Rights of the Accused

RIGHTS OF THE ACCUSED

Oregon State University
Corvallis, OR

Rights of the Accused Copyright © 2025 by Rorie Spill Solberg is licensed under a Creative Commons Attribution 4.0 International License, except where otherwise noted.

open.oregonstate.education/rightsoftheaccused

CONTENTS

Introduction 1

Case List 3

Incorporation

Incorporation of the Rights of the Accused 9

Hurtado v. California (1884) 9

Palko v. Connecticut (1947) 11

Wolf v. Colorado (1949) 14

Gideon v. Wainwright (1963) 15

Duncan v. Louisiana (1968) 19

Fourth Amendment

Establishing Probable Cause 24

Warden v. Hayden (1967) 24

Illinois v. Gates (1983) 27

Wilson v. Arkansas (1995) 31

When Fourth Amendment Protection Applies 35

Minnesota v. Olson (1990) 35

Minnesota v. Carter (1998) 38

Other Places to be Searched 42
New Jersey v. T.L.O. (1985) 42
Vernonia School District 47J v. Acton (1995) 51
Chambers v. Maroney (1970) 56
South Dakota v. Opperman (1976) 59
California v. Acevedo (1991) 65
Illinois v. Caballes (2005) 71
Maryland v. King (2013) 74
Exclusionary Rule and Exceptions 82
Wolf v. Colorado (1949) 82
Mapp v. Ohio (1961) 83
United States v. Leon (1984) 90
Nix v. Williams (1984) 99
Hudson v. Michigan (2006) 105

Exceptions to the Warrants Rule

Plain View 115
Arizona v. Hicks (1987) 115
Horton v. California (1990) 119
Oliver v. United States (1984) 121
Electronic Searches 125
Olmstead v. United States (1928) 125
Katz v. United States (1967) 129
United States v. Jones (2012) 133
Searches Incident to a Valid Arrest 141
Chimel v. California (1969) 141
Maryland v. Buie (1990) 146
Knowles v. Iowa (1998) 150

Loss of Evidence Searches 153
Cupp v. Murphy (1973) 153
Kentucky v. King (2011) 155
Missouri v. McNeely (2013) 161
Safety Searches 168
Terry v. Ohio (1968) 168
Brown v. Texas (1979) 175
Adams v. Williams (1972) 177
Florida v. J.L. (2000) 182
Minnesota v. Dickerson (1993) 185
Illinois v. Wardlow (2000) 189
Hiibel v. Sixth Judicial District of Nevada, Humboldt County (2004) 193
Consent Searches 198
Bumper v. North Carolina (1968) 198
Florida v. Bostick (1991) 200
Stoner v. California (1964) 204
United States v. Matlock (1974) 206
Georgia v. Randolph (2006) 210

Fifth Amendment

Coerced Confessions and Testimony 215
Brown v. Mississippi (1936) 215
Spano v. New York (1959) 218
Protecting the Privilege 223
Escobedo v. Illinois (1964) 223
Miranda v. Arizona (1966) 227
What Constitutes Interrogation? 239
Brewer v. Williams (1977) 239
Rhode Island v. Innis (1980) 244

What Constitutes Custody? 249
Oregon v. Mathiason (1966) 249
Salinas v. Texas (2013) 252
Exceptions and Admissibility 258
Harris v. New York (1971) 258
Oregon v. Elstad (1985) 261
Missouri v. Seibert (2004) 267
New York v. Harris (1990) 270

Investigatory Methods

Gathering Evidence from the Body 276
Rochin v. California (1952) 276
Winston v. Lee (1985) 282
Identification Methods 286
Hayes v. Florida (1985) 286
United States v. Dionisio (1973) 288
United States v. Wade (1967) 291
Kirby v. Illinois (1972) 295

Sixth Amendment

Right to Confront Witnesses 299
Pointer v. Texas (1965) 299
Illinois v. Allen (1970) 302
Estelle v. Williams (1976) 305

Right to Counsel 309
Powell v. Alabama (1932) 309
Betts v. Brady (1942) 312
Gideon v. Wainwright (1963) 317
Argersinger v. Hamlin (1972) 320
Effectiveness of Counsel 324
United States v. Cronic (1984) 324
Strickland v. Washington (1984) 328
Speedy and Public Trial 336
United States v. Marion (1971) 336
Barker v. Wingo (1972) 339
Juries and Fair Trials 345
Duncan v. Louisiana (1968) 345
Batson v. Kentucky (1986) 348
Georgia v. McCollum Et Al. (1992) 353
J.E.B. v. Alabama ex rel. T. B. (1994) 356
Foster v. Chatman (2016) 362
Sheppard v. Maxwell (1966) 368
Peña-Rodriguez v. Colorado (2017) 373

Eighth Amendment

Cruel and Unusual Punishment 380

Solem v. Helm (1983) 380

Furman v. Georgia (1972) 385

Gregg v. Georgia (1976) 387

Donald P. Roper, Superintendent, Potosi Correctional Center v. Christopher Simmons (2005) 393

Kansas v. Marsh (2006) 397

Baze v. Rees (2008) 401

Kennedy v. Louisiana (2008) 405

Atkins v. Virginia (2002) 410

Glossip v. Gross (2015) 415

City of Grants Pass v. Johnson (2024) 418

Contributors 423

Justices Serving on the Court 1790 - 1834 425

Justices Serving on the Court 1835 - 1889 432

Justices Serving on the Court 1890 - 1937 440

Median Justice Scores Per Year 1937 - 2018 450

Justices Serving on the Court 1937 - 1949 451

Justices Serving on the Court 1950 - 1969 467

Justices Serving on the Court 1970 - 1989 493

Justices Serving on the Court 1990 - 2009 519

Justices Serving on the Court 2010 - 2025 544

Introduction

There are several good constitutional law and civil rights and liberties textbooks on the market, so why create another? There was a confluence of factors that led to the creation of this volume. First, and most importantly, after many years of teaching a constitutional law series at a large public institution, it became apparent that the costs of the texts were a barrier to many students. Second, as texts were updated, the authors had to make choices about inclusion or exclusion of cases due to printing and publishing constraints. As such, some material that was pedagogically useful had to be jettisoned to include recent cases as the Court has changed doctrines in multiple areas recently. These two factors were the main motivations. Trailing behind them is the wonderful support and staff at Oregon State University's Open Educational Resources unit. With their help, I knew that the volumes would be useful and accessible to students.

To complete this volume, I worked with several excellent students that had completed the constitutional law series. We examined several other textbooks, and discussed which cases were critical and which were most helpful to them as they tried to understand the substantive material from the course. Together we built a plan for each chapter to include cases that are landmarks, and other cases that help build the profile of the doctrine so that there are guideposts as the doctrine shifts or changes. We read the full case and then selected the key components that related to the constitutional issue, focusing on the key facts, the constitutional questions, and the resolution of the case. We included dissents and concurring opinions where we agreed they were historically important, useful or provided a significantly different approach to the question. We have also included appendices that may help students place the cases in historical context. First, each case is hyperlinked by year to a table that indicates who was on the Court at the time of the decision, their appointing president, and that president's political affiliation. When available, the table also includes the justices' Martin Quinn scores for that year so that the ideological balance of the Court can be easily assessed. For these years, there is also a figure that provides these data in a visual format. Finally, there is a table and graph of the scores of the median justice for the years available, again using the Martin Quinn scores as our source.

To use this volume, I would approach it as any other constitutional law textbook; however, there is a significant difference. This volume, again, only contains excerpts. Unless the justices provide an introduction or make a strong connection to previous doctrine in the excerpt, these handholds between major cases are left to the instructor to elucidate. I have used this type of text before in a "rights of the criminally accused course" and it has been highly successful and pushes the students to make the connections as they read through the cases and discuss them in class

We hope to update this text every other year. I plan to assign my students a group project to excerpt a recent important case that warrants inclusion in the volume. The best versions of these excerpts, with additional editing by me, will then be included in a new version

A huge thank you to Andrew Hoekman, Katherine McKenna, Charlotte Pietrzak, Fox Perez, Makenna Perry, Jacob Staab, Sloan Harmel, Alex Nobiletti, Sobhi Sidani, and Kimberly Clairmont for their hard work and dedication to this project.

Rorie Solberg, Editor
Oregon State University

Case List

A copy of the following case list, with embedded links for each chapter and case, is available to download as a document (https://beav.es/xGE) for editing and distribution. The list is also available to download as a sheet (https://beav.es/xGz) for easier reorganization and filtering.

Incorporation

Incorporation of the Rights of the Accused

Palko v. Connecticut (1947)
Wolf v. Colorado (1949)
Gideon v. Wainwright (1963)
Duncan v. Louisiana (1968)

Fourth Amendment

Establishing Probable Cause

Warden v. Hayden (1967)
Illinois v. Gates (1983)
Wilson v. Arkansas (1995)

When Fourth Amendment Protection Applies

Minnesota v. Olson (1990)
Minnesota v. Carter (1998)

Other Places to be Searched

New Jersey v. T.L.O. (1985)
Vernonia School District 47J v. Acton (1995)
Chambers v. Maroney (1970)
South Dakota v. Opperman (1976)

California v. Acevedo (1991)
Illinois v. Caballes (2005)
Maryland v. King (2013)

Exclusionary Rule and Exceptions

Wolf v. Colorado (1949)
Mapp v. Ohio (1961)
United States v. Leon (1984)
Nix v. Williams (1984)
Hudson v. Michigan (2006)

Exceptions to the Warrants Rule

Plain View

Arizona v. Hicks (1987)
Horton v. California (1990)
Oliver v. United States (1984)

Electronic Searches

Olmstead v. United States (1928)
Katz v. United States (1967)
United States v. Jones (2012)

Searches Incident to a Valid Arrest

Chimel v. California (1969)
Maryland v. Buie (1990)
Knowles v. Iowa (1998)

Loss of Evidence Searches

Cupp v. Murphy (1973)
Kentucky v. King (2011)
Missouri v. McNeely (2013)

Safety Searches

Terry v. Ohio (1968)
Brown v. Texas (1979)
Adams v. Williams (1972)
Florida v. J.L. (2000)
Minnesota v. Dickerson (1993)
Illinois v. Wardlow (2000)
Hiibel v. Sixth Judicial District of Nevada, Humboldt County (2004)

Consent Searches

Bumper v. North Carolina (1968)
Florida v. Bostick (1991)
Stoner v. California (1964)
United States v. Matlock (1974)
Georgia v. Randolph (2006)

Fifth Amendment

Coerced Confessions and Testimony

Brown v. Mississippi (1936)
Spano v. New York (1959)

Protecting the Privilege

Escobedo v. Illinois (1964)
Miranda v. Arizona (1966)

What Constitutes Interrogation?

Brewer v. Williams (1977)
Rhode Island v. Innis (1980)

What Constitutes Custody?

Oregon v. Mathiason (1966)
Salinas v. Texas (2013)

Exceptions and Admissibility

Harris v. New York (1971)
Oregon v. Elstad (1985)
Missouri v. Seibert (2004)
New York v. Harris (1990)

Investigatory Methods

Gathering Evidence from the Body

Rochin v. California (1952)
Winston v. Lee (1985)

Identification Methods

Hayes v. Florida (1985)
United States v. Dionisio (1973)
United States v. Wade (1967)
Kirby v. Illinois (1972)

Sixth Amendment

Right to Confront Witnesses

Pointer v. Texas (1965)
Illinois v. Allen (1970)
Estelle v. Williams (1976)

Right to Counsel

Powell v. Alabama (1932)
Betts v. Brady (1942)
Gideon v. Wainwright (1963)
Argersinger v. Hamlin (1972)

Effectiveness of Counsel

United States v. Cronic (1984)
Strickland v. Washington (1984)

Speedy and Public Trial

United States v. Marion (1971)
Barker v. Wingo (1972)

Juries and Fair Trials

Duncan v. Louisiana (1968)
Batson v. Kentucky (1986)
Georgia v. McCollum Et Al. (1992)
J.E.B. v. Alabama ex rel. T. B. (1994)
Foster v. Chatman (2016)
Sheppard v. Maxwell (1966)
Peña-Rodriguez v. Colorado (2017)

Eighth Amendment

Cruel and Unusual Punishment

Solem v. Helm (1983)
Furman v. Georgia (1972)
Gregg v. Georgia (1976)
Donald P. Roper, Superintendent, Potosi Correctional Center v. Christopher Simmons (2005)
Kansas v. Marsh (2006)
Baze v. Rees (2008)
Kennedy v. Louisiana (2008)
Atkins v. Virginia (2002)
Glossip v. Gross (2015)
City of Grants Pass v. Johnson (2024)

Incorporation

Case List

Incorporation of the Rights of the Accused

Palko v. Connecticut (1947)
Wolf v. Colorado (1949)
Gideon v. Wainwright (1963)
Duncan v. Louisiana (1968)

Incorporation of the Rights of the Accused

Hurtado v. California

110 U.S. 516 (1884)

> Vote: 7-1
> Opinion: J. Matthews
> Decision: Affirmed
> Majority: J. Matthews, joined by J. Waite, J. Miller, J. Bradley, J. Woods, J. Gray, J. Blatchford
> Dissent: J. Harlan

MR. Justice Matthews delivered the opinion of the court.

...

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words: 'Nor shall any state deprive any person of life, liberty, or property without due process of law.'

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law.

The question is one of grave and serious import, affecting both private and public rights and interests of great magnitude, and involves a consideration of what additional restrictions upon the legislative policy of the States has been imposed by the Fourteenth Amendment to the Constitution of the United States ...

...

On the other hand, it is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that, by immemorial usage, it has acquired a fixed, definite, and technical meaning; that it refers to and includes not only the general principles of public liberty and private right which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institu-

tions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

... it may be said that Lord Coke himself explains his own meaning by saying 'the law of the land,' as expressed in Magna Charta, was intended due process of law, that is, by indictment or presentment of good and lawful men.

It is quite apparent from these extracts that the interpretation usually put upon Lord Coke's statement is too large, because if an indictment or presentment by a grand jury is essential to due process of law in all cases of imprisonment for crime, it applies not only to felonies but to misdemeanors and petty offences, and the conclusion would be inevitable that information as a substitute for indictments would be illegal in all cases ...

...

When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties." It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government ...

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice-suum cuique tribuere. There is nothing in Magna Charta, rightly construed a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms ...

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial ...

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offence of less grade than a felony, except misprision of treason; and in every circumstance of its

administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictment ...

For these reasons, finding no error therein, the judgment of the Supreme Court of California is

Affirmed.

Excerpted by Kimberly Clairmont

Palko v. Connecticut

302 U.S. 319 (1947)

> Vote: 7-1
> Opinion: J. Cardozo
> Decision: Affirmed
> Majority: J. Cardozo, joined by J. McReynolds, J. Brandeis, J. Sutherland, J. Stone, J. Roberts, J. Black
> Dissent: J. Butler

MR. JUSTICE CARDOZO delivered the opinion of the Court.

...

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the State of Connecticut, with the permission of the judge presiding at the trial, gave notice of a plea to the Supreme Court of Errors ...

Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. State v. Palko, 121 Conn. 669; 186 Atl. 657. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder ...

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the Fourteenth Amendment of the Constitution of the United States ...

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but Solely to the federal government, creates immunity from

double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State ...

We have said that, in appellant's view, the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer ... On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, *De Jonge v.* Oregon (1937) [other citations omitted], or the like freedom of the press, *Grosjean v. American Press Co.* (1936) [other citations omitted], or the free exercise of religion, *Hamilton v. Regents* (1934) [other citations omitted] ... In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states ...

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts* (1934) [other citations omitted] ... Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey* (1908). This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether! No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by -a study and appreciation of the meaning, the essential implications, of liberty itself ...

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of

absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed ...

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State v. Felch* (1918). This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, *State v. Carabetta* (1927), has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before ...

The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.

There is argument in his behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment ... gives all the answer that is necessary.

The judgment is

Affirmed.

Excerpted by Kimberly Clairmont

Wolf v. Colorado

338 U.S. 25 (1949)

> Vote: 6-3
> Opinion: J. Frankfurter
> Decision: Affirmed
> Majority: J. Frankfurter, joined by J. Vinson, J. Reed, J. Jackson, J. Burton
> Concurring: J. Black
> Dissent: J. Murphy, joined by J. Rutledge, and J. Douglas

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The precise question for consideration is this: Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States* (1914)?...

The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration ...

For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in Palko v. Connecticut, supra, 302 U. S. 319. That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to name only the dead in rejecting the suggestion that that the Due Process Clause incorporated the original Bill of Rights ...

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights ...

The security of one's privacy against arbitrary intrusion by the police-which is at the core of the Fourth Amendment-is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples ...

Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective ... We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.

We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be presented should Congress under § 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States.

Affirmed.

Excerpted by Kimberly Clairmont

Gideon v. Wainwright

372 U.S. 335 (1963)

> Opinion: J. Black
> Decision: unanimous reversed
> Majority: J. Black, joined by J. Warren, J. Brennan, J. Stewart, J. White
> Concurring: J. Clark, J. Harlan, J. Douglas

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case."

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and. made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." ...

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison ...

Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision ...

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.' Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment ...

On the basis of this historical data the Court concluded that "appointment of counsel is not a fundamental right, essential to a fair trial." ... It was for this reason the Betts Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon the States by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in' a state court, just as the Sixth Amendment requires in a federal court ...

In many cases other than Powell and Betts, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. For the same reason, though not always in precisely the same terminology, the Court had made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation, the Fourth Amendment's prohibition of unreasonable searches and seizures,' and the Eighth's ban on cruel and unusual punishment ...

We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fait trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before Betts v. Brady, this Court, after full consideration of all the historical data examined in Betts, had unequivocally declared that "the right to the aid of counsel is of this fundamental character." *Powell v. Alabama* (1932). While the Court at the close of its Powell opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable ...

In returning, to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him ...

The Court in Betts v. Brady departed from the sound wisdom upon which the Court's holding in Powell v. Alabama rested. Florida, supported by two other States, has asked that Betts v. Brady be left intact. Twenty-two States, as friends of the Court, argue that Betts was "an anachronism when handed down" and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS, concurring in judgement.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights. Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in *O'Neil v. Vermont* ... as did Justices BLACK, DOUGLAS, Murphy and Rutledge in *Adamson v. California* ... That view was also expressed by Justices Bradley and Swayne in the *Slaughter-House Cases* ... and seemingly was accepted by Justice Clifford when he dissented with Justice Field in *Walker v. Sauvinet* ... Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open. ... And what we do today does not foreclose the matter.

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government.' Mr. Justice Jackson shared that view. But that view has not prevailed ' and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

...

Excerpted by Kimberly Clairmont

Duncan v. Louisiana

391 U.S. 145 (1968)

> Vote: 7-2
> Opinion: White
> Decision: Reversed
> Majority: White, joined by Warren, Black, Douglas, Brennan, Fortas, Marshall
> Concurring: Black, Douglas, Fortas
> Dissent: Harlan and Stewart

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law simple battery is a misdemeanor, punishable by a maximum of two years' imprisonment and a $300 fine. Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution ... appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed ...

Appellant was 19 years of age when tried. While driving on Highway 23 in Plaquemines Parish on October 18, 1966, he saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. At trial the white boys and a white onlooker testified, as did appellant and his cousins. The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The

whites testified that just before getting in the car appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

...

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "'fundamental principles of' liberty and justice which lie at the base of all our civil and political institutions,'" *Powell v Alabama* (1932). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which-were they to be tried in a federal court-would come within the Sixth Amendment's guarantee ... Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused ...

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objective of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689 ...

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court ...

Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime ...

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power-a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of

guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States ...

We would not assert, however, that every criminal trial-or any particular trial-held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus, we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely ...

Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision s' and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses, *Cheff v. Schnackenberg* (1966). But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia v. Clawans* (1937). In the case before us, the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for up to two years and a fine. The question, then, is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury.

We think not ... Of course, the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different -consequences to events which, when they lie near the line, actually differ very little.

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled b ... chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail." ... We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense." Consequently, appellant was entitled to a jury trial and it was error to deny it.

The judgment below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Excerpted by Kimberly Clairmont

Fourth Amendment

Case List

Establishing Probable Cause

Warden v. Hayden (1967)
Illinois v. Gates (1983)
Wilson v. Arkansas (1995)

When Fourth Amendment Protection Applies

Minnesota v. Olson (1990)
Minnesota v. Carter (1998)

Other Places to be Searched

New Jersey v. T.L.O. (1985)
Vernonia School District 47J v. Acton (1995)
Chambers v. Maroney (1970)
South Dakota v. Opperman (1976)
California v. Acevedo (1991)
Illinois v. Caballes (2005)
Maryland v. King (2013)

Exclusionary Rule and Exceptions

Wolf v. Colorado (1949)
Mapp v. Ohio (1961)
United States v. Leon (1984)
Nix v. Williams (1984)
Hudson v. Michigan (2006)

Establishing Probable Cause

Warden v. Hayden

387 U.S. 294 (1967)

> Vote: 6-3
> Decision:
> Majority: Brennan, joined by Clark, Harlan, Stewart, and White
> Concurrence: Black
> Concurrence: Fortas, joined by Warren
> Dissent: Douglas

JUSTICE BRENNAN delivered the opinion of the Court.

We review in this case the validity of the proposition that there is under the Fourth Amendment a "distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be affected, and property the possession of which is a crime."

A Maryland court sitting without a jury convicted respondent of armed robbery. Items of his clothing ... were seized during a search of his home, and were admitted in evidence without objection. After unsuccessful state court proceedings, he sought and was denied federal habeas corpus relief in the District Court for Maryland. A divided panel of the Court of Appeals for the Fourth Circuit reversed. The Court of Appeals believed that *Harris v. United States (1947)* sustained the validity of the search, but held that respondent was correct in his contention that the clothing seized was improperly admitted in evidence because the items had "evidential value only" and therefore were not lawfully subject to seizure. We granted certiorari. We reverse.

About 8 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took some $363 and ran. Two cab drivers in the vicinity, attracted by shouts of "Holdup," followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5'8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to police who were proceeding to the scene of the robbery. Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection.

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile, an officer was attracted to an adjoining bathroom by the noise of running

water, and discovered a shotgun and a pistol in a flush tank; another officer who, according to the District Court, "was searching the cellar for a man or the money" found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All these items of evidence were introduced against the respondent at his trial.

We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, "the exigencies of the situation made that course imperative." *McDonald v. United States (1948).* The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation, if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

. ...

It is argued that, while the weapons, ammunition, and cap may have been seized in the course of a search for weapons, the officer who seized the clothing was searching neither for the suspect nor for weapons when he looked into the washing machine in which he found the clothing. But even if we assume, although we do not decide, that the exigent circumstances in this case made lawful a search without warrant only for the suspect or his weapons, it cannot be said on this record that the officer who found the clothes in the washing machine was not searching for weapons. He testified that he was searching for the man or the money, but his failure to state explicitly that he was searching for weapons, in the absence of a specific question to that effect, can hardly be accorded controlling weight. He knew that the robber was armed and he did not know that some weapons had been found at the time he opened the machine. In these circumstances the inference that he was in fact also looking for weapons is fully justified.

We come, then, to the question whether, even though the search was lawful, the Court of Appeals was correct in holding that the seizure and introduction of the items of clothing violated the Fourth Amendment because they are "mere evidence." The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by courts and commentators. The Court of Appeals, however, felt "obligated to adhere to it." We today reject the distinction as based on premises no longer accepted as rules governing the application of the Fourth Amendment.

. ...

Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband. On its face, the provision assures the "right of the people to be secure in their persons, houses, papers, and effects ... ," without regard to the use to which any of these things are applied. This "right of the people" is certainly unrelated to the "mere evidence" limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. More-

over, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same "papers and effects" may be "mere evidence" in one case and "instrumentality" in another.

In *Gouled v. United States (1921)*, the Court said that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding. ... " The Court derived from *Boyd v. United States (1886)* ... the proposition that warrants "may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken," that is, when the property is an instrumentality or fruit of crime, or contraband. Since it was "impossible to say, on the record ... that the Government had any interest" in the papers involved "other than as evidence against the accused ... ," "to permit them to be used in evidence would be, in effect, as ruled in the *Boyd* Case, to compel the defendant to become a witness against himself."

The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California (1966).* This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

. ...

The premise that property interests control the right of the Government to search and seize has been discredited. ...

. ... The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus — automatically provided in the case of fruits, instrumentalities or contraband — between the item to be seized and criminal behavior. Thus, in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required ... But no such problem is presented in this case. The clothes found in the washing machine matched the description of those worn by the robber and the police therefore could reasonably believe that the items would aid in the identification of the culprit.

. ...

The rationale most frequently suggested for the rule preventing the seizure of evidence is that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States v. Poller (1930)*. But privacy "would be just as well served by a restriction on search to the even-numbered days of the month. ... And it would have the extra advantage of avoiding hair-splitting questions. ... " [Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif.L.Rev.]. The "mere evidence" limitation has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and

after the intervention of "a neutral and detached magistrate. ... " *Johnson v. United States (2015)*. The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure "mere evidence" from intrusions to secure fruits, instrumentalities, or contraband.

The judgment of the Court of Appeals is

Reversed.

Excepted by Makenna Perry

Illinois v. Gates

462 U.S. 213 (1983)

> Vote: 6-3
> Decision: Reversed
> Majority: Rehnquist, joined by Burger, Blackmun, Powell, and O'Connor
> Concurrence: White (in judgment)
> Dissent: Brennan, joined by Marshall
> Dissent: Stevens, joined by Brennan

JUSTICE REHNQUIST delivered the opinion of the Court.

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

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

. ...

We ... consider the question originally presented in the petition for certiorari, and conclude that the Illinois Supreme Court read the requirements of our Fourth Amendment decisions too restrictively.

. ...

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

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

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

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

"Lance & Susan Gates"

"Greenway"

"in Condominiums"

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

Mader then made arrangements with an agent of the Drug Enforcement Administration for surveillance of the May 5 Eastern Airlines flight. The agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxi to the nearby Holiday Inn. They also reported that Gates went to a room registered to one Susan Gates and that, at 7 o'clock the next morning, Gates and an unidentified woman left the motel in a Mercury bearing Illinois license plates and drove north-bound on an interstate highway frequently used by travelers to the Chicago area. In addition, the DEA agent informed Mader that the license plate number on the Mercury was registered to a Hornet station wagon owned by Gates. The agent also advised Mader that the driving time between West Palm Beach and Bloomingdale was approximately 22 to 24 hours.

Mader signed an affidavit setting forth the foregoing facts, and submitted it to a judge of the Circuit Court of Du Page County, together with a copy of the anonymous letter. The judge of that court thereupon issued a search warrant for the Gateses' residence and for their automobile. The judge, in deciding to issue the warrant, could have determined that the *modus operandi* of the Gateses had been substantially corroborated. As the anonymous letter predicted, Lance Gates had flown from Chicago to West Palm Beach late in the afternoon of May 5th, had checked into a hotel room registered

in the name of his wife, and, at 7 o'clock the following morning, had headed north, accompanied by an unidentified woman, out of West Palm Beach on an interstate highway used by travelers from South Florida to Chicago in an automobile bearing a license plate issued to him.

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

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

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

The Illinois court, alluding to an elaborate set of legal rules that have developed among various lower courts to enforce the "two-pronged test," found that the test had not been satisfied. First, the "veracity" prong was not satisfied because "[t]here was simply no basis [for] conclud[ing] that the anonymous person [who wrote the letter to the Bloomingdale Police Department] was credible." The court indicated that corroboration by police of details contained in the letter might never satisfy the "veracity" prong. ...

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

This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause. ... Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical conception." *Brinegar v. United States,* (1949).

. ...

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

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

. ... Unlike a totality-of-the-circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the "two-pronged test" has encouraged an excessively technical dissection of informants' tips. ...

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

If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search. ... We think reaffirmation of this standard better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable cause determinations of magistrates than is the "two-pronged test."

. ... We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli.*

. ...

Our decisions applying the totality-of-the-circumstances analysis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work.

. ...

Our decision in *Draper v. United States,* (1959), however, is the classic case on the value of corroborative efforts of police officials. There, an informant named Hereford reported that Draper would arrive in Denver on a train from Chicago on

one of two days, and that he would be carrying a quantity of heroin. The informant also supplied a fairly detailed physical description of Draper, and predicted that he would be wearing a light colored raincoat, brown slacks, and black shoes, and would be walking "real fast." *Id.* Hereford gave no indication of the basis for his information.

On one of the stated dates, police officers observed a man matching this description exit a train arriving from Chicago; his attire and luggage matched Hereford's report, and he was walking rapidly. We explained in *Draper* that, by this point in his investigation, the arresting officer

"had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission, and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, [the officer] had 'reasonable grounds' to believe that the remaining unverified bit of Hereford's information — that Draper would have the heroin with him — was likewise true," *id.*

The showing of probable cause in the present case was fully as compelling as that in *Draper*. Even standing alone, the facts obtained through the independent investigation of Mader and the DEA at least suggested that the Gateses were involved in drug trafficking. ...

In addition, the judge could rely on the anonymous letter, which had been corroborated in major part by Mader's efforts — just as had occurred in Draper.

. ...

Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted.

. ...

Our original phrasing of the so-called "two-pronged test" in *Aguilar v. Texas, supra,* suggests that the two prongs were intended simply as guides to a magistrate's determination of probable cause, not as inflexible, independent requirements applicable in every case.

Excerpted by Rorie L. Solberg

Wilson v. Arkansas

514 U.S. 927 (1995)

> Vote: 9-0
> Decision: Reversed and remanded
> Majority: Thomas, joined by Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer

JUSTICE THOMAS delivered the opinion of the Court.

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

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

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

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

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

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

... In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing ... "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," *New Jersey* v. *T. L. O., (1985)*, our effort to give content

to this term may be guided by the meaning ascribed to it by the Framers of the Amendment. An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.

. ...

Our own cases have acknowledged that the common-law principle of announcement is "embedded in Anglo-American law," *Miller* v. *United States (1958),* but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

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

. ...

Indeed, at the time of the framing, the common-law admonition that an officer "ought to signify the cause of his coming," *Semayne's Case*, [(1601)] had not been extended conclusively to the context of felony arrests. ...

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

We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

Respondent contends that the judgment below should be affirmed because the unannounced entry in this case was justified for two reasons. First, respondent argues that police officers reasonably believed that a prior announcement would have placed them in peril, given their knowledge that petitioner had threatened a government informant with a semiau-

tomatic weapon and that Mr. Jacobs had previously been convicted of arson and firebombing. Second, respondent suggests that prior announcement would have produced an unreasonable risk that petitioner would destroy easily disposable narcotics evidence.

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

It is so ordered.

Excerpted by Makenna Perry

When Fourth Amendment Protection Applies

Minnesota v. Olson

495 U.S. 91 (1990)

> Vote: 7-2
> Decision: Affirmed
> Majority: White, joined by Brennan, Marshall, Stevens, O'Connor, Scalia, and Kennedy
> Concurrence: Stevens
> Concurrence: Kennedy
> Dissent: Rehnquist
> Dissent: Blackmun

Justice WHITE delivered the opinion of the Court.

The police in this case made a warrantless, nonconsensual entry into a house where Olson was an overnight guest and arrested him. The issue is whether the arrest violated Olson's Fourth Amendment rights. We hold that it did.

Shortly before 6 a.m. on Saturday, July 18, 1987, a lone gunman robbed an Amoco gasoline station in Minneapolis, Minnesota, and fatally shot the station manager. A police officer heard the police dispatcher report and suspected Joseph Ecker. The officer and his partner drove immediately to Ecker's home, arriving at about the same time that an Oldsmobile arrived. The Oldsmobile took evasive action, spun out of control, and came to a stop. Two men fled the car on foot. Ecker, who was later identified as the gunman, was captured shortly thereafter inside his home. The second man escaped.

Inside the abandoned Oldsmobile, police found a sack of money and the murder weapon. They also found a title certificate with the name Rob Olson crossed out as a secured party, a letter addressed to a Roger R. Olson of 3151 Johnson Street, and a videotape rental receipt made out to Rob Olson and dated two days earlier. The police verified that a Robert Olson lived at 3151 Johnson Street.

The next morning, Sunday, July 19, a woman identifying herself as Dianna Murphy called the police and said that a man by the name of Rob drove the car in which the gas station killer left the scene, and that Rob was planning to leave town by bus. About noon, the same woman called again, gave her address and phone number, and said that a man named Rob had told a Maria and two other women, Louanne and Julie, that he was the driver in the Amoco robbery. The caller stated that Louanne was Julie's mother, and that the two women lived at 2406 Fillmore Northeast. The detective-in-charge who took the second phone call sent police officers to 2406 Fillmore to check out Louanne and Julie. When police arrived, they determined that the dwelling was a duplex and that Louanne Bergstrom and her daughter Julie lived in the upper unit, but were not home. Police spoke to Louanne's mother, Helen Niederhoffer, who lived in the lower unit. She

confirmed that a Rob Olson had been staying upstairs, but was not then in the unit. She promised to call the police when Olson returned. At 2 p.m., a pickup order, or "probable cause arrest bulletin," was issued for Olson's arrest. The police were instructed to stay away from the duplex.

At approximately 2:45 p.m., Niederhoffer called police and said Olson had returned. The detective-in-charge instructed police officers to go to the house and surround it. He then telephoned Julie from headquarters and told her Rob should come out of the house. The detective heard a male voice say "tell them I left." Julie stated that Rob had left, whereupon, at 3 p.m., the detective ordered the police to enter the house. Without seeking permission and with weapons drawn, the police entered the upper unit and found respondent hiding in a closet. Less than an hour after his arrest, respondent made an inculpatory statement at police headquarters.

The Hennepin County trial court held a hearing and denied respondent's motion to suppress his statement. The statement was admitted into evidence at Olson's trial, and he was convicted on one count of first degree murder, three counts of armed robbery, and three counts of second degree assault. On appeal, the Minnesota Supreme Court reversed. The court ruled that respondent had a sufficient interest in the Bergstrom home to challenge the legality of his warrantless arrest there, that the arrest was illegal because there were no exigent circumstances to justify a warrantless entry, and that respondent's statement was tainted by that illegality and should have been suppressed.

Because the admission of the statement was not harmless beyond reasonable doubt, the court reversed Olson's conviction and remanded for a new trial.

We granted the State's petition for certiorari, and now affirm.

It was held in *Payton v. New York (1980)*, that a suspect should not be arrested in his house without an arrest warrant, even though there is probable cause to arrest him. The purpose of the decision was not to protect the person of the suspect but to protect his home from entry in the absence of a magistrate's finding of probable cause. In this case, the court below held that Olson's warrantless arrest was illegal because he had a sufficient connection with the premises to be treated like a householder. The State challenges that conclusion.

. ...

The State argues that Olson's relationship to the premises does not satisfy the 12 factors which in its view determine whether a dwelling is a "home." Aside from the fact that it is based on the mistaken premise that a place must be one's "home" in order for one to have a legitimate expectation of privacy there, the State's proposed test is needlessly complex. We need go no further than to conclude, as we do, that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.

As recognized by the Minnesota Supreme Court, the facts of this case are similar to those in *Jones v. United States (1960)*. In *Jones,* the defendant was arrested in a friend's apartment during the execution of a search warrant and sought to challenge the warrant as not supported by probable cause.

. ...

The Court ruled that Jones could challenge the search of the apartment because he was "legitimately on [the] premises,". Although the "legitimately on [the] premises" standard was rejected in *Rakas* as too broad, the *Rakas* Court explicitly reaffirmed the factual holding in *Jones*:

"We do not question the conclusion in *Jones* that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful. ... "

"We think that *Jones,* on its facts, merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place."

. ... The State emphasizes that, in this case, Olson was never left alone in the duplex or given a key, whereas, in *Jones,* the owner of the apartment was away and Jones had a key with which he could come and go and admit and exclude others. These differences are crucial, it is argued, because, in not disturbing the holding in *Jones,* the Court pointed out that, while his host was away, Jones had complete dominion and control over the apartment and could exclude others from it. We do not understand *Rakas,* however, to hold that an overnight guest can never have a legitimate expectation of privacy except when his host is away and he has a key, or that only when those facts are present may an overnight guest assert the "unremarkable proposition," that a person may have a sufficient interest in a place other than his home to enable him to be free in that place from unreasonable searches and seizures.

To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. ... Society expects at least as much privacy in these places as in a telephone booth — "a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable," *Katz* (Harlan, J., concurring).

. ...

Because respondent's expectation of privacy in the Bergstrom home was rooted in "understandings that are recognized and permitted by society," it was legitimate, and respondent can claim the protection of the Fourth Amendment.

. ...

This case requires us to determine whether the Minnesota Supreme Court was correct in holding that there were no exigent circumstances that justified the warrantless entry into the house to make the arrest.

The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that

"a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, *Welsh v. Wisconsin (1984)*, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling."

The court also apparently thought that, in the absence of hot pursuit, there must be at least probable cause to believe that one or more of the other factors justifying the entry were present and that in assessing the risk of danger, the gravity of the crime, and likelihood that the suspect is armed should be considered. Applying this standard, the state court determined that exigent circumstances did not exist.

We are not inclined to disagree with this fact-specific application of the proper legal standard. The court pointed out that, although a grave crime was involved, respondent "was known not to be the murderer, but thought to be the driver of the getaway car," and that the police had already recovered the murder weapon.

"The police knew that Louanne and Julie were with the suspect in the upstairs duplex, with no suggestion of danger to them. Three or four Minneapolis police squads surrounded the house. The time was 3 p.m., Sunday. ... It was evident the suspect was going nowhere. If he came out of the house, he would have been promptly apprehended."

We do not disturb the state court's judgment that these facts do not add up to exigent circumstances.

We therefore affirm the judgment of the Minnesota Supreme Court.

It is so ordered.

Excerpted by Makenna Perry

Minnesota v. Carter

525 U.S. 83 (1998)

> Vote: 6-3
> Decision: Reversed
> Majority: Rehnquist joined by, O'Connor, Scalia, Kennady, Thomas, and Breyer
> Concurrence: Scalia joined by Thomas
> Concurrence: Kennedy
> Concurrence: Breyer
> Dissent: Ginsburg joined by Stevens and Souter

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents and the lessee of an apartment were sitting in one of its rooms, bagging cocaine. While so engaged they were observed by a police officer, who looked through a drawn window blind. The Supreme Court of Minnesota held that the officer's viewing was a search that violated respondents' Fourth Amendment rights. We hold that no such violation occurred.

James Thielen, a police officer in the Twin Cities' suburb ... went to an apartment building to investigate a tip from a confidential informant. The informant said that he had walked by the window of a ground-floor apartment and had seen people putting a white powder into bags. The officer looked in the same window through a gap in the closed blind and observed the bagging operation for several minutes. He then notified headquarters, which began preparing affidavits for a search warrant while he returned to the apartment building. When two men left the building in a previously identified Cadillac, the police stopped the car. Inside were respondents Carter and Johns. As the police opened the door of the car to let Johns out, they observed a black, zippered pouch and a handgun, later determined to be loaded, on the vehicle's floor. Carter and Johns were arrested, and a later police search of the vehicle the next day discovered pagers, a scale, and 47 grams of cocaine in plastic sandwich bags.

