and *Jackson*, decided under the Sixth Amendment, thus served very different functions. For that reason, *Patterson*, holding that waiver of *Miranda* rights may constitute a waiver of Sixth Amendment rights, was wrongly decided. Furthermore, as read by Stevens, the clear rule for

¹⁶⁶ *Id.* at 18.

¹⁶⁷ Justice Breyer did not, however, join one small portion of Stevens' dissent: footnote 5. That footnote addressed a concurring opinion in *Montejo* by Justice Alito, joined by Justice Kennedy, that compared *Arizona v. Gant* to *Montejo* on the question of the role of *stare decisis*.

¹⁶⁸ *Id.* at 5.

when to apply *Jackson* – whenever a post-indictment defendant requests *or* has counsel – made the rule perfectly workable. On the other hand, the majority insisted that *Jackson*'s costs in freeing the guilty were substantial without citing “any empirical data or even anecdotal support...”¹⁶⁹ Indeed, to the contrary, several *amici* with an interest in law enforcement conceded that “*Jackson*'s protective rule rarely impedes prosecution.”¹⁷⁰ Accordingly, the balance of costs and benefits favored retaining *Jackson*, and there is little, if any, justification for departing from *stare decisis*. Finally, said Stevens, even if *Jackson* had never been decided, *Montejo* should prevail on these facts. The Sixth Amendment, even under the majority's reading, bars post-indictment interrogations absent waiver of rights under that amendment. But, because Stevens would reject *Patterson*'s holding, *Montejo*'s waiver of his *Miranda* rights could not alone constitute a waiver of Sixth Amendment rights, and there was no other evidence of such a waiver. Absent waiver, post-indictment interrogation was prohibited even if *Montejo* never affirmatively invoked his Sixth Amendment rights.

It is too early to tell whether some state courts will find Stevens's dissent persuasive and retain or adopt the *Jackson* rule under their state constitutions. What is clear about this 5-4 decision is that *Jackson* no longer governs under the federal Constitution. A suspect's post-indictment invocation of his Sixth Amendment rights does not, therefore, flatly bar police from trying to get him to change his mind and waive those rights. However, that change of mind and waiver must still be “knowing, voluntary, and intelligent.” Furthermore, if the suspect is facing “custodial interrogation” and asserts his *Miranda* right to counsel, *Edwards*' per se rule will still apply.

F. SCOPE OF THE SIXTH AMENDMENT EXCLUSIONARY RULE

Replace the first two full paragraphs that are not block quotes at page 791, after “Question: How do you think this issue will or should be decided?,” with the following:

Another central exclusionary problem involves the use of Sixth-Amendment violative statements for impeachment purposes. In *Michigan v. Harvey*,¹⁷¹ the Court had held that prosecutors may impeach defendants with statements taken in violation of the old *Michigan v. Jackson* rule. Remember that that rule had precluded a finding of waiver where police initiate post-indictment interrogation after the defendant asserts his Sixth Amendment right to counsel. The logic of the *Harvey* case was essentially that the *Jackson* rule was a mere “prophylactic” rule designed to protect core Sixth Amendment rights and subject to a cost-benefit analysis. The costs of excluding a *Jackson*-violative statement for impeachment purposes did not seem worth the benefits because police could not count on a defendant taking the stand and lying, so the deterrent effect of excluding violative statements on direct would not be diluted by admitted them on cross. But recently, in *Montejo v. Louisiana*, as noted above, the Court overruled *Jackson* itself. Would the Court still permit impeachment for other types of Sixth Amendment violations given that *Jackson*'s prophylactic protection no longer applied?

¹⁶⁹ *Id.* at 7 n.3.

¹⁷⁰ *Id.*

¹⁷¹ 494 U.S. 44 (1990).

The Court answered this question “yes,” suggesting that its answer likely applied to at least one broad category of Sixth Amendment rights -- those that apply pre-trial -- in *Kansas v. Venstris*,¹⁷² though *Venstris* itself more narrowly involved a jailhouse informant’s deliberately eliciting a post-charge statement from the defendant. At trial, Venstris testified that his co-defendant, Theel, was entirely at fault for the alleged robbery and homicide. The government successfully called a jailhouse informant to impeach Venstris. The informant testified, over defense objection, that Venstris admitted both to being the shooter and taking the victim’s money and car. The prosecution had conceded, however, that the statement was “probably” one obtained in violation of Venstris’s Sixth Amendment rights but argued that that did not give Venstris license to commit perjury. Venstris was convicted of aggravated burglary and aggravated robbery but acquitted of felony murder, suggesting that the jury did not, or at least did not wholly, believe the informant’s testimony.