After seizing the car, the police returned to apartment 103 and arrested the occupant, Kimberly Thompson, who is not a party to this appeal. A search of the apartment pursuant to a warrant revealed cocaine residue on the kitchen table and plastic baggies similar to those found in the Cadillac. Thielen identified Carter, Johns, and Thompson as the three people he had observed placing the powder into baggies. The police later learned that while Thompson was the lessee of the apartment, Carter and Johns lived in Chicago and had come to the apartment for the sole purpose of packaging the cocaine. Carter and Johns had never been to the apartment before and were only in the apartment for approximately 2 1/2 hours. In return for the use of the apartment, Carter and Johns had given Thompson one-eighth of an ounce of the cocaine.

Carter and Johns were charged with conspiracy to commit a controlled substance crime in the first degree and aiding and abetting in a controlled substance crime in the first degree. ... They moved to suppress all evidence obtained from the apartment and the Cadillac, as well as to suppress several post-arrest incriminating statements they had made. They argued that Thielen's initial observation of their drug packaging activities was an unreasonable search in violation of the Fourth Amendment and that all evidence obtained as a result of this unreasonable search was inadmissible as fruit of the poisonous tree. The Minnesota trial court held that since, unlike the defendant in *Minnesota* v. *Olson (1990*), Carter and Johns were not overnight social guests but temporary out-of-state visitors, they were not entitled to claim the protection of the Fourth Amendment against the government intrusion into the apartment. The trial court also concluded that Thielen's observation was not a search within the meaning of the Fourth Amendment. After a trial, Carter and Johns were each convicted of both offenses. The Minnesota Court of Appeals held that respondent Carter did not have "standing" to object to Thielen's actions because his claim that he was predominantly a social guest was "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose-to package drugs. ... "

A divided Minnesota Supreme Court reversed, holding that respondents had "standing" to claim the protection of the Fourth Amendment because they had" 'a legitimate expectation of privacy in the invaded place.'" (quoting *Rakas* v. *Illinois* (1978)). The court noted that even though "society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the

privacy of their homes to conduct a common task, be it legal or illegal activity. We, therefore, hold that [respondents] had standing to bring [their] motion to suppress the evidence gathered as a result of Thielen's observations." Based upon its conclusion that respondents had "standing" to raise their Fourth Amendment claims, the court went on to hold that Thielen's observation constituted a search of the apartment under the Fourth Amendment, and that the search was unreasonable. We granted certiorari, 523 U. S. 1003 (1998), and now reverse.

The Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of "standing" doctrine, an analysis that this Court expressly rejected 20 years ago in *Rakas.* In that case, we held that automobile passengers could not assert the protection of the Fourth Amendment against the seizure of incriminating evidence from a vehicle where they owned neither the vehicle nor the evidence. Central to our analysis was the idea that in determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights, the "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." Thus, we held that in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable. ...

... [T]he extent to which the Fourth Amendment protects people may depend upon where those people are. We have held that "capacity to claim the protection of the Fourth Amendment depends ... upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas, supra.*

The text of the Amendment suggests that its protections extend only to people in "their" houses. But we have held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else. In *Minnesota* v. *Olson (1990)*, for example, we decided that an overnight guest in a house had the sort of expectation of privacy that the Fourth Amendment protects. We said:

"To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the every day expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. ...

"From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend."

. ...

Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with Thompson, or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship in *Olson* to suggest a degree of acceptance into the household. While the apartment was a dwelling place for Thompson, it was for these respondents simply a place to do business.

Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home." *New York* v. *Burger (1987)*. And while it was a "home" in which respondents were present, it was not their home. ...

If we regard the overnight guest in *Minnesota* v. *Olson* as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely "legitimately on the premises" as typifying those who may not do so, the present case is obviously somewhere in between. But the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights.

Because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer's observation constituted a "search." The judgments of the Supreme Court of Minnesota are accordingly reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted By Makenna Perry

Other Places to be Searched

New Jersey v. T.L.O.

469 U.S. 325 (1985)

> Vote: 6-3
> Decision: Reversed
> Majority: White, joined by Burger, Powell, Rehnquist, and O'Connor
> Concurrence: Powell, joined by O'Connor
> Concurrence: Blackmun
> Concur/dissent: Brennan, joined by Marshall
> Concur/dissent: Stevens, joined by Marshall and Brennan (Part I)

Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

On March 7, 1980, a teacher ... in ... N.J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T.L.O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O. 's companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.

Mr. Choplick notified T.L.O. 's mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had

been selling marihuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T.L.O. ... . Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T.L.O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress.

... [T]he court concluded that the search conducted by Mr. Choplick was a reasonable one. The initial decision to open the purse was justified by Mr. Choplick's well-founded suspicion that T.L.O. had violated the rule forbidding smoking in the lavatory. Once the purse was open, evidence of marihuana violations was in plain view, and Mr. Choplick was entitled to conduct a thorough search to determine the nature and extent of T.L.O.'s drug-related activities. Having denied the motion to suppress, the court on March 23, 1981, found T.L.O. to be a delinquent and on January 8th, 1982, sentenced her to a year's probation.

On appeal from the final judgment of the Juvenile Court, a divided Appellate Division affirmed the trial court's finding that there had been no Fourth Amendment violation ... T.L.O. appealed the Fourth Amendment ruling, and the Supreme Court of New Jersey reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in T.L.O.'s purse.

The New Jersey Supreme Court agreed with the lower courts that the Fourth Amendment applies to searches conducted by school officials. The court also rejected the State of New Jersey's argument that the exclusionary rule should not be employed to prevent the use in juvenile proceedings of evidence unlawfully seized by school officials. Declining to consider whether applying the rule to the fruits of searches by school officials would have any deterrent value, the court held simply that the precedents of this Court establish that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings."

With respect to the question of the legality of the search before it, the court agreed with the Juvenile Court that a warrantless search by a school official does not violate the Fourth Amendment so long as the official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order." However, the court, with two justices dissenting, sharply disagreed with the Juvenile Court's conclusion that the search of the purse was reasonable. ...

. ...

We granted the State of New Jersey's petition for certiorari. Although the State had argued in the Supreme Court of New Jersey that the search of T.L.O.'s purse did not violate the Fourth Amendment, the petition for certiorari raised only the question whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers. When this case was first argued last Term, the State conceded for the purpose of argument that the standard devised by the New Jersey Supreme Court for determining the legality of school searches was appropriate and that the court had correctly applied that standard; the State contended only that the remedial purposes of the exclusionary rule were not well served by applying it to searches conducted by public authorities not primarily engaged in law enforcement.

Although we originally granted certiorari to decide the issue of the appropriate remedy in juvenile court proceedings for unlawful school searches, our doubts regarding the wisdom of deciding that question in isolation from the broader ques-

tion of what limits, if any, the Fourth Amendment places on the activities of school authorities prompted us to order reargument on that question. Having heard argument on the legality of the search of T.L.O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." *Elkins v. United States (1960)*. ...

. ...

Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials. ...

These two propositions—that the Fourth Amendment applies to the States through the Fourteenth Amendment, and that the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment—might appear sufficient to answer the suggestion that the Fourth Amendment does not proscribe unreasonable searches by school officials. On reargument, however, the State of New Jersey has argued that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them.

. ...

... [T]his Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." *Burdeau v. McDowell (1921)*. Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, see *Camara v. Municipal Court (1967)*, Occupational Safety and Health Act inspectors, see *Marshall v. Barlow's Inc., (1978),* and even firemen entering privately owned premises to battle a fire, see *Michigan v. Tyler (1978)*, are all subject to the restraints imposed by the Fourth Amendment. As we observed in *Camara v. Municipal Court, supra,* "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," *Marshall v. Barlow's (1978)*, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court*. ...

Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special

nature of their authority over schoolchildren. Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment.

If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. ... Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. ... In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

. ...

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham v. Wright (1977).* We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

. ...

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara v. Municipal Court,* we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

. ...

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception," *Terry v. Ohio (1968)*; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place,". Under ordinary circumstances, a search of a student by a teacher or

other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

There remains the question of the legality of the search in this case. We recognize that the "reasonable grounds" standard applied by the New Jersey Supreme Court in its consideration of this question is not substantially different from the standard that we have adopted today. Nonetheless, we believe that the New Jersey court's application of that standard to strike down the search of T.L.O.'s purse reflects a somewhat crabbed notion of reasonableness. Our review of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes.

. ...

The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T.L.O.'s purse would therefore have "no direct bearing on the infraction" of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse. Second, even assuming that a search of T.L.O.'s purse might under some circumstances be reasonable in light of the accusation made against T.L.O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that T.L.O. had cigarettes in her purse. At best, according to the court, Mr. Choplick had "a good hunch."

Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was not an "inchoate and unparticularized suspicion or 'hunch,' " *Terry v. Ohio (1968)*; rather, it was the sort of "common-sense conclusio[n] about human behavior" upon which "practical people"—including government officials—are entitled to rely. *United States v. Cortez, (1981)*. ...

. ...

Because the hypothesis that T.L.O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also consistent with the teacher's accusation. Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T.L.O.'s purse to see if it contained cigarettes.

. ...

Because the search resulting in the discovery of the evidence of marihuana dealing by T.L.O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence from T.L.O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is

Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, concurring in part and dissenting in part.

I fully agree with Part II of the Court's opinion. Teachers, like all other government officials, must conform their conduct to the Fourth Amendment's protections of personal privacy and personal security.

. ...

I do not, however, otherwise join the Court's opinion. Today's decision sanctions school officials to conduct full-scale searches on a "reasonableness" standard whose only definite content is that it is *not* the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor even by a fair application of the "balancing test" it proclaims in this very opinion.

Assistant Vice Principal Choplick's thorough excavation of T.L.O. 's purse was undoubtedly a serious intrusion on her privacy. Unlike the searches in *Terry v. Ohio (1972),* the search at issue here encompassed a detailed and minute examination of respondent's pocketbook, in which the contents of private papers and letters were thoroughly scrutinized. Wisely, neither petitioner nor the Court today attempts to justify the search of T.L.O.'s pocketbook as a minimally intrusive search in the *Terry* line. To be faithful to the Court's settled doctrine, the inquiry therefore must focus on the warrant and probable-cause requirements

I agree that school teachers or principals, when not acting as agents of law enforcement authorities, generally may conduct a search of their students' belongings without first obtaining a warrant. To agree with the Court on this point is to say that school searches may justifiably be held to that extent to constitute an exception to the Fourth Amendment's warrant requirement. Such an exception, however, is not to be justified, as the Court apparently holds, by assessing net social value through application of an unguided "balancing test" in which "the individual's legitimate expectations of privacy and personal security" are weighed against "the government's need for effective methods to deal with breaches of public order." The Warrant Clause is something more than an exhortation to this Court to maximize social welfare as *we* see fit. It requires that the authorities must obtain a warrant before conducting a full-scale search. The undifferentiated governmental interest in law enforcement is insufficient to justify an exception to the warrant requirement. Rather, some *special* governmental interest beyond the need merely to apprehend lawbreakers is necessary to justify a categorical exception to the warrant requirement. For the most part, special governmental needs sufficient to override the warrant requirement flow from "exigency"—that is, from the press of time that makes obtaining a warrant either impossible or hopelessly infeasible. ...

To require a showing of some extraordinary governmental interest before dispensing with the warrant requirement is not to undervalue society's need to apprehend violators of the criminal law. To be sure, forcing law enforcement personnel to obtain a warrant before engaging in a search will predictably deter the police from conducting some searches that they would otherwise like to conduct. But this is not an unintended *result* of the Fourth Amendment's protection of privacy; rather, it is the very *purpose* for which the Amendment was thought necessary. Only where the governmental interests at stake exceed those implicated in any ordinary law enforcement context—that is, only where there is some extraordinary governmental interest involved—is it legitimate to engage in a balancing test to determine whether a warrant is indeed necessary.

. ...

I emphatically disagree with the Court's decision to cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search. The Court's decision jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth Amendment—on the basis of its Rorschach-like "balancing test." Use of such a "balancing test" to determine the standard for evaluating the validity of a full-scale search represents a sizable innovation in Fourth Amendment analysis. This innovation finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens. Moreover, even if this Court's historic understanding of the Fourth Amendment were mistaken and a balancing test of some kind were appropriate, any such test that gave adequate weight to the privacy and security interests protected by the Fourth Amendment would not reach the preordained result the Court's conclusory analysis reaches today. Therefore, because I believe that the balancing test used by the Court today is flawed both in its inception and in its execution,

I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BRENNAN joins as to Part I, concurring in part and dissenting in part.

Assistant Vice Principal Choplick searched T.L.O.'s purse for evidence that she was smoking in the girls' restroom. Because T.L.O.'s suspected misconduct was not illegal and did not pose a serious threat to school discipline, the New Jersey Supreme Court held that Choplick's search of her purse was an unreasonable invasion of her privacy and that the evidence which he seized could not be used against her in criminal proceedings. The New Jersey court's holding was a careful response to the case it was required to decide.

. ...

The New Jersey Supreme Court's holding on this question is plainly correct. ... [T]his case does not involve the use of evidence in a school disciplinary proceeding; the juvenile proceedings brought against T.L.O. involved a charge that would have been a criminal offense if committed by an adult. Accordingly, the exclusionary rule issue decided by that court and later presented to this Court concerned only the use in a criminal proceeding of evidence obtained in a search conducted by a public school administrator.

Having confined the issue to the law enforcement context, the New Jersey court then reasoned that this Court's cases have made it quite clear that the exclusionary rule is equally applicable

"whether the public official who illegally obtained the evidence was a municipal inspector, See *Camara [v. Municipal Court,]* [1967]; a firefighter, *Michigan v. Tyler*, [1978]; or a school administrator or law enforcement official."

It correctly concluded "that, if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings."

. ...

The practical basis for this principle is, in part, its deterrent effect, and as a general matter it is tolerably clear to me, as it has been to the Court, that the existence of an exclusionary remedy does deter the authorities from violating the Fourth Amendment by sharply reducing their incentive to do so. ...

Justice Brandeis was both a great student and a great teacher. It was he who wrote:

"Our Government is the potent, the onmipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Olmstead v. United States, (1928) (dissenting opinion). Those of us who revere the flag and the ideals for which it stands believe in the power of symbols. We cannot ignore that rules of law also have a symbolic power that may vastly exceed their utility.

Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that "our society attaches serious consequences to a violation of constitutional rights," and that this is a principle of "liberty and justice for all."

Thus, the simple and correct answer to the question presented by the State's petition for certiorari would have required affirmance of a state court's judgment suppressing evidence. ... In characteristic disregard of the doctrine of judicial restraint, the Court avoided that result in this case by ordering reargument and directing the parties to address a constitutional question that the parties, with good reason, had not asked the Court to decide. Because judicial activism undermines the Court's power to perform its central mission in a legitimate way, I dissented from the reargument order. ...

. ...

The Court embraces the standard applied by the New Jersey Supreme Court as equivalent to its own, and then deprecates the state court's application of the standard as reflecting "a somewhat crabbed notion of reasonableness." There is no mystery, however, in the state court's finding that the search in this case was unconstitutional; the decision below was not based on a manipulation of reasonable suspicion, but on the trivial character of the activity that promoted the official search. ...

In the view of the state court, there is a quite obvious and material difference between a search for evidence relating to violent or disruptive activity, and a search for evidence of a smoking rule violation. This distinction does not imply that a no-smoking rule is a matter of minor importance. Rather, like a rule that prohibits a student from being tardy, its occasional violation in a context that poses no threat of disrupting school order and discipline offers no reason to believe that an immediate search is necessary to avoid unlawful conduct, violence, or a serious impairment of the educational process.

. ...

Like the New Jersey Supreme Court, I would view this case differently if the Assistant Vice Principal had reason to believe T.L.O.'s purse contained evidence of criminal activity, or of an activity that would seriously disrupt school discipline. There was, however, absolutely no basis for any such assumption — not even a "hunch."

In this case, Mr. Choplick overreacted to what appeared to be nothing more than a minor infraction — a rule prohibiting smoking in the bathroom. ... As far as the smoking infraction is concerned, the search for cigarettes merely tended to corroborate a teacher's eyewitness account of T.L.O.'s violation of a minor regulation designed to channel student smoking behavior into designated locations. Because this conduct was neither unlawful nor significantly disruptive of school order or the educational process, the invasion of privacy associated with the forcible opening of T.L.O.'s purse was entirely unjustified at its inception.

. ... The rule the Court adopts today is so open-ended that it may make the Fourth Amendment virtually meaningless in the school context. Although I agree that school administrators must have broad latitude to maintain order and discipline in our classrooms, that authority is not unlimited.

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth. ...

I respectfully dissent.

Excerpted by Makenna Perry and Alex Nobiletti

Vernonia School District 47J v. Acton

515 U.S. 646 (1995)

> Vote: 6-3
> Decision: Vacate and remand
> Majority: Scalia, joined by Rehnquist, Kennedy, Thomas, Ginsburg, and Breyer.
> Concurrence: Ginsburg
> Dissent: O'Connor, joined by Stevens and Souter

JUSTICE SCALIA delivered the opinion of the Court.

The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution.

. ...

In the mid-to-Iate 1980's ... teachers and administrators observed a sharp increase in drug use. ... Along with more drugs came more disciplinary problems.

Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. ...

Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture. This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. ...

. ... According to the District Court:

"[T]he administration was at its wits end and ... a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached 'epidemic proportions.' The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture."

At that point, District officials began considering a drugtesting program. ... Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

. ... Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. ...

The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. ...

The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. ... The laboratory's procedures are 99.94% accurate. The District follows strict procedures regarding the chain of custody and access to test results. The laboratory does not know the identity of the students whose samples it tests. ... Only the superintendent, principals, viceprincipals, and athletic directors have access to test results. ...

. ...

In the fall of 1991, respondent James Acton, then a seventh grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 9, of the Oregon Constitution. After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action. The United States Court of Appeals for the Ninth Circuit reversed, holding that the Policy violated both the Fourth and Fourteenth Amendments and Article I, § 9, of the Oregon Constitution. We granted certiorari.

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. ... " We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, *Elkins v. United States*, (1960), including public school officials, *New Jersey v. T. L. 0.*, (1985). In *Skinner v. Railway Labor Executives' Assn.*, (1989), we held that state-compelled collection and testing of urine, such as that required by the Policy, constitutes a "search" subject to the demands of the Fourth Amendment.

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." At least in a case such as this ... whether a particular search meets the reasonableness standard "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Skinner*, (quoting *Delaware v. Prouse*, (1979)). Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant, *Skinner*. ... But a warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required ... probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, (1987)

We have found such "special needs" to exist in the public school context. There, the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based on probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *T. L. 0.*

The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *T. L. 0.* What expectations are legitimate varies ... In addition, the legitimacy of certain privacy expectations vis-a-vis the State may depend upon the individual's legal relationship with the State. ... Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination including ... the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status. ...

In *T. L. O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints. Such a view of things, we said, "is not entirely 'consonant with compulsory education laws,'" (quoting *Ingraham v. Wright*, (1977)), and is inconsistent with our prior decisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses. But while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," *DeShaney v. Winnebago County Dept. of Social Servs.*, (1989), we have acknowledged that for many purposes "school authorities ac[t] in loco parentis," *Bethel School Dist. No. 403 v. Fraser*, (1986), with the power and indeed the duty to "inculcate the habits and manners of civility." Thus, while children assuredly do not "shed their constitutional rights ... at the schoolhouse gate," *Tinker v. Des Moines Independent Community School Dist.*, (1969), the nature of those rights is what is appropriate for children in school.

Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. ... Particularly with regard to medical examinations and procedures, therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally." *T. L. 0.*, (Powell, J., concurring).

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. ...

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample), they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval." ... [S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of. We recognized in *Skinner* that collecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." We noted, however, that the degree of intrusion depends upon

the manner in which production of the urine sample is monitored. ... Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.

The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.

Respondents argue, however, that the District's Policy is in fact more intrusive than this suggests, because it requires the students, if they are to avoid sanctions for a falsely positive test, to identify in advance prescription medications they are taking. We agree that this raises some cause for concern. ... On the other hand, we have never indicated that requiring advance disclosure of medications is per se unreasonable. Indeed, in *Skinner* we held that it was not "a significant invasion of privacy." It can be argued that, in *Skinner*, the disclosure went only to the medical personnel taking the sample, and the Government personnel analyzing it, and that disclosure to teachers and coaches-to persons who personally know the student-is a greater invasion of privacy. Assuming for the sake of argument that both those propositions are true, we do not believe they establish a difference that respondents are entitled to rely on here.

The General Authorization Form that respondents refused to sign, which refusal was the basis for James's exclusion from the sports program, said only (in relevant part): "I ... authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student." While the practice of the District seems to have been to have a school official take medication information from the student at the time of the test, that practice is not set forth in, or required by, the Policy, which says simply: "Student athletes who ... are or have been taking prescription medication must provide verification (either by a copy of the prescription or by doctor's authorization) prior to being tested." It may well be that, if and when James was selected for random testing at a time that he was taking medication, the School District would have permitted him to provide the requested information in a confidential manner-for example, in a sealed envelope delivered to the testing lab. Nothing in the Policy contradicts that, and when respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst. Accordingly, we reach the same conclusion as in *Skinner*: that the invasion of privacy was not significant.

Finally, we turn to consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it. ... Is there a compelling state interest here? Rather, the phrase describes an interest that appears important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.

That the nature of the concern is important-indeed, perhaps compelling-can hardly be doubted. ... School years are the time when the physical, psychological, and addictive effects of drugs are most severe. ... In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction. Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes. ...

As for the immediacy of the District's concerns: We are not inclined to question ... the District Court's conclusion that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," ... and that "the rebellion was being fueled by alcohol and drug abuse. ... " As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. ... It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.

Taking into account all the factors we have considered above-the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met ... by the search-we conclude Vernonia's Policy is reasonable and hence constitutional.

. ...

The Ninth Circuit held that Vernonia's Policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, § 9, of the Oregon Constitution. Our conclusion that the former holding was in error means that the latter holding rested on a flawed premise. We therefore vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

. ... By the reasoning of today's decision, the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search.

In justifying this result, the Court dispenses with a requirement of individualized suspicion on considered policy grounds. First, it explains that precisely because every student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing whom to test. Second, a broad-based search regime, the Court reasons, dilutes the accusatory nature of the search. In making these policy arguments, of course, the Court sidesteps powerful, countervailing privacy concerns. Blanket searches, because they can involve "thousands or millions" of searches, "pos[e] a greater threat to liberty" than do suspicion-based ones, which "affec[t] one person at a time," *Illinois v. Krull*, (1987) (O'CONNOR, J., dissenting). ...

But whether a blanket search is "better" than a regime based on individualized suspicion is not a debate in which we should engage. In my view, it is not open to judges or government officials to decide on policy grounds which is better and which is worse. For most of our constitutional history, mass, suspicionless searches have been generally considered per se unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicionbased regime would be ineffectual. Because that is not the case here, I dissent.

Excerpted by Alex Nobiletti

Chambers v. Maroney

399 U.S. 42 (1970)

> Vote: 8-0
> Decision: Affirmed
> Majority: White, joined by Black, Brennan, Burger, Douglas, Harlan, Marshall, and Stewart
> Concurrence: Stewart
> Concur/Dissent: Harlan
> Not participating: Blackmun

MR. JUSTICE WHITE delivered the opinion of the Court.

The principal question in this case concerns the admissibility of evidence seized from an automobile, in which petitioner was riding at the time of his arrest, after the automobile was taken to a police station and was there thoroughly searched without a warrant. The Court of Appeals for the Third Circuit found no violation of petitioner's Fourth Amendment rights. We affirm.

During the night of May 20, 1963, a Gulf service station in North Braddock, Pennsylvania, was robbed by two men, each of whom carried and displayed a gun. The robbers took the currency from the cash register; the service station attendant, one Stephen Kovacich, was directed to place the coins in his right-hand glove, which was then taken by the robbers. Two teenagers, who had earlier noticed a blue compact station wagon circling the block in the vicinity ... then saw the station wagon speed away. ... About the same time, they learned that the Gulf station had been robbed. They reported to police, who arrived immediately, that four men were in the station wagon and one was wearing a green sweater. Kovacich told

the police that one of the men who robbed him was wearing a green sweater and the other was wearing a trench coat. A description of the car and the two robbers was broadcast over the police radio. Within an hour, a light blue compact station wagon answering the description and carrying four men was stopped by the police about two miles from the Gulf station. Petitioner was one of the men in the station wagon. He was wearing a green sweater, and there was a trench coat in the car. The occupants were arrested, and the car was driven to the police station. In the course of a thorough search of the car at the station, the police found ... two .38-caliber revolvers ... a right-hand glove containing small change, and certain cards bearing the name of Raymond Havicon, the attendant at a Boron service station in McKeesport, Pennsylvania, who had been robbed at gunpoint on May 13, 1963. In the course of a warrant-authorized search of petitioner's home the day after petitioner's arrest, police found and seized certain .38-caliber ammunition. ...

Petitioner was indicted for both robberies. ... [H]e was convicted of both robberies at the second trial. Both Kovacich and Havicon identified petitioner as one of the robbers. The materials taken from the station wagon were introduced into evidence, Kovacich identifying his glove and Havicon the cards taken in the May 13 robbery. The bullets seized at petitioner's house were also introduced over objections of petitioner's counsel. Petitioner was sentenced to a term of four to eight years' imprisonment for the May 13 robbery and to a term of two to seven years' imprisonment for the May 20 robbery. ... Petitioner did not take a direct appeal from these convictions. In 1965, petitioner sought a writ of habeas corpus in the state court, which denied the writ after a brief evidentiary hearing; the denial of the writ was affirmed on appeal in the Pennsylvania appellate courts. Habeas corpus proceedings were then commenced in the United States District Court for the Western District of Pennsylvania. An order to show cause was issued. Based on the State's response and the state court record, the petition for habeas corpus was denied without a hearing. The Court of Appeals for the Third Circuit affirmed, and we granted certiorari.

We pass quickly the claim that the search of the automobile was the fruit of an unlawful arrest. Both the courts below thought the arresting officers had probable cause to make the arrest. We agree. Having talked to the teen-age observers and to the victim Kovacich, the police had ample cause to stop a light blue compact station wagon carrying four men and to arrest the occupants, one of whom was wearing a green sweater and one of whom had a trench coat with him in the car.

Even so, the search that produced the incriminating evidence was made at the police station some time after the arrest, and cannot be justified as a search incident to an arrest:

"Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."

Preston v. United States (1964). *Dyke v. Taylor Implement Mfg. Co*. (1968), is to the same effect; the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house.

There are, however, alternative grounds arguably justifying the search of the car in this case. In *Preston*, the arrest was for vagrancy; it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto. In *Dyke*, the Court expressly rejected the suggestion that there was probable cause to search the car. Here, the situation is different, for the police had probable cause to believe that the robbers, carrying guns and the fruits of the crime, had fled the scene in a light blue compact station wagon which would be carrying four men, one wearing a green sweater and

another wearing a trench coat. As the state courts correctly held, there was probable cause to arrest the occupants of the station wagon that the officers stopped; just as obviously was there probable cause to search the car for guns and stolen money.

In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office. In *Carroll v. United States* (1925), the issue was the admissibility in evidence of contraband liquor seized in a warrantless search of a car on the highway. After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles ... may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. The Court expressed its holding as follows:

"We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing ... it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

"Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. ... "

. ...

"The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

The Court also noted that the search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest:

"The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

Finding that there was probable cause for the search and seizure at issue before it, the Court affirmed the convictions.

. ...

. ... Neither *Carroll*, nor other cases in this Court require or suggest that, in every conceivable circumstance, the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting, since a car is readily movable. Where this is true, as in *Carroll* and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. ... [I]t has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll* holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence, an immediate search is constitutionally permissible. Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question, and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between ... seizing and holding a car before presenting the probable cause issue to a magistrate and ... carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped, since there was probable cause to search and it was a fleeting target for a search. The probable cause factor still obtained at the station house, and so did the mobility of the car, unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event, there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. The same consequences may not follow where there is unforeseeable cause to search a house. But, as *Carroll*, held, for the purposes of the Fourth Amendment, there is a constitutional difference between houses and cars.

. ...

Affirmed.

Excerpted by Alex Nobiletti and Sloan Harmel

South Dakota v. Opperman

428 U.S. 364 (1976)

> Vote: 5-4
> Decision: Reversed and remanded
> Majority: Burger, joined by Blackmun, Powell, Rehnquist, and Stevens
> Concurrence: Powell
> Dissent: White
> Dissent: Marshall, joined by Brennan and Stewart

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We review the judgment of the Supreme Court of South Dakota, holding that local police violated the Fourth Amendment to the Federal Constitution, as applicable to the States under the Fourteenth Amendment, when they conducted a routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances.

Local ordinances prohibit parking in certain areas of downtown Vermillion, S.D. between the hours of 2 am. and 6 a.m. During the early morning hours of December 10, 1973, a Vermillion police officer observed respondent's unoccupied vehicle illegally parked in the restricted zone. At approximately 3 a.m., the officer issued an overtime parking ticket and placed it on the car's windshield. The citation warned:

"Vehicles in violation of any parking ordinance may be towed from the area."

At approximately 10 o'clock on the same morning, another officer issued a second ticket for an overtime parking violation. These circumstances were routinely reported to police headquarters, and after the vehicle was inspected, the car was towed to the city impound lot.

From outside the car at the impound lot, a police officer observed a watch on the dashboard and other items of personal property located on the back seat and back floorboard. At the officer's direction, the car door was then unlocked and, using a standard inventory form pursuant to standard police procedures, the officer inventoried the contents of the car, including the contents of the glove compartment, which was unlocked. There he found marihuana contained in a plastic bag. All items, including the contraband, were removed to the police department for safekeeping. During the late afternoon of December 10, respondent appeared at the police department to claim his property. The marihuana was retained by police.

Respondent was subsequently arrested on charges of possession of marihuana. His motion to suppress the evidence yielded by the inventory search was denied; he was convicted after a jury trial and sentenced to a fine of $100 and 14 days' incarceration in the county jail. On appeal, the Supreme Court of South Dakota reversed the conviction. The court concluded that the evidence had been obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. We granted certiorari, and we reverse.

This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are "effects," and thus within the reach of the Fourth Amendment, *Cady v. Dombrowski*, (1973), warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not. ...

The reason for this well settled distinction is twofold. First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. ... But the Court has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction. ... Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection

and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

. ...

In the interests of public safety ... automobiles are frequently taken into police custody. ... The authority of police to seize and remove from the streets vehicles ... threatening public safety and convenience is beyond challenge.

When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody, *United States v. Mitchell*, (CA9 1972); the protection of the police against claims or disputes over lost or stolen property, *United States v. Kelehar*, (CA5 1972); and the protection of the police from potential danger, *Cooper v. California* [(1967)]. The practice has been viewed as essential to respond to incidents of theft or vandalism. In addition, police frequently attempt to determine whether a vehicle has been stolen, and thereafter abandoned.

These caretaking procedures have almost uniformly been upheld by the state courts, which, by virtue of the localized nature of traffic regulation, have had considerable occasion to deal with the issue. Applying the Fourth Amendment standard of "reasonableness," the state courts have overwhelmingly concluded that, even if an inventory is characterized as a "search," the intrusion is constitutionally permissible.

. ...

. ... These cases have recognized that standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration, as well as a place for the temporary storage of valuables.

The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable. ...

In applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents. In *Cooper v. California*, the Court upheld the inventory of a car impounded under the authority of a state forfeiture statute. Even though the inventory was conducted in a distinctly criminal setting and carried out a week after the car had been impounded, the Court nonetheless found that the car search, including examination of the glove compartment where contraband was found, was reasonable under the circumstances. This conclusion was reached despite the fact that no warrant had issued and probable cause to search for the contraband in the vehicle had not been established. The Court said in language explicitly applicable here:

"It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."

In the following Term, the Court in *Harris v. United States*, (1968), upheld the introduction of evidence, seized by an officer who, after conducting an inventory search of a car and while taking means to safeguard it, observed a car registration card lying on the metal stripping of the car door. Rejecting the argument that a warrant was necessary, the Court held that the intrusion was justifiable, since it was "taken to protect the car while it was in police custody." Finally, in *Cady v. Dombrowski* [(1973)], the Court upheld a warrantless search of an automobile towed to a private garage even though no probable cause existed to believe that the vehicle contained fruits of a crime. The sole justification for the warrantless incursion was that it was incident to the caretaking function of the local police to protect the community's safety. Indeed, the protective search was instituted solely because local police "were under the impression" that the incapacitated driver, a Chicago police officer, was required to carry his service revolver at all times; the police had reasonable grounds to believe a weapon might be in the car, and thus available to vandals. The Court carefully noted that the protective search was carried out in accordance with standard procedures in the local police department, a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function. ...

The holdings in *Cooper*, *Harris*, and *Cady* point the way to the correct resolution of this [c]ase. None of the three cases, of course, involves the precise situation presented here; but, as in all Fourth Amendment cases, we are obliged to look to all the facts and circumstances of this case in light of the principles set forth in these prior decisions.

. ...

The Vermillion police were indisputably engaged in a caretaking search of a lawfully impounded automobile. The inventory was conducted only after the car had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of valuables inside the car. As in *Cady*, there is no suggestion whatever that this ... was a pretext concealing an investigatory police motive.

On this record, we conclude that ... the conduct of the police was not "unreasonable" under the Fourth Amendment.

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

Reversed and remanded.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, dissenting.

The Court today holds that the Fourth Amendment permits a routine police inventory search of the closed glove compartment of a locked automobile impounded for ordinary traffic violations. Under the Court's holding, such a search may be made without attempting to secure the consent of the owner and without any particular reason to believe the impounded automobile contains contraband, evidence, or valuables, or presents any danger to its custodians or the public. Because I believe this holding to be contrary to sound elaboration of established Fourth Amendment principles, I dissent.

... [T]he requirement of a warrant aside, resolution of the question whether an inventory search of closed compartments inside a locked automobile can ever be justified as a constitutionally "reasonable" search depends upon a reconciliation of the owner's constitutionally protected privacy interests against governmental intrusion, and legitimate governmental interests furthered by securing the car and its contents. ... The Court fails clearly to articulate the reasons for its reconciliation of these interests in this case, but it is at least clear to me that the considerations alluded to by the Court ... are insufficient to justify the Court's result in this case.

To begin with, the Court appears to suggest by reference to a "diminished" expectation of privacy, that a person's constitutional interest in protecting the integrity of closed compartments of his locked automobile may routinely be sacrificed to governmental interests requiring interference with that privacy that are less compelling than would be necessary to justify a search of similar scope of the person's home or office. This has never been the law. The Court correctly observes that some prior cases have drawn distinctions between automobiles and homes or offices in Fourth Amendment cases; but even as the Court's discussion makes clear, the reasons for distinction in those cases are not present here. Thus, *Chambers v. Maroney*, (1970), and *Carroll v. United States*, (1925), permitted certain probable cause searches to be carried out without warrants in view of the exigencies created by the mobility of automobiles, but both decisions reaffirmed that the standard of probable cause necessary to authorize such a search was no less than the standard applicable to search of a home or office. In other contexts, the Court has recognized that automobile travel sacrifices some privacy interests to the publicity of plain view. But this recognition, too, is inapposite here, for there is no question of plain view in this case. Nor does this case concern intrusions of the scope that the Court apparently assumes would ordinarily be permissible in order to insure the running safety of a car. While it may be that privacy expectations associated with automobile travel are in some regards less than those associated with a home or office, it is equally clear that "[t]he word automobile' is not a talisman in whose presence the Fourth Amendment fades away ... ," *Coolidge v. New Hampshire*, (1971). Thus, we have recognized that "[a] *search*, even of an automobile, is a substantial invasion of privacy," *United States v. Ortiz*, (1975) (emphasis added), and, accordingly, our cases have consistently recognized that the nature and substantiality of interest required to justify a search of private areas of an automobile is no less than that necessary to justify an intrusion of similar scope into a home or office. The Court's opinion appears to suggest that its result may, in any event, be justified because the inventory search procedure is a "reasonable" response to

"three distinct needs: the protection of the owner's property while it remains in police custody ... ; the protection of the police against claims or disputes over lost or stolen property ... ; and the protection of the police from potential danger."

This suggestion is flagrantly misleading, however, because the record of this case explicitly belies any relevance of the last two concerns. In any event, it is my view that none of these "needs," separately or together, can suffice to justify the inventory search procedure approved by the Court.

First, this search cannot be justified in any way as a safety measure, for — though the Court ignores it — the sole purpose given by the State for the Vermillion police's inventory procedure was to secure valuables. Nor is there any indication that the officer's search in this case was tailored in any way to safety concerns, or that ordinarily it is so circumscribed. Even aside from the actual basis for the police practice in this case, however, I do not believe that any blanket safety argument could justify a program of routine searches of the scope permitted here. As MR. JUSTICE POWELL recognizes, ordinarily "there is little danger associated with impounding unsearched automobiles." Thus, while the safety rationale may not be entirely discounted when it is actually relied upon, it surely cannot justify the search of every car upon the

basis of undifferentiated possibility of harm; on the contrary, such an intrusion could ordinarily be justified only in those individual cases where the officer's inspection was prompted by specific circumstances indicating the possibility of a particular danger.

Second, the Court suggests that the search for valuables in the closed glove compartment might be justified as a measure to protect the police against lost property claims. Again, this suggestion is belied by the record, since — although the Court declines to discuss it — the South Dakota Supreme Court's interpretation of state law explicitly absolves the police, as "gratuitous depositors," from any obligation beyond inventorying objects in plain view and locking the car. Moreover ... it may well be doubted that an inventory procedure would, in any event, work significantly to minimize the frustrations of false claims.

Finally, the Court suggests that the public interest in protecting valuables that may be found inside a closed compartment of an impounded car may justify the inventory procedure. I recognize the genuineness of this governmental interest in protecting property from pilferage. But even if I assume that the posting of a guard would be fiscally impossible as an alternative means to the same protective end, I cannot agree with the Court's conclusion. The Court's result authorizes — indeed it appears to require — the routine search of nearly every car impounded. In my view, the Constitution does not permit such searches as a matter of routine; absent specific consent, such a search is permissible only in exceptional circumstances of particular necessity.

It is at least clear that any owner might prohibit the police from executing a protective search of his impounded car, since, by hypothesis, the inventory is conducted for the owner's benefit. Moreover, it is obvious that not everyone whose car is impounded would want it to be searched. ... Nevertheless, according to the Court's result, the law may presume that each owner in respondent's position consents to the search. I cannot agree. In my view, the Court's approach is squarely contrary to the law of consent; it ignores the duty, in the absence of consent, to analyze in each individual case whether there is a need to search a particular car for the protection of its owner which is sufficient to outweigh the particular invasion. It is clear to me under established principles that, in order to override the absence of explicit consent, such a search must at least be conditioned upon the fulfillment of two requirements. First, there must be specific cause to believe that a search of the scope to be undertaken is necessary in order to preserve the integrity of particular valuable property threatened by the impoundment. ... Second, even where a search might be appropriate, such an intrusion may only follow the exhaustion and failure of reasonable efforts under the circumstances to identify and reach the owner of the property in order to facilitate alternative means of security or to obtain his consent to the search, for in this context the right to refuse the search remains with the owner.

Because the record in this case shows that the procedures followed by the Vermillion police in searching respondent's car fall far short of these standards, in my view, the search was impermissible, and its fruits must be suppressed. ...