When the case reached the United States Supreme Court, the Court, in an opinion written by Justice Scalia, distinguished the “core” right to counsel – a right that applies at trial – from “prophylactic” rights, such as the Sixth Amendment right to counsel during interrogations, which were created to ensure that police manipulation does not render counsel’s representation “entirely impotent.” A violation of that right, said the Court, occurred at the time of the interrogation, not at the time of admission of the statement at trial. At trial, the defendant here had counsel, although arguably counsel’s trial representation is not “worth much” when the state has overwhelming evidence of guilt, so the trial right is necessarily distinct from the pre-trial one. Once having characterized the relevant right as a pre-trial prophylactic one violated only at the time of interrogation, the Court saw the question at trial as not one of preventing a constitutional violation but of what remedy it deserved. Applying logic strikingly similar to that it used in *Harvey*, the Court held that, although a statement obtained in violation of the Sixth Amendment could not be used in the prosecution’s case-in-chief, it could be used to impeach the defendant should he testify inconsistently at trial. Said the Court, “[o]nce the defendant testifies [at trial] in a way that contradicts prior statements, denying the prosecution use of ‘the traditional truth-testing devices of the adversary process’ . . . is a high price to pay for vindication of the right to counsel at the prior [interrogation] stage.”¹⁷³

Finally, the Court rejected the argument of *amici* that jailhouse snitch testimony is so inherently unreliable that it required a special rule to protect the innocent. The Court refused to become a “rule-making organ for the promulgation of state rules of criminal procedure,” particularly because, it said, “[o]ur legal system is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses.”¹⁷⁴ Moreover, creating a special rule seemed especially inappropriate in this case, where the jury apparently disbelieved the informant.

Justices Stevens and Ginsburg dissented, rejecting every one of the majority’s premises. First, Justice Stevens rejected the distinction between inferior prophylactic rules and superior trial ones in this area, finding the violation to have begun during interrogation but to have continued by admission of the statement at trial: “The use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process – the fairness of which the Sixth

¹⁷² 129 S. Ct. 1841 (2009).

¹⁷³ *Id.* at 1846.

¹⁷⁴ *Id.* at 1847 n.*.

Amendment was designed to protect.”¹⁷⁵ This was no metaphysical assertion but a practical one, for when counsel “is excluded from a critical pretrial interaction between the defendant and the State, she may be unable to effectively counter the potentially devastating, and potentially false, evidence subsequently introduced at trial.”¹⁷⁶ Second, the Sixth Amendment protects more than counsel’s mere presence but rather mandates her effective assistance, so Stevens rejected the majority’s “stingy view” of the right as one met even where counsel’s presence at trial is “not worth much.”¹⁷⁷ Third, Stevens warned against the dangers of ignoring the likelihood that “evidence gathered by self-interested jailhouse informants may be false...”¹⁷⁸ Fourth, Stevens saw no inconsistency with protecting the right to counsel and the need to seek the truth because part of the purpose of effective “partisan advocacy” is to “best promote the ultimate objective that the guilty be convicted and the innocent go free.”¹⁷⁹ Finally, said Stevens, by creating yet another occasion in which the Court “privileged the prosecution at the expense of the Constitution,” the Court “taxes the legitimacy of the entire criminal process.”¹⁸⁰ Permitting such “shabby tactics” by the prosecution, concluded Stevens, is “intolerable in all cases.”¹⁸¹

CHAPTER 10: EYEWITNESS IDENTIFICATION

II. THE RIGHT TO COUNSEL

A. LINEUPS

Insert, at page 886, just before NOTES AND QUESTIONS #3, the following:

In *Rothgery v. Gillespie County, Texas*, the Court recently considered just how early the Sixth Amendment right “attaches” in a criminal case. There, Rothgery was arrested without a warrant as a felon in possession of a firearm by officers relying on an erroneous record showing that Rothgery was a convicted felon. The police promptly brought Rothgery before a magistrate judge for an “article 15.17 hearing,” which, under Texas law, combined the Fourth Amendment *Gerstein* probable cause hearing, the bail determination, and the advising an arrestee of the accusations against him functions. At that hearing, the magistrate judge reviewed an affidavit of probable cause submitted by the officer and, finding probable cause, set bail at \$5000, on which Rothgery was readily released upon posting a surety bond. Rothgery’s multiple oral and written requests for the appointment of counsel for him as an indigent went ignored, and he was rearrested after a grand jury indicted him on the felon in possession of a weapon charge, this time being unable to post the new higher bail of \$15,000, remaining in jail for three weeks. Six months after the article 15.17 hearing, the court finally appointed a lawyer to represent Rothgery. That lawyer quickly gathered and presented to the prosecutor documents showing that Rothgery was not in fact a felon, finally resulting in the dismissal of the charges.

¹⁷⁵ *Id.* at 1847, 1848.

¹⁷⁶ *Id.* at 1848-49.

¹⁷⁷ *Id.* at 1849 n. 3.

¹⁷⁸ *Id.* at 1849 n.2.

¹⁷⁹ *Id.* at 1849.

¹⁸⁰ *Id.* at 1849.

¹⁸¹ *Id.* at 1849.

Rothgery brought a civil action under section 1983, title 42, of the United States Code, arguing that he spent unnecessary time in jail because Gillespie County's unwritten policy of denying appointed counsel to indigents out on bond until at least the entry of an information or indictment violated his Sixth Amendment right to counsel. The United States Court of Appeals affirmed the district court's grant of summary judgment in favor of the County, the appellate court concluding that, because prosecutors were unaware of Rothgery's arrest and appearance before the magistrate judge, and there was no evidence that the arresting officer had authority to commit the state to prosecute without the knowledge or involvement of the prosecutor, formal adversarial proceedings had not begun. The state had not, concluded that court, therefore firmly committed itself "to prosecute" Rothgery, so the Sixth Amendment right had not yet attached.

The United States Supreme Court vacated and remanded, holding that the right had indeed attached. The Court rejected the argument that prosecutorial awareness or involvement were relevant to the attachment question, for such a rule would be " 'wholly unworkable and impossible to administer,' " ¹⁸² bogging down the courts in prying inquiries into police-prosecutor communications and making the Sixth Amendment right turn on such random events as the day of arrest or the sophistication of the computer intake system. The Court summarized its reasoning thus:

It is not that the Court of Appeals believed that any such regime would be desirable, but it thought originally that its rule was implied by this Court's statement that the right attaches when the government has "committed itself to prosecute." *Kirby*, 406 U. S., at 689. The Court of Appeals reasoned that because "the decision not to prosecute is the quintessential function of a prosecutor" under Texas law, 491 F. 3d, at 297 (internal quotation marks omitted), the State could not commit itself to prosecution until the prosecutor signaled that it had.

But what counts as a commitment to prosecute is an issue of federal law unaffected by allocations of power among state officials under a State's law, cf. *Moran*, 475 U. S., at 429, n. 3 ("[T]he type of circumstances that would give rise to the right would certainly have a federal definition"), and under the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate the prosecution, see *Jackson*, 475 U. S., at 629, n. 3; *Brewer*, 430 U.S., at 399; *Kirby*, *supra*, at 689; see also n. 9, *supra*. From that point on, the defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law" that define his capacity and control his actual ability to defend himself against a formal accusation that he is a criminal. *Kirby*, *supra*, at 689. By that point, it is too late to wonder whether he is "accused" within the meaning of the Sixth Amendment, and it makes no practical sense to deny it. See Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*,

¹⁸² Slip op. at 13 (quoting *Escobedo v. Illinois*, 378 U.S. 478, 496 (1964) (White, J., dissenting)).

17 Am. Crim. L. Rev. 1, 31 (1979) (“[I]t would defy common sense to say that a criminal prosecution has not commenced against a defendant who, perhaps incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor, less typically by the police, and approved by a court of law” (internal quotation marks omitted)). All of this is equally true whether the machinery of prosecution was turned on by the local police or the state attorney general. In this case, for example, Rothgery alleges that after the initial appearance, he was “unable to find any employment for wages” because “all of the potential employers he contacted knew or learned of the criminal charge pending against him.” Original Complaint in No. 1:04–CV–00456–LY (WD Tex., July 15, 2004), p. 5. One may assume that those potential employers would still have declined to make job offers if advised that the county prosecutor had not filed the complaint.¹⁸³