Excerpted by Alex Nobiletti

California v. Acevedo

500 U.S. 565 (1991)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: Blackmun, joined by Rehnquist, O'Connor, Scalia, Kennedy, and Souter
> Concurrence: Scalia
> Dissent: White
> Dissent: Stevens, joined by Justice Marshall

JUSTICE BLACKMUN delivered the opinion of the Court.

This case requires us once again to consider the so-called "automobile exception" to the warrant requirement of the Fourth Amendment and its application to the search of a closed container in the trunk of a car.

On October 28, 1987, Officer Coleman ... received a telephone call from a federal drug enforcement agent in Hawaii. The agent informed Coleman that he had seized a package containing marijuana which was to have been delivered to the Federal Express Office in Santa Ana and which was addressed to J.R. Daza ... in that city. The agent arranged to send the package to Coleman instead. Coleman then was to take the package to the Federal Express office and arrest the person who arrived to claim it.

Coleman received the package on October 29, verified its contents, and took it to the Senior Operations Manager at the Federal Express office. At about 10:30 a.m. on October 30, a man, who identified himself as Jamie Daza, arrived to claim the package. He accepted it and drove to his apartment on West Stevens. He carried the package into the apartment.

At 11:45 a.m., officers observed Daza leave the apartment and drop the box and paper that had contained the marijuana into a trash bin. Coleman at that point left the scene to get a search warrant. ...

At 12:30 p.m., respondent Charles Steven Acevedo arrived. He entered Daza's apartment, stayed for about 10 minutes, and reappeared carrying a brown paper bag that looked full. The officers noticed that the bag was the size of one of the wrapped marijuana packages sent from Hawaii. Acevedo walked to a silver Honda in the parking lot. He placed the bag in the trunk of the car and started to drive away. Fearing the loss of evidence, officers in a marked police car stopped him. They opened the trunk and the bag, and found marijuana.

Respondent was charged in state court with possession of marijuana for sale. ... He moved to suppress the marijuana found in the car. The motion was denied. ...

The California Court of Appeal, Fourth District, concluded that the marijuana found in the paper bag in the car's trunk should have been suppressed. The court concluded that the officers had probable cause to believe that the paper bag contained drugs, but lacked probable cause to suspect that Acevedo's car, itself, otherwise contained contraband. Because the officers' probable cause was directed specifically at the bag, the court held that the case was controlled by *United States v. Chadwick*, (1977), rather than by *United States v. Ross*, (1982). Although the court agreed that the officers could seize the paper bag, it held that, under *Chadwick*, they could not open the bag without first obtaining a warrant for that pur-

pose. The court then recognized "the anomalous nature" of the dichotomy between the rule in *Chadwick* and the rule in *Ross*. That dichotomy dictates that, if there is probable cause to search a car, then the entire car — including any closed container found therein — may be searched without a warrant, but if there is probable cause only as to a container in the car, the container may be held, but not searched, until a warrant is obtained.

The Supreme Court of California denied the State's petition for review. ...

We granted certiorari to reexamine the law applicable to a closed container in an automobile. ...

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Contemporaneously with the adoption of the Fourth Amendment, the First Congress ... distinguished between the need for a warrant to search for contraband concealed in "a dwelling house or similar place" and the need for a warrant to search for contraband concealed in a movable vessel. See *Carroll v. United States*, (1925). In *Carroll*, this Court established an exception to the warrant requirement for moving vehicles, for it recognized

"a necessary difference between a search of a store, dwelling house or other structure ... and a search of a ship, motor boat, wagon or automobile ... where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

It therefore held that a warrantless search of an automobile based upon probable cause to believe that the vehicle contained evidence of crime ... did not contravene the Warrant Clause of the Fourth Amendment.

The Court refined the exigency requirement in *Chambers v. Maroney*, (1970), when it held that the existence of exigent circumstances was to be determined at the time the automobile is seized. ... Following *Chambers*, if the police have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct either an immediate or a delayed search of the vehicle.

In *United States v. Ross*, decided in 1982, we held that a warrantless search of an automobile under the *Carroll* doctrine could include a search of a container or package found inside the car when such a search was supported by probable cause. ...

. ...

"[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."

In *Ross*, therefore, we clarified the scope of the *Carroll* doctrine as properly including a "probing search" of compartments and containers within the automobile so long as the search is supported by probable cause.

In addition to this clarification, *Ross* distinguished the *Carroll* doctrine from the separate rule that governed the search of closed containers. The Court had announced this separate rule, unique to luggage and other closed packages, bags, and containers, in *United States v. Chadwick*, (1977). In *Chadwick*, federal narcotics agents had probable cause to believe that

a 200-pound double-locked footlocker contained marijuana. The agents tracked the locker as the defendants removed it from a train and carried it through the station to a waiting car. As soon as the defendants lifted the locker into the trunk of the car, the agents arrested them, seized the locker, and searched it. ...

The Court ... reasoned, a person expects more privacy in his luggage and personal effects than he does in his automobile. Moreover, it concluded that, as "may often not be the case when automobiles are seized," secure storage facilities are usually available when the police seize luggage. In *Arkansas v. Sanders*, (1979), the Court extended *Chadwick's* rule to apply to a suitcase actually being transported in the trunk of a car. ... Although the Court had applied the *Carroll* doctrine to searches of integral parts of the automobile itself, (indeed, in *Carroll*, contraband whiskey was in the upholstery of the seats), it did not extend the doctrine to the warrantless search of personal luggage

"merely because it was located in an automobile lawfully stopped by the police."

Again, the *Sanders* majority stressed the heightened privacy expectation in personal luggage, and concluded that the presence of luggage in an automobile did not diminish the owner's expectation of privacy in his personal items.

In *Ross*, the Court endeavored to distinguish between *Carroll*, which governed the *Ross* automobile search, and *Chadwick*, which governed the *Sanders* automobile search. It held that the *Carroll* doctrine covered searches of automobiles when the police had probable cause to search an entire vehicle, but that the *Chadwick* doctrine governed searches of luggage when the officers had probable cause to search only a container within the vehicle. Thus, in a *Ross* situation, the police could conduct a reasonable search under the Fourth Amendment without obtaining a warrant, whereas in a *Sanders* situation, the police had to obtain a warrant before they searched.

. ...

The facts in this case closely resemble the facts in *Ross*. In *Ross*, the police had probable cause to believe that drugs were stored in the trunk of a particular car. Here, the California Court of Appeal concluded that the police had probable cause to believe that respondent was carrying marijuana in a bag in his car's trunk. ...

This Court in *Ross* rejected *Chadwick's* distinction between containers and cars. It concluded that the expectation of privacy in one's vehicle is equal to one's expectation of privacy in the container, and noted that "the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container." It also recognized that it was arguable that the same exigent circumstances that permit a warrantless search of an automobile would justify the warrantless search of a movable container. In deference to the rule of *Chadwick* and *Sanders*, however, the Court put that question to one side. It concluded that the time and expense of the warrant process would be misdirected if the police could search every cubic inch of an automobile until they discovered a paper sack, at which point the Fourth Amendment required them to take the sack to a magistrate for permission to look inside. We now must decide the question deferred in *Ross*: whether the Fourth Amendment requires the police to obtain a warrant to open the sack in a movable vehicle simply because they lack probable cause to search the entire car. We conclude that it does not.

. ...

We now agree that a container found after a general search of the automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy. In fact, we

see no principled distinction in terms of either the privacy expectation or the exigent circumstances between the paper bag found by the police in Ross and the paper bag found by the police here. Furthermore, by attempting to distinguish between a container for which the police are specifically searching and a container which they come across in a car, we have provided only minimal protection for privacy, and have impeded effective law enforcement.

The line between probable cause to search a vehicle and probable cause to search a package in that vehicle is not always clear, and separate rules that govern the two objects to be searched may enable the police to broaden their power to make warrantless searches and disserve privacy interests. ... At the moment when officers stop an automobile, it may be less than clear whether they suspect with a high degree of certainty that the vehicle contains drugs in a bag or simply contains drugs. If the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*.

. ...

Finally, the search of a paper bag intrudes far less on individual privacy than does the incursion sanctioned long ago in *Carroll*. In that case, prohibition agents slashed the upholstery of the automobile. This Court nonetheless found their search to be reasonable under the Fourth Amendment. If destroying the interior of an automobile is not unreasonable, we cannot conclude that looking inside a closed container is. ... [W]e now hold that the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle.

. ...

The interpretation of the *Carroll* doctrine set forth in *Ross* now applies to all searches of containers found in an automobile. In other words, the police may search without a warrant if their search is supported by probable cause. ...

We reaffirm that principle. In the case before us, the police had probable cause to believe that the paper bag in the automobile's trunk contained marijuana. That probable cause now allows a warrantless search of the paper bag. The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.

. ...

Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences. We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.

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

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

At the end of its opinion, the Court pays lip service to the proposition that should provide the basis for a correct analysis of the legal question presented by this case: It is

“”a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.'” *Mincey v. Arizona*, (1978), quoting *Katz v. United States*, (1967).”

Relying on arguments that conservative judges have repeatedly rejected in past cases, the Court today — despite its disclaimer to the contrary — enlarges the scope of the automobile exception to this “cardinal principle,” which undergirded our Fourth Amendment jurisprudence prior to the retirement of the author of the landmark opinion in *United States v. Chadwick*, (1977). As a preface to my response to the Court’s arguments, it is appropriate to restate the basis for the warrant requirement, the significance of the *Chadwick* case, and the reasons why the limitations on the automobile exception that were articulated in *United States v. Ross*, (1982), represent a fair accommodation between the basic rule requiring prior judicial approval of searches and the automobile exception.

The Fourth Amendment is a restraint on Executive power. The Amendment constitutes the Framers’ direct constitutional response to the unreasonable law enforcement practices employed by agents of the British Crown. Over the years ... the Court has recognized the importance of this restraint as a bulwark against police practices that prevail in totalitarian regimes.

This history is, however, only part of the explanation for the warrant requirement. The requirement also reflects the sound policy judgment that, absent exceptional circumstances, the decision to invade the privacy of an individual’s personal effects should be made by a neutral magistrate, rather than an agent of the Executive. In his opinion for the Court in *Johnson v. United States*, [(1948)], Justice Jackson explained:

“The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”

Our decisions have always acknowledged that the warrant requirement imposes a burden on law enforcement. And our cases have not questioned that trained professionals normally make reliable assessments of the existence of probable cause to conduct a search. We have repeatedly held, however, that these factors are outweighed by the individual interest in privacy that is protected by advance judicial approval. The Fourth Amendment dictates that the privacy interest is paramount, no matter how marginal the risk of error might be if the legality of warrantless searches were judged only after the fact.

. ...

In its opinion today, the Court recognizes that the police did not have probable cause to search respondent’s vehicle, and that a search of anything but the paper bag that respondent had carried from Daza’s apartment and placed in the trunk of his car would have been unconstitutional. Moreover, as I read the opinion, the Court assumes that the police could

not have made a warrantless inspection of the bag before it was placed in the car. Finally, the Court also does not question the fact that, under our prior cases, it would have been lawful for the police to seize the container and detain it (and respondent) until they obtained a search warrant. Thus, all of the relevant facts that governed our decisions in *Chadwick* and *Sanders* are present here, whereas the relevant fact that justified the vehicle search in *Ross* is not present.

The Court does not attempt to identify any exigent circumstances that would justify its refusal to apply the general rule against warrantless searches. Instead, it advances these three arguments: First, the rules identified in the foregoing cases are confusing and anomalous. Second, the rules do not protect any significant interest in privacy. And third, the rules impede effective law enforcement. None of these arguments withstands scrutiny.

. ...

To the extent there was any "anomaly" in our prior jurisprudence, the Court has "cured" it at the expense of creating a more serious paradox. For surely it is anomalous to prohibit a search of a briefcase while the owner is carrying it exposed on a public street, yet to permit a search once the owner has placed the briefcase in the locked trunk of his car. One's privacy interest in one's luggage can certainly not be diminished by one's removing it from a public thoroughfare and placing it — out of sight — in a privately owned vehicle. Nor is the danger that evidence will escape increased if the luggage is in a car, rather than on the street. In either location, if the police have probable cause, they are authorized to seize the luggage and to detain it until they obtain judicial approval for a search. Any line demarking an exception to the warrant requirement will appear blurred at the edges, but the Court has certainly erred if it believes that, by erasing one line and drawing another, it has drawn a clearer boundary.

. ...

Even if the warrant requirement does inconvenience the police to some extent, that fact does not distinguish this constitutional requirement from any other procedural protection secured by the Bill of Rights. It is merely a part of the price that our society must pay in order to preserve its freedom. Thus, in a unanimous opinion that relied on both *Johnson* and *Chadwick*, Justice Stewart wrote:

"Moreover, the mere fact that law enforcement may be made more efficient can never, by itself, justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*.

It is too early to know how much freedom America has lost today. The magnitude of the loss is, however, not nearly as significant as the Court's willingness to inflict it without even a colorable basis for its rejection of prior law.

I respectfully dissent.

Excerpted by Alex Nobiletti

Illinois v. Caballes

543 U.S. 405 (2005)

> Vote: 6-2
> Decision: Vacated and remanded
> Majority: Stevens, joined by O'Connor, Scalia, Kennedy, Thomas, and Breyer
> Dissent: Souter
> Dissent: Ginsburg, joined by Souter
> Not participating: Rehnquist

JUSTICE STEVENS delivered the opinion of the Court.

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

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

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

Here, the initial seizure of respondent when he was stopped on the highway was based on probable cause, and was concededly lawful. It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. ...

... [W]e accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.

Despite this conclusion, the Illinois Supreme Court held that the initially lawful traffic stop became an unlawful seizure solely as a result of the canine sniff that occurred. ... That is, the court characterized the dog sniff as the cause rather than

the consequence of a constitutional violation. In its view, the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics, it was unlawful. In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.

Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. [*US v.*] *Jacobsen* [1984]. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." *Ibid.* This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." *Id.* (punctuation omitted). In *United States v. Place*, (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "sui generis" because it "discloses only the presence or absence of narcotics, a contraband item." Respondent likewise concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.

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

. ...

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

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

Illinois State Police Trooper Daniel Gillette stopped Roy Caballes for driving 71 miles per hour in a zone with a posted speed limit of 65 miles per hour. Trooper Craig Graham of the Drug Interdiction Team heard on the radio that Trooper Gillette was making a traffic stop. Although Gillette requested no aid, Graham decided to come to the scene to conduct a dog sniff. Gillette informed Caballes that he was speeding and asked for the usual documents—driver's license, car registration, and proof of insurance. Caballes promptly provided the requested documents but refused to consent to a search of his vehicle. After calling his dispatcher to check on the validity of Caballes' license and for outstanding

warrants, Gillette returned to his vehicle to write Caballes a warning ticket. Interrupted by a radio call on an unrelated matter, Gillette was still writing the ticket when Trooper Graham arrived with his drug-detection dog. Graham walked the dog around the car, the dog alerted at Caballes' trunk, and, after opening the trunk, the troopers found marijuana.

The Supreme Court of Illinois held that the drug evidence should have been suppressed. ... [T]he court employed a two-part test taken from *Terry v. Ohio*, (1968), to determine the overall reasonableness of the stop. The court asked first "whether the officer's action was justified at its inception," and second "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." (quoting *People v. Brownlee*, (1999) (in turn quoting *Terry*)). "[I]t is undisputed," the court observed, "that the traffic stop was properly initiated"; thus, the dispositive inquiry trained on the "second part of the *Terry* test," in which "[t]he State bears the burden of establishing that the conduct remained within the scope of the stop."

police did not detect the odor of marijuana in the car or note any other evidence suggesting the presence of illegal drugs." Lacking "specific and articulable facts" supporting the canine sniff. (quoting *Cox*), the court ruled, "the police impermissibly broadened the scope of the traffic stop in this case into a drug investigation." I would affirm the Illinois Supreme Court's judgment and hold that the drug sniff violated the Fourth Amendment.

. ...

The Court rejects the Illinois Supreme Court's judgment and, implicitly, the application of *Terry* to a traffic stop converted, by calling in a dog, to a drug search. ... Dog sniffs that detect only the possession of contraband may be employed without offense to the Fourth Amendment, the Court reasons, because they reveal no lawful activity and hence disturb no legitimate expectation of privacy.

In my view, the Court diminishes the Fourth Amendment's force by abandoning the second *Terry* inquiry. ... A drug-detection dog is an intimidating animal. Injecting such an animal into a routine traffic stop changes the character of the encounter between the police and the motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer. Caballes—who, as far as Troopers Gillette and Graham knew, was guilty solely of driving six miles per hour over the speed limit—was exposed to the embarrassment and intimidation of being investigated, on a public thoroughfare, for drugs. Even if the drug sniff is not characterized as a Fourth Amendment "search," the sniff surely broadened the scope of the traffic-violation-related seizure.

. ...

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

. ...

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

Excerpted by Alex Nobiletti

Maryland v. King

69 U.S. 435 (2013)

> Vote: 5-4
> Decision: Reversed
> Majority: Kennedy, joined by Roberts, Thomas, Breyer, and Alito
> Dissent: Scalia, joined by Ginsburg, Sotomayor, and Kagan

JUSTICE KENNEDY delivered the opinion of the Court.

In 2003 a man concealing his face and armed with a gun broke into a woman's home in Salisbury, Maryland. He raped her. The police were unable to identify or apprehend the assailant ... but they did obtain from the victim a sample of the perpetrator's DNA.

In 2009 Alonzo King was arrested in Wicomico County, Maryland. ... As part of a routine booking procedure for serious offenses, his DNA sample was taken by applying a cotton swab or filter paper—known as a buccal swab—to the inside of his cheeks. The DNA was found to match the DNA taken from the Salisbury rape victim. King was tried and convicted for the rape. ...

The Court of Appeals of Maryland, on review of King's rape conviction, ruled that the DNA taken when King was booked for the 2009 charge was an unlawful seizure because obtaining and using the cheek swab was an unreasonable search of the person. It set the rape conviction aside. This Court granted certiorari and now reverses the judgment of the Maryland court.

When King was arrested on April 10, 2009 ... he was processed for detention. ... Booking personnel used a cheek swab to take the DNA sample from him pursuant to provisions of the Maryland DNA Collection Act (or Act).

. ...

Both federal and state courts have reached differing conclusions as to whether the Fourth Amendment prohibits the collection and analysis of a DNA sample from persons arrested, but not yet convicted, on felony charges. This Court granted certiorari to address the question. ...

The advent of DNA technology is one of the most significant scientific advancements of our era. ... Since the first use of forensic DNA analysis to catch a rapist and murderer in England in 1986, see J. Butler, Fundamentals of Forensic DNA Typing 5 (2009) (hereinafter Butler), law enforcement, the defense bar, and the courts have acknowledged DNA testing's "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009).

The Act authorizes Maryland law enforcement authorities to collect DNA samples from "an individual who is charged with ... a crime of violence or an attempt to commit a crime of violence; or ... burglary or an attempt to commit burglary." Maryland law defines a crime of violence to include murder, rape, first-degree assault ... and a variety of other serious crimes. Once taken, a DNA sample may not be processed or placed in a database before the individual is arraigned (unless the individual consents). It is at this point that a judicial officer ensures that there is probable cause to detain the arrestee on a qualifying serious offense. ...

The Act also limits the information added to a DNA database and how it may be used. Specifically, "[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored." No purpose other than identification is permissible. ... The officers involved in taking and analyzing respondent's DNA sample complied with the Act in all respects.

Respondent's DNA was collected in this case using a common procedure known as a "buccal swab." "Buccal cell collection involves wiping a small piece of filter paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells." Butler 86. ...

Respondent's identification as the rapist resulted in part through the operation of a national project to standardize collection and storage of DNA profiles. Authorized by Congress ... the Combined DNA Index System (CODIS) connects DNA laboratories at the local, state, and national level. ...