The Court likewise rejected the County’s alternative argument that an inquiry is necessary into whether the state in each individual case has committed itself to prosecute, the prosecutor’s awareness of or involvement in the case being but one factor in this inquiry. The Court concluded that its precedent expressed “‘no doubt’ that the right to counsel attach[e]s at the initial appearance,” for it is then “when the government has used the judicial machinery to signal a commitment to prosecute....” Although the state may rethink its commitment by not seeking an indictment or by *nolle prosequi* (dropping the charges), absent a change of the state’s position, “a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives.”¹⁸⁴

The Court also explained that it was not deciding whether the officer’s probable cause affidavit constituted a “complaint” under Texas law, indeed noting that reliance on a particular state’s law in answering such federal constitutional questions was unacceptable, for the constitution’s meaning cannot be allowed to “founder on the vagaries of the state criminal law, lest the attachment rule be rendered ‘utterly vague and unpredictable.’ ”¹⁸⁵ “What counts,” said the Court, is that under the particular circumstances before it the document “filed with the magistrate judge accused Rothgery of committing a particular crime and prompted the judicial officer to take legal action in response (here, to set the terms of bail and order the defendant locked up).”¹⁸⁶ Curiously, while ignoring Texas’s law, the Court did deem it relevant to the Sixth Amendment issue, without explaining why, what the practices were in numerous states and other jurisdictions combined, pointedly noting that 43 states, the District of Columbia, and the federal

¹⁸³ *Id.* at 14–15.

¹⁸⁴ *Id.* at 17.

¹⁸⁵ *Id.* at 6, 9 (quoting *Virginia v. Moore*, 553 U.S. ___, ___, 128 S. Ct. 1598 (2008) (slip op. at 10)).

¹⁸⁶ *Id.* at 6 & n.9.

government “take the first step toward appointing counsel ‘before, at, or just after initial appearance.’”¹⁸⁷

The Court emphasized, however, that it was holding only that the Sixth Amendment right in *Rothgery* had “attached,” that is, that the time had arrived when the right to counsel kicks in. But that right assures the actual presence of counsel only at “critical stages” of the prosecution, and the Court stated squarely that it simply had not decided whether the article 15.17 hearing was a critical stage, nor had the Court decided whether the six month delay in the state’s appointing counsel for Rothgery prejudiced his Sixth Amendment rights or inflicted any cognizable harm. (We will have more to say on “critical stages” after discussing *United States v. Ash* below). Justice Alito, in a concurring opinion joined by Chief Justice Roberts and Justice Scalia, vigorously stressed that he joined the majority opinion solely because of his understanding that it did not address the critical stage question. Justice Thomas dissented on the ground that the original meaning of the Sixth Amendment would not have attached the right at all at so early a stage of the case. Chief Justice Roberts, in a concurring opinion joined by Justice Scalia, declared that Thomas’s dissent was “compelling” but that a sufficient case had not been made out to revisit clear precedent supporting the majority decision.

B. Photospreads

Insert at page 886, just before the heading “C. Role of Counsel at a Lineup or Photospread,” the following:

In *dicta* in *Rothgery v. Gillespie County Texas*, discussed above, the Court more recently offered this definition: “what makes a stage critical is what shows the need for counsel’s presence.”¹⁸⁸ This statement might suggest yet a third variation on the meaning of the term “critical stage”: the first being *United States v. Wade*’s focus on the potential for counsel’s absence at a pretrial event prejudicing the trial outcome and eliminating the opportunity for meaningful confrontation of witnesses at trial; the second being *Ash*’s focus on the need for a lawyer to serve as a spokesperson or advisor; and the third being *Rothgery*’s focus on the simple “need for counsel’s presence.” But, immediately after mentioning this “need” test, the *Rothgery* Court dropped this footnote seemingly reaffirming the *Ash* approach:

The cases have defined critical stages as proceedings between an individual and agents of the State (whether “formal or informal, in court or out,” see *United States v. Wade*, 388 U. S. 218, 226 (1967)) that amount to “trial-like confrontations,” at which counsel would help the accused “in coping with legal problems or . . . meeting his adversary,” *United States v. Ash*, 413 U. S. 300, 312–313 (1973); see also *Massiah v. United States*, 377 U. S. 201 (1964).

¹⁸⁷ *Id.* at 11.

¹⁸⁸ *Id.* at 19.