. ...

All 50 States require the collection of DNA from felony convicts, and respondent does not dispute the validity of that practice. ... At issue is a standard, expanding technology already in widespread use throughout the Nation.

Although the DNA swab procedure used here presents a question the Court has not yet addressed, the framework for deciding the issue is well established. The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It can be agreed that using a buccal swab ... is a search. ...

. ...

To say that the Fourth Amendment applies here is the beginning point, not the end of the analysis. ... "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' " *Vernonia School Dist. 47J v. Acton*, (1995). In giving content to the inquiry whether an intrusion is reasonable,

the Court has preferred "some quantum of individualized suspicion ... [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*,(1976). ...

In some circumstances, such as "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Illinois v. McArthur*, (2001). ...

The instant case can be addressed with this background. The Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal. ... The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of officers whose perspective might be "colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.' " *Terry*, (quoting *Johnson v. United States*, (1948)). ...

Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. ... An assessment of reasonableness to determine the lawfulness of requiring this class of arrestees to provide a DNA sample is central to the instant case.

The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. ... Even in that context, the Court has been clear that individual suspicion is not necessary. ...

The "routine administrative procedure[s] at a police station house incident to booking and jailing the suspect" derive from different origins and have different constitutional justifications than, say, the search of a place, *Illinois v. Lafayette*, (1983). ... When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests.

First, "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, (2004). An individual's identity is more than just his name or Social Security number, and the government's interest in identification goes beyond ensuring that the proper name is typed on the indictment. Identity has never been considered limited to the name on the arrestee's birth certificate. ...

A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention. ... They use routine and accepted means as varied as comparing the suspect's booking photograph to sketch artists' depictions of persons of interest, showing his mugshot to potential witnesses, and of course making a computerized comparison of the arrestee's fingerprints. ... In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.

The task of identification necessarily entails searching public and police records based on the identifying information. ... The DNA collected from arrestees is an irrefutable identification of the person from whom it was taken. ... A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid

possession. In this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect. ... It uses a different form of identification than a name or fingerprint, but its function is the same.

Second, law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate "risks for facility staff, for the existing detainee population, and for a new detainee." *Florence*. DNA identification can provide untainted information to those charged with detaining suspects. ...

. ...

Third, looking forward to future stages of criminal prosecution, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials." *Bell v. Wolfish*, (1979). A person who is arrested for one offense but knows that he has yet to answer for some past crime may be more inclined to flee the instant charges, lest continued contact with the criminal justice system expose one or more other serious offenses. ...

Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. ... DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness. ...

. ...

Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense. ...

. ...

Perhaps the most direct historical analogue to the DNA technology used to identify respondent is the familiar practice of fingerprinting arrestees. From the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of "the administrative steps incident to arrest." *County of Riverside v. McLaughlin*, (1991).

. ...

By the middle of the 20th century, it was considered "elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes." *Smith v. United States*, (CADC 1963) (Burger, J.). ...

DNA identification is an advanced technique superior to fingerprinting in many ways. ... The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, and DNA is a markedly more accurate form of identifying arrestees. ...

The respondent's primary objection to this analogy is that DNA identification is not as fast as fingerprinting, and so it should not be considered to be the 21st-century equivalent. ... The question of how long it takes to process identifying information obtained from a valid search goes only to the efficacy of the search for its purpose of prompt identification,

not the constitutionality of the search. ... Just as fingerprinting was constitutional. ... DNA identification of arrestees is a permissible tool of law enforcement today. ... By identifying not only who the arrestee is ... the police can ensure that they have the proper person under arrest and that they have made the necessary arrangements for his custody. ...

. ...

By comparison to this substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one. ...

The reasonableness of any search must be considered in the context of the person's legitimate expectations of privacy. ...

The expectations of privacy of an individual taken into police custody "necessarily [are] of a diminished scope.". ...

In this critical respect, the search here at issue differs from the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens. ... When the police stop a motorist at a checkpoint ... they intrude upon substantial expectations of privacy. So the Court has insisted on some purpose other than "to detect evidence of ordinary criminal wrongdoing" to justify these searches in the absence of individualized suspicion. *Edmond*. Once an individual has been arrested on probable cause for a dangerous offense ... his or her expectations of privacy and freedom from police scrutiny are reduced. ...

. ...

In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. ...

The judgment of the Court of Appeals of Maryland is reversed.

It is so ordered.

Justice Scalia, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join, dissenting.

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception. ... Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.

It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to identify those in the State's custody, taxes the credulity of the credulous. And the Court's comparison of Maryland's DNA searches to other techniques, such as fingerprinting, can seem apt only to those who know no more than today's opinion has chosen to tell them about how those DNA searches actually work.

. ...

. ... No matter the degree of invasiveness, suspicionless searches are never allowed if their principal end is ordinary crime-solving. A search incident to arrest either serves other ends (such as officer safety, in a search for weapons) or is not suspicionless (as when there is reason to believe the arrestee possesses evidence relevant to the crime of arrest).

Sensing (correctly) that it needs more, the Court elaborates at length the ways that the search here served the special purpose of "identifying" King. But that seems to me quite wrong—unless what one means by "identifying" someone is "searching for evidence that he has committed crimes unrelated to the crime of his arrest." At points the Court does appear to use "identifying" in that peculiar sense—claiming, for example, that knowing "an arrestee's past conduct is essential to an assessment of the danger he poses." If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search. ...

The portion of the Court's opinion that explains the identification rationale is strangely silent on the actual workings of the DNA search at issue here. To know those facts is to be instantly disabused of the notion that what happened had anything to do with identifying King.

King was arrested on April 10, 2009, on charges unrelated to the case before us. That same day, April 10, the police searched him and seized the DNA evidence at issue here. What happened next? Reading the Court's opinion, particularly its insistence that the search was necessary to know "who [had] been arrested," one might guess that King's DNA was swiftly processed and his identity thereby confirmed. ...

Nothing could be further from the truth. Maryland officials did not even begin the process of testing King's DNA that day. ... ... Maryland law forbids them to do so. A "DNA sample collected from an individual charged with a crime ... *may not* be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date." Md. Pub. Saf. Code Ann. §2–504(d)(1) (Lexis 2011) (emphasis added). And King's first appearance in court was not until three days after his arrest. (I suspect, though, that they did not wait three days to ask his name or take his fingerprints.)

This places in a rather different light the Court's solemn declaration that the search here was necessary so that King could be identified. ... If the purpose of this Act is to assess "whether [King] should be released on bail," why would it possibly forbid the DNA testing process to begin until King was arraigned?. ... The truth, known to Maryland and increasingly to the reader: this search had nothing to do with establishing King's identity.

It gets worse. King's DNA sample was not received by the Maryland State Police's Forensic Sciences Division until April 23, 2009—two weeks after his arrest. ... It was not until August 4, 2009—four months after King's arrest—that the forwarded sample ... was matched with a sample taken from the scene of an unrelated crime years earlier.

A more specific description of exactly what happened at this point illustrates why, by definition, King could not have been identified by this match. The FBI's DNA database (known as CODIS) consists of two distinct collections. One of them, the one to which King's DNA was submitted, consists of DNA samples taken from known convicts or arrestees. I will refer to this as the "Convict and Arrestee Collection." The other collection consists of samples taken from crime scenes; I will refer to this as the "Unsolved Crimes Collection." The Convict and Arrestee Collection stores "no names

or other personal identifiers of the offenders, arrestees, or detainees." Rather, it contains only the DNA profile itself, the name of the agency that submitted it, the laboratory personnel who analyzed it, and an identification number for the specimen. This is because the submitting state laboratories are expected already to know the identities of the convicts and arrestees from whom samples are taken. (And, of course, they do.)

Moreover, the CODIS system works by checking to see whether any of the samples in the Unsolved Crimes Collection match any of the samples in the Convict and Arrestee Collection. That is sensible, if what one wants to do is solve those cold cases, but note what it requires: that the identity of the people whose DNA has been entered in the Convict and Arrestee Collection already be known. If one wanted to identify someone in custody using his DNA, the logical thing to do would be to compare that DNA against the Convict and Arrestee Collection. ... But that is not what was done. And that is because this search had nothing to do with identification.

In fact, if anything was "identified" at the moment that the DNA database returned a match, it was not King. ... Rather, what the August 4 match "identified" was the previously-taken sample from the earlier crime. That sample was genuinely mysterious to Maryland. ...

That taking DNA samples from arrestees has nothing to do with identifying them is confirmed not just by actual practice (which the Court ignores) but by the enabling statute itself (which the Court also ignores). The Maryland Act at issue has a section helpfully entitled "Purpose of collecting and testing DNA samples." (One would expect such a section to play a somewhat larger role in the Court's analysis of the Act's purpose—which is to say, at least some role.) That provision lists five purposes for which DNA samples may be tested. By this point, it will not surprise the reader to learn that the Court's imagined purpose is not among them.

Instead, the law provides that DNA samples are collected and tested, as a matter of Maryland law, "as part of an official investigation into a crime.". ... That is certainly how everyone has always understood the Maryland Act until today. ... Even this Court's order staying the decision below states that the statute "provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population"—with, unsurprisingly, no mention of identity.(Roberts, C. J., in chambers).

More devastating still for the Court's "identification" theory, the statute does enumerate two instances in which a DNA sample may be tested for the purpose of identification: "to help identify *human remains*," (emphasis added), and "to help identify *missing individuals*," (emphasis added). No mention of identifying arrestees. ...

The Maryland regulations implementing the Act confirm what is now monotonously obvious: These DNA searches have nothing to do with identification. For example, if someone is arrested and law enforcement determines that "a convicted offender Statewide DNA Data Base sample already exists" for that arrestee, "the agency is not required to obtain a new sample." But how could the State know if an arrestee has already had his DNA sample collected, if the point of the sample is to identify who he is? Of course, if the DNA sample is instead taken in order to investigate crimes, this restriction makes perfect sense: Having previously placed an identified someone's DNA on file to check against available crime-scene evidence, there is no sense in going to the expense of taking a new sample. Maryland's regulations further require that the "individual collecting a sample ... verify the identity of the individual from whom a sample is taken by

name and, if applicable, State identification (SID) number." (But how?) And after the sample is taken, it continues to be identified by the individual's name, fingerprints, etc., —rather than (as the Court believes) being used to identify individuals. ("Records and specimen information shall *be identified by* ... [the] [n]ame of the donor" (emphasis added)).

So, to review: DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test. When they are tested, they are checked against the Unsolved Crimes Collection—rather than the Convict and Arrestee Collection, which could be used to identify them. The Act forbids the Court's purpose (identification), but prescribes as its purpose what our suspicionless-search cases forbid ("official investigation into a crime"). Against all of that, it is safe to say that if the Court's identification theory is not wrong, there is no such thing as error.

. ...

. ... The issue before us is not whether DNA can some day be used for identification; nor even whether it can today be used for identification; but whether it was used for identification here.

Today, it can fairly be said that fingerprints really are used to identify people—so well, in fact, that there would be no need for the expense of a separate, wholly redundant DNA confirmation of the same information. What DNA adds—what makes it a valuable weapon in the law-enforcement arsenal—is the ability to solve unsolved crimes. ...

. ...

The most regrettable aspect of the suspicionless search that occurred here is that it proved to be quite unnecessary. All parties concede that it would have been entirely permissible, as far as the Fourth Amendment is concerned, for Maryland to take a sample of King's DNA as a consequence of his conviction for second-degree assault. So the ironic result of the Court's error is this: The only arrestees to whom the outcome here will ever make a difference are those who have been acquitted of the crime of arrest (so that their DNA could not have been taken upon conviction). ...

Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane ... applies for a driver's license, or attends a public school. ... But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.

I therefore dissent, and hope that today's incursion upon the Fourth Amendment ... will some day be repudiated.

Excerpted by Alex Nobiletti

Exclusionary Rule and Exceptions

Wolf v. Colorado

338 U.S. 25 (1949)

> Vote: 6-3
> Opinion: J. Frankfurter
> Decision: Affirmed
> Majority: J. Frankfurter, joined by J. Vinson, J. Reed, J. Jackson, J. Burton
> Concurring: J. Black
> Dissent: J. Murphy, joined by J. Rutledge, and J. Douglas

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The precise question for consideration is this: Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States* (1914)?...

The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration ...

For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in Palko v. Connecticut, supra, 302 U. S. 319. That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to name only the dead in rejecting the suggestion that that the Due Process Clause incorporated the original Bill of Rights ...

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights ...

The security of one's privacy against arbitrary intrusion by the police-which is at the core of the Fourth Amendment-is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the

States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples ...

Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective ... We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.

We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be presented should Congress under § 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States.

Affirmed.

Excerpted by Kimberly Clairmont

Mapp v. Ohio

367 U.S. 643 (1961)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: Clark, joined by Warren, Black, Douglas, and Brennan
> Concurrence: Black
> Concurrence: Douglas
> Concurrence: Stewart (in judgment)
> Dissent: Harlan, joined by Frankfurter and Whittaker

MR. JUSTICE CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code. ... [T]he Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence ... seized during an unlawful search of defendant's home. ... "

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home.". ... [T]he officers knocked on the door and demanded entrance, but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers ... would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. ... Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial, no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the methods' employed to obtain the [evidence] ... were such as to 'offend "a sense of justice,"'" but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant."

The State says that, even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf v. Colorado*, (1949), in which this Court did indeed hold "that, in a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." On this appeal ... it is urged once again that we review that holding. ...

[I]n *Weeks v. United States*, (1914), stated that "the Fourth Amendment ... put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] ... forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. ... "

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment ... might as well be stricken from the Constitution. ... "

. ... The Court, in *Olmstead v. United States*, (1928), in unmistakable language restated the *Weeks* rule: "The striking outcome of the *Weeks* ... really forbade its introduction if obtained by government officers through a violation of the Amendment."

. ...

In 1949, 35 years after *Weeks* was announced, this Court, in *Wolf v. Colorado*, again for the first time, discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said: "[W]e have no hesitation in saying that, were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment."

Nevertheless, after declaring that the "security of one's privacy against arbitrary intrusion by the police" is "implicit in the concept of ordered liberty' and, as such, enforceable against the States through the Due Process Clause," *Palko v. Connecticut*, (1937), and announcing that it "stoutly adhere[d]" to the *Weeks* decision, the Court decided that the *Weeks* exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." The Court's reasons for not considering essential to the right to privacy ... were bottomed on factual considerations.

... [W]e will consider the current validity of the factual grounds upon which *Wolf* was based.

... [P]rior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those ... have wholly or partly adopted or adhered to the *Weeks* rule. Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions. ... " *People v. Cahan*, (1955). In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have been afforded "the right to privacy." The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*.

Likewise, time has set its face against what *Wolf* called the "weighty testimony" of *People v. Defore*, (1926). There, Justice (then Judge) Cardozo, rejecting adoption of the *Weeks* exclusionary rule in New York, had said that "[t]he Federal rule as it stands is either too strict or too lax." However, the force of that reasoning has been largely vitiated by later decisions of this Court. These include the recent discarding of the "silver platter" doctrine which allowed federal judicial use of evidence seized in violation of the Constitution by state agents, *Elkins v. United States* (1960). ... Because there can be no fixed formula, we are admittedly met with "recurring questions of the reasonableness of searches," but less is not to be expected when dealing with a Constitution. ...

It therefore plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949 ... could not, in any analysis, now be deemed controlling.

Some five years after *Wolf*, in answer to a plea made here Term after Term that we overturn its doctrine on applicability of the *Weeks* exclusionary rule. ...

And only last Term, after again carefully reexamining the *Wolf* doctrine in *Elkins v. United States* ... [t]he Court concluded that ... all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. Today we are ... led ... to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then, just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention. ... Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches–state or federal–it was logically and constitutionally necessary that the exclusion doctrine–an essential part of the right to privacy–be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. ...

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy ... would stand in marked contrast to all other rights declared as "basic to a free society." *Wolf v. Colorado*. This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. And nothing could be more certain than that, when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?. ...

. ... Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus, the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. ... In nonexclusionary States, federal officers, being human, were by it invited to, and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. ...

. ... Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. *Byars v. United States*, (1927).

There are those who say, as did Justice (then Judge) Cardozo, that, under our constitutional exclusionary doctrine, "[t]he criminal is to go free because the constable has blundered." *People v. Defore*. In some cases, this will undoubtedly be the result. But, as was said in *Elkins*, "there is another consideration–the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. ... Nor can it lightly be assumed that ... adoption of the exclusionary rule fetters law enforcement. ... The Court noted that "The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective. ... The movement towards the rule of exclusion has been halting, but seemingly inexorable."

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK, concurring.

. ...

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that, when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies, but actually requires, the exclusionary rule.

. ...

. ... The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law, and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the *Boyd* doctrine as controlling in this state case, and to join the Court's judgment and opinion, which are in accordance with that constitutional doctrine.

MR. JUSTICE DOUGLAS, concurring.

Though I have joined the opinion of the Court, I add a few words. This criminal proceeding started with a lawless search and seizure. The police entered a home forcefully, and seized documents that were later used to convict the occupant of a crime.

She lived alone with her fifteen-year-old daughter in the second-floor flat of a duplex in Cleveland. At about 1:30 in the afternoon of May 23, 1957, three policemen arrived at this house. They rang the bell, and the appellant, appearing at her window, asked them what they wanted. According to their later testimony, the policemen had come to the house on information from "a confidential source that there was a person hiding out in the home who was wanted for questioning in connection with a recent bombing." To the appellant's question, however, they replied only that they wanted to question her, and would not state the subject about which they wanted to talk.

The appellant, who had retained an attorney in connection with a pending civil matter, told the police she would call him to ask if she should let them in. On her attorney's advice, she told them she would let them in only when they produced a valid search warrant. For the next two and a half hours, the police laid siege to the house. At four o'clock, their number was increased to at least seven. Appellant's lawyer appeared on the scene, and one of the policemen told him that they now had a search warrant, but the officer refused to show it. Instead, going to the back door, the officer first tried to kick it in and, when that proved unsuccessful, he broke the glass in the door and opened it from the inside.

The appellant, who was on the steps going up to her flat, demanded to see the search warrant, but the officer refused to let her see it, although he waved a paper in front of her face. She grabbed it and thrust it down the front of her dress. The policemen seized her, took the paper from her, and had her handcuffed to another officer. She was taken upstairs, thus bound, and into the larger of the two bedrooms in the apartment; there she was forced to sit on the bed. Meanwhile, the officers entered the house and made a complete search of the four rooms of her flat and of the basement of the house.

. ...

We held in *Wolf v. Colorado*, that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the Weeks case was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But, with all respect, it was not the voice of reason or principle.

. ...

. ... The immediate result was a storm of constitutional controversy which only today finds its end. I believe that this is an appropriate case in which to put an end to the asymmetry which Wolf imported into the law. It is an appropriate case because the facts it presents show–as would few other cases–the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person.

. ...

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, dissenting.

In overruling the *Wolf* case, the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for stare decisis, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that, I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new rule which now replaces it.

From the Court's statement of the case, one would gather that the central, if not controlling, issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution, an issue which would, of course, face us with the need for reexamining *Wolf*. However, such is not the situation. For, although that question was indeed raised here and below among appellant's subordinate points, the new and pivotal issue brought to the Court by this appeal is whether § 2905.34 of the Ohio Revised Code, making criminal the mere knowing possession or control of obscene material, and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment. That was the principal issue which was decided by the Ohio Supreme Court, which was tendered by appellant's Jurisdictional Statement, and which was briefed and argued in this Court.

. ...