Justice Alito, in his concurrence, joined by Chief Justice Roberts and Justice Scalia, stressed that the Sixth Amendment right is a *trial* right, for the word “defence” in that Amendment “means defense at trial, not defense in relation to other objectives that may be important to the accused.”¹⁸⁹ For example, noted Alito, the Court, in his view, had rejected the argument that the assistance of counsel was needed at a *Gerstein* Fourth Amendment hearing, which focuses more on pretrial custody than on trial rights, and had rejected “the notion that the right to counsel entitles the defendant to a ‘preindictment private investigator.’”¹⁹⁰ Alito conceded, however, that “certain pretrial events may so prejudice the outcome of the defendant’s prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial.” But Alito made some final comments both about what constitutes a critical stage and about how much time before a critical stage counsel must be appointed:

Weaving together these strands of authority, I interpret the Sixth Amendment to require the appointment of counsel only after the defendant’s prosecution has begun, and then only as necessary to guarantee the defendant effective assistance at trial. Cf. *McNeil*, 501 U. S., at 177–178 (“The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to protec[t] the unaided layman at critical confrontations with his expert adversary, the government, *after* the adverse positions of government and defendant have solidified with respect to a particular alleged crime” (emphasis and alteration in original; internal quotation marks omitted)). It follows that defendants in Texas will not necessarily be entitled to the assistance of counsel within some specified period after their magistrations. See *ante*, at 19 (opinion of the Court) (pointing out the “analytical mistake” of assuming “that attachment necessarily requires the occurrence or imminence of a critical stage”). Texas counties need only appoint counsel as far in advance of trial, and as far in advance of any pretrial “critical stage,” as necessary to guarantee effective assistance at trial. Cf. *ibid.* (“[C]ounsel must be appointed within a reasonable time after attachment *to allow for adequate representation at any critical stage before trial, as well as at trial itself*” (emphasis added)).¹⁹¹

To Summarize: (1) The Sixth Amendment right to counsel “attaches” when “formal adversarial proceedings have begun,” thus telling us when the right governs; (2) Once we know that the time for its applications has arrived, what it protects, however, is the presence of counsel at trial or at a pretrial “critical stage”; (3) even at a critical stage, however, a defendant may knowingly, intelligently, and voluntarily waive his Sixth Amendment right to counsel (as we discussed in the interrogations chapter); and, (4) as we will see in a later chapter, what is provided at trial and at a critical stage is merely the “effective assistance” of counsel, not the best counsel imaginable – indeed, a level of competence that, in the view of some commentators, is far below what professionalism requires. There is, however, also some ambiguity about the meaning of “formal adversarial proceedings,” “critical stage,” and “effective assistance” and some apparent disagreement about their meaning among the Justices.

¹⁸⁹ *Id.* at 4 (Alito, J., concurring).

¹⁹⁰ *Id.* at 4 (Alito, J., concurring) (citing *United States v. Gouveia*, 406 U.S. 180 (1984)).

¹⁹¹ *Id.* at 5-6 (Alito, J., concurring).

Query: (1) How should the lower courts decide the question whether the article 15.17 hearing in *Rothgery* was a “critical stage” upon remand? Do the majority opinion and Justice Alito’s concurrence lead to different results? Do *Wade* and *Ash* help you in answering this question?

(2) If the police held a lineup during the six month period before Rothgery was appointed counsel, would the absence of counsel at that lineup violate Rothgery’s Sixth Amendment right to counsel? Would your answer change if the police conducted a photospread instead of a lineup? A showup?

CHAPTER 11: THE RIGHT TO COUNSEL

III. EFFECTIVE ASSISTANCE OF COUNSEL

A. THE *STRICKLAND* TEST

Insert at page 914, just before section B. “THE PRESUMPTION OF EFFECTIVENESS,” the following:

On the other hand, in *Schriro v. Landrigan*, the Court held that where a defendant instructs his attorney not to offer any mitigating evidence, he cannot later claim that the attorney’s failure to investigate further constitutes ineffective assistance of counsel.¹⁹² Landrigan had told his lawyer not to offer mitigating evidence at his capital sentencing hearing, and he also informed the judge at the hearing that there was no relevant mitigating evidence “as far as I’m concerned.” Writing for a 5-justice majority, Justice Thomas agreed with the trial court in Landrigan’s habeas action that the defendant would not have been able to demonstrate prejudice under *Strickland*. Justice Thomas distinguished *Rompilla* on the ground that the defendant in that case, unlike Landrigan, had not informed the court that he did not want mitigating evidence presented.¹⁹³ Justice Thomas also noted that there was no precedent for requiring Landrigan’s waiver of mitigating evidence to be “knowing and intelligent.”¹⁹⁴