The action of the Court finds no support in the rule that decision of Constitutional issues should be avoided wherever possible. For, in overruling *Wolf*, the Court, instead of passing upon the validity of Ohio's § 2905.34, has simply chosen between two Constitutional questions. Moreover, I submit that it has chosen the more difficult and less appropriate of the two questions. The Ohio statute which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control (with exceptions not here applicable) and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene, surely presents a Constitutional question which is both simpler and less far-reaching than the question which the Court decides today. It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied.

. ...

Essential to the majority's argument against *Wolf* is the proposition that the rule of *Weeks v. United States* [(1914)], excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts. Although I entertain considerable doubt as to the soundness of this foundational proposition of the majority, *Wolf v. Colorado*, (concurring opinion), I shall assume, for present purposes, that the *Weeks* rule "is of constitutional origin."

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is "part and parcel" of the Fourth Amendment; (2) *Wolf*

held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment, and (3) it is therefore "logically and constitutionally necessary" that the *Weeks* exclusionary rule should also be enforced against the States.

This reasoning ultimately rests on the unsound premise that, because *Wolf* carried into the States ... it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty," and as such are enforceable against the States. For me, this does not follow at all.

. ...

A state conviction comes to us as the complete product of a sovereign judicial system. Typically, a case will have been tried in a trial court, tested in some final appel late court, and will go no further. In the comparatively rare instance when a conviction is reviewed by us on due process grounds, we deal then with a finished product in the creation of which we are allowed no hand, and our task, far from being one of over-all supervision, is, speaking generally, restricted to a determination of whether the prosecution was constitutionally fair. ... I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. ...

. ...

Excerpted by Alex Nobiletti

United States v. Leon

468 U.S. 897 (1984)

> Vote: 6-3
> Decision: Reversed
> Majority: White, joined by Burger, Blackmun, Powell, Rehnquist, and O'Connor
> Concurring: Blackmun
> Dissent: Brennan, joined by Marshall
> Dissent: Stevens

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case ... evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. To resolve this question, we must consider once again the tension between the sometimes competing goals of, on the one hand, deterring

official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are "acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman v. United States*, (1969).

In August, 1981, a confidential informant of unproven reliability informed an officer of the Burbank Police Department that two persons known to him as "Armando" and "Patsy" were selling large quantities of cocaine and methaqualone from their residence. ... He further declared that "Armando" and "Patsy" generally kept only small quantities of drugs at their residence and stored the remainder at another location in Burbank.

On the basis of this information, the Burbank police initiated an extensive investigation. ... During the course of the investigation, officers observed an automobile belonging to respondent Ricardo Del Castillo, who had previously been arrested for possession of 50 pounds of marihuana, arrive. ... The driver of that car entered the house, exited shortly thereafter carrying a small paper sack, and drove away. A check of Del Castillo's probation records led the officers to respondent Alberto Leon, whose telephone number Del Castillo had listed as his employer's. Leon had been arrested in 1980 on drug charges, and a companion had informed the police at that time that Leon was heavily involved in the importation of drugs into this country. Before the current investigation began, the Burbank officers had learned that an informant had told a Glendale police officer that Leon stored a large quantity of methaqualone at his residence in Glendale. ...

. ... Officer Cyril Rombach of the Burbank Police Department, an experienced and well-trained narcotics investigator, prepared an application for a warrant to search ... for an extensive list of items believed to be related to respondents' drug trafficking activities. Officer Rombach's extensive application was reviewed by several Deputy District Attorneys.

A facially valid search warrant was issued. ... The ensuing searches produced large quantities of drugs. ... Respondents were indicted by a grand jury in the District Court for the Central District of California and charged with conspiracy to possess and distribute cocaine and a variety of substantive counts.

The respondents then filed motions to suppress the evidence seized pursuant to the warrant. The District Court ... concluded that the affidavit was insufficient to establish probable cause, but did not suppress all of the evidence. ... In response to a request from the Government, the court made clear that Officer Rombach had acted in good faith, but it rejected the Government's suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable, good faith reliance on a search warrant. ... To the extent that the affidavit set forth facts demonstrating the basis of the informant's knowledge of criminal activity, the information included was fatally stale. The affidavit, moreover, failed to establish the informant's credibility. Accordingly, the Court of Appeals concluded that the information provided by the informant was inadequate under both prongs of the two-part test established in *Aguilar v. Texas*, (1964), and *Spinelli v. United States*, (1969). The officers' independent investigation neither cured the staleness nor corroborated the details of the informant's declarations. ... Because these deficiencies had not been cured by the police investigation, the District Court properly suppressed the fruits of the search. The Court of Appeals refused the Government's invitation to recognize a good faith exception to the Fourth Amendment exclusionary rule.

The Government's petition for certiorari ... presented only the question

"[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good faith reliance on a search warrant that is subsequently held to be defective."

We granted certiorari to consider the propriety of such a modification. ...

We have concluded that, in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions. Accordingly, we reverse the judgment of the Court of Appeals.

Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment ... or that the rule is required by the conjunction of the Fourth and Fifth Amendments. These implications need not detain us long. The Fifth Amendment theory has not withstood critical analysis or the test of time ... and the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone v. Powell*, (1976).

The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and ... makes clear that the use of fruits of a past unlawful search or seizure "work[s] no new Fourth Amendment wrong." *United States v. Calandra*, (1974). The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." *Stone v. Powell* [(1976)], (WHITE, J., dissenting). The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*.

. ...

... [T]he ... question is currently before us ... must be resolved by weighing the costs and benefits of preventing the use ... of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern.

. ... An objectionable collateral consequence of this interference with the criminal justice system's truthfinding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and administration of justice." Accordingly,

"[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

United States v. Calandra; *United States v. Janis*, (1976).

. ...

In *Stone v. Powell*, the Court emphasized the costs of the exclusionary rule, expressed its view that limiting the circumstances under which Fourth Amendment claims could be raised ... would not reduce the rule's deterrent effect, and held

that a state prisoner who has been afforded a full and fair opportunity to litigate a Fourth Amendment claim may not obtain federal habeas relief on the ground that unlawfully obtained evidence had been introduced at his trial. ... Similarly, in *United States v. Janis* [(1976)], we permitted the use in federal civil proceedings of evidence illegally seized by state officials, since the likelihood of deterring police misconduct through such an extension of the exclusionary rule was insufficient to outweigh its substantial social costs. In so doing, we declared that,

"[i]f ... the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted."

As cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that "anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Alderman v. United States* [(1968)]. ...

. ...

When considering the use of evidence obtained in violation of the Fourth Amendment ... we have declined to adopt a per se or "but for" rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest. ... The perception underlying these decisions ... is a product of considerations relating to the exclusionary rule and the constitutional principles it is designed to protect. In short, the "dissipation of the taint" concept that the Court has applied in deciding whether exclusion is appropriate in a particular case

"attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost."

Brown v. Illinois [(1975)], (POWELL, J., concurring in part). Not surprisingly in view of this purpose, an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus.

. ...

... [T]he balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us. ... [O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case in chief.

Because a search warrant

"provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'"

United States v. Chadwick, (1977) (quoting *Johnson v. United States*, (1948)). ...

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to "perform his neutral and detached'

function and not serve merely as a rubber stamp for the police." *Aguilar v. Texas* [(1964)]. ... Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." *Illinois v. Gates, [(1983)]*.

. ...

Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

Only in the first of these three situations, however, has the Court set forth a rationale for suppressing evidence obtained pursuant to a search warrant; in the other areas, it has simply excluded such evidence without considering whether Fourth Amendment interests will be advanced. To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates in these areas, their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment, or that lawlessness among these actors requires application of the extreme sanction of exclusion.

Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate. Many of the factors that indicate that the exclusionary rule cannot provide an effective "special" or "general" deterrent for individual offending law enforcement officers apply as well to judges or magistrates. And, to the extent that the rule is thought to operate as a "systemic" deterrent on a wider audience, it clearly can have no such effect on individuals empowered to issue search warrants. Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments. One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or "magistrate shopping," and thus promotes the ends of the Fourth Amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage officers to scrutinize more closely the form of the warrant, and to point out suspected judicial errors. We find such arguments speculative, and conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis, and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.

We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. ...

. ... In short, where the officer's conduct is objectively reasonable,

"excluding the evidence will not further the ends of the exclusionary rule in any appreciable way. ... "

Stone v. Powell, (WHITE, J., dissenting).

This is particularly true, we believe, when an officer, acting with objective good faith, has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality, and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. ... Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. ...

. ...

. ... The good faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.

Nor are we persuaded that application of a good faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state. ...

. ...

Having determined that the warrant should not have issued, the Court of Appeals understandably declined to adopt a modification of the Fourth Amendment exclusionary rule that this Court had not previously sanctioned. ... We have now reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. Our conclusion is that the rule's purposes will only rarely be served by applying it in such circumstances.

In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. Only respondent Leon has contended that no reasonably well trained

police officer could have believed that there existed probable cause to search his house; significantly, the other respondents advance no comparable argument. ... Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.

Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Ten years ago, in *United States v. Calandra*, (1974), I expressed the fear that the Court's decision

"may signal that a majority of my colleagues have positioned themselves to reopen the door [to evidence secured by official lawlessness] still further and abandon altogether the exclusionary rule in search and seizure cases."

(dissenting opinion). Since then, in case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete. That today's decisions represent the piece de resistance of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case in chief of illegally obtained evidence against the individual whose rights have been violated — a result that had previously been thought to be foreclosed.

The Court seeks to justify this result on the ground that the "costs" of adhering to the exclusionary rule in cases like those before us exceed the "benefits." But the language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability. It suggests that not only constitutional principle but also empirical data support the majority's result. When the Court's analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the "costs" of excluding illegally obtained evidence loom to exaggerated heights, and where the "benefits" of such exclusion are made to disappear with a mere wave of the hand.

The majority ignores the fundamental constitutional importance of what is at stake here. While the machinery of law enforcement, and indeed the nature of crime itself, have changed dramatically since the Fourth Amendment became part of the Nation's fundamental law in 1791, what the Framers understood then remains true today — that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy. ...

If those independent tribunals lose their resolve, however, as the Court has done today, and give way to the seductive call of expediency, the vital guarantees of the Fourth Amendment are reduced to nothing more than a "form of words." *Silverthorne Lumber Co. v. United States*, (1920).

A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence rationale. ...

. ...

At bottom, the Court's decision turns on the proposition that the exclusionary rule is merely a

"'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right.'"

quoting *United States v. Calandra*. The germ of that idea is found in *Wolf v. Colorado*, (1949). ... The essence of this view, as expressed initially in the *Calandra* opinion and as reiterated today, is that the sole

"purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong ... is *fully accomplished* by the original search without probable cause."

(emphasis added). This reading of the Amendment implies that its proscriptions are directed solely at those government agents who may actually invade an individual's constitutionally protected privacy. The courts are not subject to any direct constitutional duty to exclude illegally obtained evidence, because the question of the admissibility of such evidence is not addressed by the Amendment. This view of the scope of the Amendment relegates the judiciary to the periphery. ...

Such a reading appears plausible, because, as critics of the exclusionary rule never tire of repeating, the Fourth Amendment makes no express provision for the exclusion of evidence secured in violation of its commands. A short answer to this claim, of course, is that many of the Constitution's most vital imperatives are stated in general terms, and the task of giving meaning to these precepts is therefore left to subsequent judicial decisionmaking in the context of concrete cases. The nature of our Constitution, as Chief Justice Marshall long ago explained,

"requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

McCulloch v. Maryland, (1819).

. ...

When that fact is kept in mind, the role of the courts and their possible involvement in the concerns of the Fourth Amendment comes into sharper focus. Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is, in fact, a single governmental action prohibited by the terms of the Amendment. ...

The Court evades this principle by drawing an artificial line between the constitutional rights and responsibilities that are engaged by actions of the police and those that are engaged when a defendant appears before the courts. ...

I submit that such a crabbed reading of the Fourth Amendment casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme. ...

As the Court further explained in *Olmstead v. United States*, (1928):

"The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. ... But in the *Weeks* case and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that ... the evidence thereby obtained could not be received."

That conception of the rule, in my view, is more faithful to the meaning and purpose of the Fourth Amendment and to the judiciary's role as the guardian of the people's constitutional liberties.

. ...

What the Framers of the Bill of Rights sought to accomplish through the express requirements of the Fourth Amendment was to define precisely the conditions under which government agents could search private property so that citizens would not have to depend solely upon the discretion and restraint of those agents for the protection of their privacy. Although the self-restraint and care exhibited by the officers in this case is commendable, that alone can never be a sufficient protection for constitutional liberties. I am convinced that it is not too much to ask that an attentive magistrate take those minimum steps necessary to ensure that every warrant he issues describes with particularity the things that his independent review of the warrant application convinces him are likely to be found in the premises. And I am equally convinced that it is not too much to ask that well-trained and experienced police officers take a moment to check that the warrant they have been issued at least describes those things for which they have sought leave to search. These convictions spring not from my own view of sound criminal law enforcement policy, but are instead compelled by the language of the Fourth Amendment and the history that led to its adoption.

. ... A chief consequence of today's decisions will be to convey a clear and unambiguous message to magistrates that their decisions to issue warrants are now insulated from subsequent judicial review. Creation of this new exception for good faith reliance upon a warrant implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will, from now on, have virtually no consequence: if their decision to issue a warrant was correct, the evidence will be admitted; if their decision was incorrect but the police relied in good faith on the warrant, the evidence will also be admitted. Inevitably, the care and attention devoted to such an inconsequential chore will dwindle. ...

. ... The clear incentive that operated in the past to establish probable cause adequately because reviewing courts would examine the magistrate's judgment carefully has now been so completely vitiated that the police need only show that it was not "entirely unreasonable" under the circumstances of a particular case for them to believe that the warrant they were issued was valid. The long-run effect unquestionably will be to undermine the integrity of the warrant process.

. ...

When the public ... demands that those in government increase their efforts to combat crime, it is all too easy for those government officials to seek expedient solutions. In contrast to such costly and difficult measures as building more prisons, improving law enforcement methods, or hiring more prosecutors and judges to relieve the overburdened court systems in the country's metropolitan areas, the relaxation of Fourth Amendment standards seems a tempting, costless

means of meeting the public's demand for better law enforcement. In the long run, however, we as a society pay a heavy price for such expediency. ... Once lost, such rights are difficult to recover. There is hope, however, that in time this or some later Court will restore these precious freedoms to their rightful place as a primary protection for our citizens against overreaching officialdom.

I dissent.

Excerpted by Alex Nobiletti

Nix v. Williams

467 U.S. 431 (1984)

> Vote: 7-2
> Decision: Reversed and Remanded
> Majority: Burger, joined by White, Blackmun, Powell, Rehnquist, and O'Connor
> Concurrence: White
> Concurrence: Stevens
> Dissent: Brennan, joined by Marshall

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether, at respondent Williams' second murder trial in state court, evidence pertaining to the discovery and condition of the victim's body was properly admitted on the ground that it would ultimately or inevitably have been discovered. ...

On December 24, 1968, 10-year-old Pamela Powers disappeared from a YMCA building in Des Moines, Iowa. ... Shortly after she disappeared, Williams was seen leaving the YMCA carrying a large bundle wrapped in a blanket; a 14-year-old boy who had helped Williams open his car door reported that he had seen "two legs in it and they were skinny and white."

Williams' car was found the next day 160 miles east of Des Moines in Davenport, Iowa. Later, several items of clothing belonging to the child, some of Williams' clothing, and an army blanket like the one used to wrap the bundle that Williams carried out of the YMCA were found at a rest stop on Interstate 80 near Grinnell, between Des Moines and Davenport. A warrant was issued for Williams' arrest.

Police surmised that Williams had left Pamela Powers or her body somewhere between Des Moines and the Grinnell rest stop where some of the young girl's clothing had been found. On December 26, the Iowa Bureau of Criminal Investigation initiated a large-scale search. Two hundred volunteers divided into teams began the search 21 miles east of Grinnell,

covering an area several miles to the north and south of Interstate 80. They moved westward from Poweshiek County, in which Grinnell was located, into Jasper County. Searchers were instructed to check all roads, abandoned farm buildings, ditches, culverts, and any other place in which the body of a small child could be hidden.

Meanwhile, Williams surrendered to local police in Davenport, where he was promptly arraigned. Williams contacted a Des Moines attorney, who arranged for an attorney in Davenport to meet Williams at the Davenport police station. Des Moines police informed counsel they would pick Williams up in Davenport and return him to Des Moines without questioning him. Two Des Moines detectives then drove to Davenport, took Williams into custody, and proceeded to drive him back to Des Moines.

During the return trip, one of the policemen, Detective Leaming, began a conversation with Williams, saying:

"I want to give you something to think about while we're traveling down the road. ... They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is ... and if you get a snow on top of it, you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. ... "

"[A]fter a snow storm, [we may not be] able to find it at all."

Leaming told Williams he knew the body was in the area of Mitchellville — a town they would be passing on the way to Des Moines. He concluded the conversation by saying: "I do not want you to answer me. ... Just think about it. ... "

. ... As they approached Mitchellville, Williams, without any further conversation, agreed to direct the officers to the child's body.

The officers directing the search had called off the search at 3 p. m., when they left the Grinnell Police Department to join Leaming at the rest area. At that time, one search team near the Jasper County-Polk County line was only two and one-half miles from where Williams soon guided Leaming and his party to the body. The child's body was found next to a culvert in a ditch beside a gravel road in Polk County, about two miles south of Interstate 80, and essentially within the area to be searched.

In February, 1969, Williams was indicted for first-degree murder. ...

The jury found Williams guilty of first-degree murder; the judgment of conviction was affirmed by the Iowa Supreme Court. Williams then sought release on habeas corpus in the United States District Court for the Southern District of Iowa. That court concluded that the evidence in question had been wrongly admitted at Williams' trial; a divided panel of the Court of Appeals for the Eighth Circuit agreed.

We granted certiorari ... in ... *Brewer v. Williams*, (1977). This Court's opinion noted, however, that although Williams' incriminating statements could not be introduced into evidence at a second trial, evidence of the body's location and condition

"might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams."

At Williams' second trial in 1977 in the Iowa court ... evidence of the condition of her body as it was found, articles and photographs of her clothing, and the results of post mortem medical and chemical tests on the body were admitted. The trial court concluded that the State had proved by a preponderance of the evidence that, if the search had not been suspended and Williams had not led the police to the victim, her body would have been discovered "*within a short time*" in essentially the same condition as it was actually found. The trial court also ruled that, if the police had not located the body,

"the search would clearly have been taken up again where it left off, given the extreme circumstances of this case, and the body would [have] been found *in short order*."

(emphasis added).

. ... The challenged evidence was admitted, and the jury again found Williams guilty of first-degree murder; he was sentenced to life in prison.

On appeal, the Supreme Court of Iowa again affirmed. That court held that there was, in fact, a "hypothetical independent source" exception to the exclusionary rule. ...

. ...

In 1980, Williams renewed his attack on the state court conviction by seeking a writ of habeas corpus in the United States District Court for the Southern District of Iowa. The District Court conducted its own independent review of the evidence and concluded, as had the state courts, that the body would inevitably have been found by the searchers. ...

The Court of Appeals for the Eighth Circuit reversed; an equally divided court denied rehearing en banc. That court assumed ... that there is an inevitable discovery exception to the exclusionary rule, and that the Iowa Supreme Court correctly stated that exception to require proof that the police did not act in bad faith and that the evidence would have been discovered absent any constitutional violation. In reversing the District Court's denial of habeas relief, the Court of Appeals stated:

"We hold that the State has not met the first requirement. It is therefore unnecessary to decide whether the state courts' finding that the body would have been discovered anyway is fairly supported by the record."

. ...

We granted the State's petition for certiorari, and we reverse.

The Iowa Supreme Court correctly stated that the "vast majority" of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule. We are now urged to adopt and apply the so-called ultimate or inevitable discovery exception to the exclusionary rule.