In dissent, Justice Stevens pointed out that, at the time of the sentencing hearing, counsel’s failure to investigate had prevented Landrigan from knowing that he suffered “from a serious psychological condition that sheds important light on his earlier actions.” According to Stevens and three justices who joined his dissent, this alone constituted prejudice. In addition, the dissenters contended that the Court’s precedents – including two cases with which you are familiar, *Johnson v. Zerbst* and *Schneckloth v. Bustamonte* – require that a waiver as important as Landrigan’s meet the “knowing and voluntary” standard.¹⁹⁵

In *Knowles v. Mirzayance*,¹⁹⁶ the Court unanimously held, in a federal habeas proceeding, that a state court’s determination that no sixth amendment violation had occurred when trial counsel withdrew his client’s insanity defense was not contrary to, or an unreasonable application of, clearly established federal law – the relevant statutory habeas standard. There, Mirzayance had pled both not guilty and not guilty by reason of insanity. California law required bifurcated proceedings, first addressing substantive guilt under the usual standards, then a second proceeding addressing the insanity defense. Mirzayance’s counsel, hoping to avoid a first-degree murder conviction and instead obtain a second-degree murder conviction, had presented medical testimony in the initial proceeding that his client was insane at the time of the crime, therefore incapable of the premeditation or deliberation necessary for first-degree murder. The jury convicted Mirzayance of first-degree.

¹⁹² 127 S. Ct. 1933 (2007).

¹⁹³ *Id.* at 1941-42.

¹⁹⁴ *Id.* at 1942.

¹⁹⁵ *Id.* at 1945-47 (Stevens, J., dissenting).

¹⁹⁶ 129 S. Ct. 1411 (2009).

His counsel had hoped at the subsequent insanity hearing to supplement the previous medical testimony with that of Mirzayance’s parents, believing they would “provide an emotional account of Mirzayance’s struggles with mental illness to supplement the medical evidence of insanity.”¹⁹⁷ But, on the date of that hearing, Mirzayance’s parents expressed a strong reluctance to testify, leaving counsel with the recognition that all he had left was to present to the same jury that had heard and rejected the medical testimony at the initial culpability stage the same testimony at the insanity defense stage. Given this reality, Mirzayance’s counsel asked for and received permission to withdraw the insanity plea. Mirzayance was sentenced, and he subsequently challenged his conviction all the way through to federal habeas proceedings before the United States Supreme Court.

The Court concluded that counsel’s performance had not been deficient, rejecting the argument that an attorney must present a defense whenever he has “nothing to lose.” Explained the Court, “[j]udicial scrutiny of counsel’s performance must be highly deferential,” meaning counsel must be given a strong presumption of reasonable professional assistance, with the proper measure of such assistance being “prevailing professional norms.”¹⁹⁸ Professional norms do not require counsel to raise every available non-frivolous defense. Nor do they require counsel to have any tactical reason for recommending dropping a claim beyond reasonably appraising the claim’s chances for success as dismal. These conclusions were strengthened, explained the Court, by the Magistrate judge’s finding that counsel had made an informed decision after thorough investigation of all plausible legal and factual options – a factual finding that could only be reversed if “clearly erroneous.” Furthermore, ineffective assistance of counsel claims require proof not only of deficient performance but also of prejudice, meaning a reasonable probability that a contrary decision would have altered the result or that the actual decision undermined confidence in the outcome. But the defense, said the Court, could not meet its burden of showing prejudice because it was highly improbable that a jury that had rejected medical testimony of insanity at a stage at which the prosecution bore the burden of proof would suddenly have accepted such testimony at the later stage of the proceedings, at which the defense bore the burden of proof.

As part of its reasoning, the Court also rejected the argument that trial counsel had an obligation to do all that he could to convince Mirzayance’s parents to testify. Said the Court, “competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded.”¹⁹⁹

Moreover, the Court said that it would reach the same conclusions under a *de novo* standard of review as under the “unreasonable application of clearly established federal law” standard of review provided in the federal habeas statute. Nevertheless, the Court did emphasize that the question under the habeas statute was not whether the reviewing court believed that state courts had incorrectly applied the *Strickland* standard but rather whether the state courts’ determination “ ‘was unreasonable – a substantially higher threshold.’ ”²⁰⁰

¹⁹⁷ *Id.* at 1415.

¹⁹⁸ *Id.* at 1420.

¹⁹⁹ *Id.* at 1421.

²⁰⁰ *Id.* at 1420.

B. THE PRESUMPTION OF EFFECTIVENESS

Insert at page 921, just above NOTES AND QUESTIONS #2, the following:

In *Wright v. Van Patten*, the Court faced the question whether counsel's participation in a plea hearing by telephone, rather than in person, denied Van Patten his right to the effective assistance of counsel under the Sixth Amendment. More precisely, the Court faced the question whether in a federal habeas proceeding a state appellate court's determination that Van Patten's right to counsel was not violated was contrary to, or an unreasonable application of, clearly established federal law – the relevant statutory habeas standard. In a *per curiam* opinion, the Court answered this latter question “no.”

First the Court had to address whether, under *Cronic*, prejudice could be presumed. Remember that under *Cronic*, which the Court has described as a “narrow exception” to *Strickland*'s holding,²⁰¹ a Sixth Amendment violation can be found without inquiring into counsel's performance in the specific case and without requiring the defendant to show the effect that such performance likely had on the trial.²⁰² *Cronic*'s presumption applies “when..the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct at the trial,”²⁰³ or where “there [is] a breakdown in the adversarial process” stemming from counsel's complete failure to subject the prosecution's case to “meaningful adversarial testing.”²⁰⁴ Furthermore, one circumstance warranting the presumption – a circumstance that the defense argued to be relevant in *Van Patten* – was the “complete denial of counsel,” meaning that “counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.”²⁰⁵ But the Court rejected Van Patten's claim that prejudice should be presumed in the case before it, explaining its reasoning thus:

No decision of this Court, however, squarely addresses the issue in this case, see Deppisch, supra, at 1040 (noting that this case “presents [a] novel ...question”), or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context. Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a “complete denial of counsel,” on par with total absence. Even if we agree with Van Patten that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to total absence or “prevented [counsel] from assisting the accused,” so as to entail application of *Cronic*. The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time. Cf. *United States v. Gonzalez-Lopez*, 548 U.S. ----, ----, 126 S. Ct. 2557, 2563, 165 L.Ed.2d 409

²⁰¹ *Florida v. Nixon*, 543 U.S. 175, 190 (2004).

²⁰² See *Bell v. Cone*, 535 U.S. 685 (2002).

²⁰³ *Strickland*, 466 U.S. at 659-60.

²⁰⁴ *Id.* at 662; see also *Bell*, 535 U.S. at 696-97 (emphasizing that the attorney's failure to engage in adversary testing must be “complete.”).

²⁰⁵ *Strickland*, 466 U.S. at 659 & n. 25.

(2006) (Sixth Amendment ensures "effective (not mistake-free) representation" (emphasis in original)). Our cases provide no categorical answer to this question, and for that matter the several proceedings in this case hardly point toward one. The Wisconsin Court of Appeals held counsel's performance by speaker phone to be constitutionally effective; neither the Magistrate Judge, the District Court, nor the Seventh Circuit disputed this conclusion; and the Seventh Circuit itself stated that "[u]nder Strickland, it seems clear Van Patten would have no viable claim." Deppisch, 434 F.3d, at 1042.

Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.' " Musladin, 549 U.S., at ----, 127 S. Ct. 649, 654 (quoting 28 U.S.C. s 2254(d)(1)). Under the explicit terms of [section] 2254(d)(1), therefore, relief is unauthorized.²⁰⁶

The Court made clear, accordingly, that it found only that the habeas standard had not been violated. The Court left "consideration of the merits of telephone practice, however, ... for another day," this case turning only "on the recognition that no clearly established law contrary to the state court's conclusion justifies collateral relief."²⁰⁷

²⁰⁶ *Van Patten*, slip op., at 6-7.

²⁰⁷ *Id.* at 7. It is useful to remember that, under the Sixth and Fourteenth Amendments, the defendant ordinarily also has a right to insist on proceeding without counsel if he knowingly, intelligently, and voluntarily waives that right. *See Faretta v. California*, 422 U.S. 806 (1973). However, the Court recently held that "the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." *Indiana v. Edwards*, 128 U.S. 2379, 2385-86 (2008).