Williams contends that evidence of the body's location and condition is "fruit of the poisonous tree," i.e., the "fruit" or product of Detective Leaming's plea to help the child's parents give her "a Christian burial," which this Court had already held equated to interrogation. He contends that admitting the challenged evidence violated the Sixth Amendment whether it would have been inevitably discovered or not. Williams also contends that, if the inevitable discovery doctrine is constitutionally permissible, it must include a threshold showing of police good faith.

. ...

Wong Sun v. United States, (1963), extended the exclusionary rule to evidence that was the indirect product or "fruit" of unlawful police conduct, but there again the Court emphasized that evidence that has been illegally obtained need not always be suppressed, stating:

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for the illegal actions of the police*. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality, or instead by means sufficiently distinguishable to be purged of the primary taint."

(emphasis added) (quoting J. Maguire, Evidence of Guilt 221 (1959)). The Court thus pointedly negated the kind of good faith requirement advanced by the Court of Appeals in reversing the District Court.

. ...

The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

. ...

It is clear that the cases implementing the exclusionary rule "begin with the premise that the challenged evidence is, *in some sense*, the product of illegal governmental activity." *United States v. Crews*, (1980) (emphasis added). Of course, this does not end the inquiry. If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means — here, the volunteers' search — then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.

The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a worse position than they would have been in if no unlawful conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach.

. ... A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered. ... On the other hand, when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence ... also lessen the likelihood that the ... inevitable discovery exception will promote police misconduct. In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good faith requirement might produce.

Williams contends that, because he did not waive his right to the assistance of counsel, the Court may not balance competing values in deciding whether the challenged evidence was properly admitted. ... We disagree.

Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. The Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination. Here, however, Detective Leaming's conduct did nothing to impugn the reliability of the evidence in question. ... No one would seriously contend that the presence of counsel in the police car when Leaming appealed to Williams' decent human instincts would have had any bearing on the reliability of the body as evidence. Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

Nor would suppression ensure fairness on the theory that it tends to safeguard the adversary system of justice. To assure the fairness of trial proceedings, this Court has held that assistance of counsel must be available at pretrial confrontations. ... Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct. Williams' argument that inevitable discovery constitutes impermissible balancing of values is without merit.

. ...

. ... But when, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint, and the evidence is admissible.

The Court of Appeals did not find it necessary to consider whether the record fairly supported the finding that the volunteer search party would ultimately or inevitably have discovered the victim's body. However, three courts independently reviewing the evidence have found that the body of the child inevitably would have been found by the searchers. Williams challenges these findings. ...

. ... There was testimony that it would have taken an additional three to five hours to discover the body if the search had continued; the body was found near a culvert, one of the kinds of places the teams had been specifically directed to search.

On this record, it is clear that the search parties were approaching the actual location of the body, and we are satisfied ... the body inevitably would have been found. The evidence asserted by Williams as newly discovered ... does not demonstrate that the material facts were inadequately developed in the suppression hearing in state court, or that Williams was denied a full, fair, and adequate opportunity to present all relevant facts at the suppression hearing.

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

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In *Brewer v. Williams*, (1977), we held that the respondent's state conviction for first-degree murder had to be set aside because it was based in part on statements obtained from the respondent in violation of his right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments. At the same time, we noted that,

"[w]hile neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event."

To the extent that today's decision adopts this "inevitable discovery" exception to the exclusionary rule, it simply acknowledges a doctrine that is akin to the "independent source" exception first recognized by the Court in *Silverthorne Lumber Co. v. United States*, (1920). In particular, the Court concludes that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred. As has every Federal Court of Appeals previously addressing this issue, I agree that, in these circumstances, the "inevitable discovery" exception to the exclusionary rule is consistent with the requirements of the Constitution.

In its zealous efforts to emasculate the exclusionary rule, however, the Court loses sight of the crucial difference between the "inevitable discovery" doctrine and the "independent source" exception from which it is derived. When properly applied, the "independent source" exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means. It therefore does no violence to the constitutional protections that the exclusionary rule is meant to enforce. The "inevitable discovery" exception is likewise compatible with the Constitution, though it differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed.

In my view, this distinction should require that the government satisfy a heightened burden of proof before it is allowed to use such evidence. The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule. To ensure that this hypothetical find-

ing is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence before concluding that the government had met its burden of proof on this issue. Increasing the burden of proof serves to impress the factfinder with the importance of the decision, and thereby reduces the risk that illegally obtained evidence will be admitted. Because the lower courts did not impose such a requirement, I would remand this case for application of this heightened burden of proof by the lower courts in the first instance. I am therefore unable to join either the Court's opinion or its judgment.

Excerpted by Alex Nobiletti

Hudson v. Michigan

547 U.S. 586 (2006)

> Vote: 5-4
> Decision: Affirmed
> Majority: Scalia with respect to Parts I, II, and III, joined by Roberts, Kennedy, Thomas, and Alito and Parts IV, joined by Roberts, Thomas, and Alito
> Concurrence in part: Kennedy
> Dissent: Breyer, joined by Stevens, Souter and Ginsburg

Justice Scalia delivered the opinion of the Court.

We decide whether violation of the "knock-and-announce" rule requires the suppression of all evidence found in the search.

Police obtained a warrant authorizing a search for drugs and firearms at the home of petitioner Booker Hudson. They discovered both. Large quantities of drugs were found, including cocaine rocks in Hudson's pocket. A loaded gun was lodged between the cushion and armrest of the chair in which he was sitting. Hudson was charged under Michigan law with unlawful drug and firearm possession.

This case is before us only because of the method of entry into the house. When the police arrived to execute the warrant, they announced their presence, but waited only a short time–perhaps "three to five seconds,"–before turning the knob of the unlocked front door and entering Hudson's home. Hudson moved to suppress all the inculpatory evidence, arguing that the premature entry violated his Fourth Amendment rights.

The Michigan trial court granted his motion ... the Michigan Court of Appeals reversed, relying on Michigan Supreme Court cases holding that suppression is inappropriate when entry is made pursuant to warrant but without proper

"'knock and announce.'" The Michigan Supreme Court denied leave to appeal. Hudson was convicted of drug possession. He renewed his Fourth Amendment claim on appeal, but the Court of Appeals rejected it and affirmed the conviction. The Michigan Supreme Court again declined review. We granted certiorari.

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. ... Since 1917, when Congress passed the Espionage Act, this traditional protection has been part of federal statutory law. ... [I]n *Wilson*, we were asked whether the rule was also a command of the Fourth Amendment. Tracing its origins in our English legal heritage, we concluded that it was.

. ...

. ... From the trial level onward, Michigan has conceded that the entry was a knock-and-announce violation. The issue here is remedy. *Wilson* specifically declined to decide whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement. That question is squarely before us now.

In *Weeks v. United States*, (1914), we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment. We began applying the same rule to the States, through the Fourteenth Amendment, in *Mapp v. Ohio*, (1961).

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," *United States v. Leon*, (1984). ... We have therefore been "cautio[us] against expanding" it, *Colorado v. Connelly*, (1986), and "have repeatedly emphasized that the rule's 'costly toll' ... " *Pennsylvania Bd. of Probation and Parole v. Scott*, (1998) (citation omitted). We have rejected "[i]ndiscriminate application" of the rule, *Leon*, and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," *United States v. Calandra*, (1974)–that is, "where its deterrence benefits outweigh its 'substantial social costs," *Scott*, (quoting *Leon*).

. ...

In other words, exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence ... we have "never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police. ...

. ...

. ... Until a valid warrant has issued, citizens are entitled to shield "their persons, houses, papers, and effects," U. S. Const., Amdt. 4, from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different–and do not include the shielding of potential evidence from the government's eyes.

One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who "did not know of the process, of which, if he had notice, it is to be presumed that he would obey it. ... " *Wilson* [*v. Arkansas* (1995)], (quoting Semayne's Case). The knock-and-announce rule gives individuals "the opportunity to comply with the law and to avoid the destruction

of property occasioned by a forcible entry." *Richards [v. Wisconsin, (1997)]*. And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. ... In other words, it assures the opportunity to collect oneself before answering the door.

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except "where its deterrence benefits outweigh its 'substantial social costs," *Scott*, (quoting *Leon*). The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails ... imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule ... The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. ... Unlike the warrant or Miranda requirements, compliance with which is readily determined ... what constituted a "reasonable wait time" in a particular case ... is difficult for the trial court to determine and even more difficult for an appellate court to review.

Another consequence of the incongruent remedy Hudson proposes would be police officers' refraining from timely entry after knocking and announcing. As we have observed, the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires–producing preventable violence against officers in some cases, and the destruction of evidence in many others. We deemed these consequences severe enough to produce our unanimous agreement that a mere "reasonable suspicion" that knocking and announcing " ... would be dangerous or futile, or that it would inhibit the effective investigation of the crime," will cause the requirement to yield. *Richards*.

Next to these "substantial social costs" we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. ... To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises–dangers which, if there is even "reasonable suspicion" of their existence, suspend the knock-and-announce requirement anyway. Massive deterrence is hardly required.

. ...

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. ...

. ...

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial–incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

A trio of cases–*Segura v. United States*, (1984); *New York v. Harris*, (1990); and *United States v. Ramirez*, (1998)–confirms our conclusion that suppression is unwarranted in this case.

. ...

If the search in Segura could be "wholly unrelated to the prior entry," when the only entry was warrantless, it would be bizarre to treat more harshly the actions in this case, where the only entry was with a warrant. ...

In the second case, *Harris*, the police violated the defendant's Fourth Amendment rights by arresting him at home without a warrant, contrary to *Payton v. New York*, (1980). Once taken to the station house, he gave an incriminating statement. We refused to exclude it. ...

United States v. Ramirez, involved a claim that police entry violated the Fourth Amendment because it was effected by breaking a window. We ultimately concluded that the property destruction was, under all the circumstances, reasonable, but in the course of our discussion we unanimously said the following: "[D]estruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." Had the breaking of the window been unreasonable, the Court said, it would have been necessary to determine whether there had been a "sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence." What clearer expression could there be of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule?

For the foregoing reasons we affirm the judgment of the Michigan Court of Appeals.

It is so ordered.

Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting.

In *Wilson v. Arkansas*, (1995), a unanimous Court held that the Fourth Amendment normally requires law enforcement officers to knock and announce their presence before entering a dwelling. Today's opinion holds that evidence seized from a home following a violation of this requirement need not be suppressed.

As a result, the Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent. At least I can find no such support in the many Fourth Amendment cases the Court has decided in the near century since it first set forth the exclusionary principle in *Weeks v. United States*, (1914).

Today's opinion is thus doubly troubling. It represents a significant departure from the Court's precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection.

This Court has set forth the legal principles that ought to have determined the outcome of this case in two sets of basic Fourth Amendment cases. I shall begin by describing that underlying case law.

The first set of cases describes the constitutional knock-and-announce requirement, a requirement that this Court initially set forth only 11 years ago in *Wilson v. Arkansas*, *Sabbath v. United States*, (1968) (suppressing evidence seized in violation of federal statutory knock-and-announce requirement); *Miller v. United States*, (1958) (same). In *Wilson*, tracing the lineage of the knock-and-announce rule back to the 13th century. ...

. ... We further concluded that there was

"little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure."

And we held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." Thus, "a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement." *United States v. Banks*, (2003); *United States v. Ramirez*, (1998); *Richards v. Wisconsin*, (1997).

The second set of cases sets forth certain well-established principles that are relevant here. They include:

Boyd v. United States, (1886). In this seminal Fourth Amendment case, decided 120 years ago, the Court wrote, in frequently quoted language, that the Fourth Amendment's prohibitions apply

"to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property."

Weeks ... decided 28 years after *Boyd*, originated the exclusionary rule. The Court held that the Federal Government could not retain evidence seized unconstitutionally and use that evidence in a federal criminal trial. ...

Silverthorne Lumber Co. v. United States, (1920) ... created an exception to (or a qualification of) *Weeks'* exclusionary rule. The Court held that the Government could not use information obtained during an illegal search to subpoena documents that they illegally viewed during that search. Writing for the Court, Justice Holmes noted that the exclusionary rule "does not mean that the facts [unlawfully] obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others. ... ". ...

Wolf v. Colorado, (1949), and *Mapp v. Ohio*, (1961) ... considered whether *Weeks'* exclusionary rule applies to the States. In *Wolf*, the Court held that it did not. ... In *Mapp*, the Court overruled *Wolf*. Experience, it said, showed that alternative methods of enforcing the Fourth Amendment's requirements had failed. ...

. ...

For another thing, the driving legal purpose underlying the exclusionary rule ... deterrence of unlawful government behavior, argues strongly for suppression. ... In *Weeks*, *Silverthorne*, and *Mapp*, the Court based its holdings requiring suppression of unlawfully obtained evidence upon the recognition that admission of that evidence would seriously

undermine the Fourth Amendment's promise. All three cases recognized that failure to apply the exclusionary rule would make that promise a hollow one. ... Indeed, this Court in *Mapp* held that the exclusionary rule applies to the States in large part due to its belief that alternative state mechanisms for enforcing the Fourth Amendment's guarantees had proved "worthless and futile."

. ...

The Court has declined to apply the exclusionary rule only:

(1) where there is a specific reason to believe that application of the rule would "not result in appreciable deterrence," *United States v. Janis*, (1976); *United States v. Leon*, (1984) (exception where searching officer executes defective search warrant in "good faith"); *Arizona v. Evans*, (1995) (exception for clerical errors by court employees) ... or

(2) where admissibility in proceedings other than criminal trials was at issue. ...

Neither of these two exceptions applies here. ...

I am aware of no other basis for an exception. The Court has decided more than 300 Fourth Amendment cases since *Weeks*. ... But in every case involving evidence seized during an illegal search of a home ... the Court ... has ... upheld (or required) the suppression of the evidence at trial. In not one of those cases did the Court "questio[n], in the absence of a more efficacious sanction, the continued application of the [exclusionary] rule to suppress evidence from the State's case" in a criminal trial. *Franks v. Delaware*, (1978).

I can find nothing persuasive in the majority's opinion that could justify its refusal to apply the rule. ...

Neither can the majority justify its failure to respect the need for deterrence, as set forth consistently in the Court's prior case law, through its claim of "substantial social costs"–at least if it means that those "social costs" are somehow special here. The only costs it mentions are those that typically accompany any use of the Fourth Amendment's exclusionary principle: (1) that where the constable blunders, a guilty defendant may be set free (consider *Mapp* itself); (2) that defendants may assert claims where Fourth Amendment rights are uncertain (consider the Court's qualified immunity jurisprudence), and (3) that sometimes it is difficult to decide the merits of those uncertain claims. ... The majority's "substantial social costs" argument is an argument against the Fourth Amendment's exclusionary principle itself. And it is an argument that this Court, until now, has consistently rejected.

The majority, Michigan, and the United States make several additional arguments. In my view, those arguments rest upon misunderstandings of the principles underlying this Court's precedents.

The majority first argues that "the constitutional violation of an illegal manner of entry was not a but-for cause of obtaining the evidence." But taking causation as it is commonly understood in the law, I do not see how that can be so. Although the police might have entered Hudson's home lawfully, they did not in fact do so. Their unlawful behavior inseparably characterizes their actual entry; that entry was a necessary condition of their presence in Hudson's home; and their presence in Hudson's home was a necessary condition of their finding and seizing the evidence. At the same time, their discovery of evidence in Hudson's home was a readily foreseeable consequence of their entry and their unlawful presence within the home.

. ...

. ... As support for this proposition, Michigan rests on this Court's inevitable discovery cases.

This claim, however, misunderstands the inevitable discovery doctrine. Justice Holmes in *Silverthorne*, in discussing an "independent source" exception, set forth the principles underlying the inevitable discovery rule. That rule does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what hypothetically could have happened had the police acted lawfully in the first place. Rather, "independent" or "inevitable" discovery refers to discovery that did occur or that would have occurred (1) despite (not simply in the absence of) the unlawful behavior and (2) independently of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one. Instead, it must show that the same evidence "inevitably *would* have been discovered by *lawful means*." *Nix v. Williams* [(1984)],(emphasis added). ...

. ...

Thus, the Court's opinion reflects a misunderstanding of what "inevitable discovery" means when it says ... "Whether that preliminary misstep has occurred or not, the police ... would have discovered the gun and the drugs inside the house." Despite the phrase "of course," neither of these statements is correct. It is not true that, had the illegal entry not occurred, "police would have discovered the guns and drugs inside the house." Without that unlawful entry they would not have been inside the house; so there would have been no discovery.

Of course, had the police entered the house lawfully, they would have found the gun and drugs. But that fact is beside the point. The question is not what police might have done had they not behaved unlawfully. The question is what they did do. Was there set in motion an independent chain of events that would have inevitably led to the discovery and seizure of the evidence despite, and independent of, that behavior? The answer here is "no."

. ...

How can Justice Scalia maintain that the evidence here–a gun and drugs seized in the home–is "not the fruit" of the illegal entry? The officers' failure to knock and announce rendered the entire search unlawful, *Wilson*, and that unlawful search led to the discovery of evidence in petitioner's home. Thus, *Harris* compels the opposite result than that reached by the Court today. Like the *Payton* rule at issue in *Harris*, the knock-and-announce rule reflects the "reverence of the law for the individual's right of privacy in his house." *Miller*. ... Like the confession that was "excluded, as it should have been," in *Harris*, the evidence in this case was seized in the home, immediately following the illegal entry. ...

. ...

. ... [E]xperience ... provides confirmation of what common sense suggests: without suppression there is little to deter knock-and-announce violations.

There may be instances in the law where text or history or tradition leaves room for a judicial decision that rests upon little more than an unvarnished judicial instinct. But this is not one of them. Rather, our Fourth Amendment traditions place high value upon protecting privacy in the home. They emphasize the need to assure that its constitutional protec-

tions are effective, lest the Amendment 'sound the word of promise to the ear but break it to the hope.' They include an exclusionary principle, which since *Weeks* has formed the centerpiece of the criminal law's effort to ensure the practical reality of those promises. That is why the Court should assure itself that any departure from that principle is firmly grounded in logic, in history, in precedent, and in empirical fact. It has not done so. That is why, with respect, I dissent.

Excerpted by Alex Nobiletti

Exceptions to the Warrants Rule

Case List

Plain View

Arizona v. Hicks (1987)
Horton v. California (1990)
Oliver v. United States (1984)

Electronic Searches

Olmstead v. United States (1928)
Katz v. United States (1967)
United States v. Jones (2012)

Searches Incident to a Valid Arrest

Chimel v. California (1969)
Maryland v. Buie (1990)
Knowles v. Iowa (1998)

Loss of Evidence Searches

Cupp v. Murphy (1973)
Kentucky v. King (2011)
Missouri v. McNeely (2013)

Safety Searches

Terry v. Ohio (1968)
Brown v. Texas (1979)
Adams v. Williams (1972)
Florida v. J.L. (2000)
Minnesota v. Dickerson (1993)
Illinois v. Wardlow (2000)
Hiibel v. Sixth Judicial District of Nevada, Humboldt County (2004)

Consent Searches

Bumper v. North Carolina (1968)
Florida v. Bostick (1991)
Stoner v. California (1964)
United States v. Matlock (1974)
Georgia v. Randolph (2006)

Plain View

Arizona v. Hicks

480 U.S. 321 (1987)

> Vote: 6-3
> Decision: Affirmed
> Majority: Scalia, joined by Brennan, White, Marshall, Blackmun, and Stevens
> Concurrence: White
> Dissent: Powell, joined by Rehnquist and O'Connor
> Dissent: O'Connor, joined by Rehnquist and Powell

JUSTICE SCALIA delivered the opinion of the Court.

In *Coolidge v. New Hampshire*, we said that, in certain circumstances, a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area may be reasonable under the Fourth Amendment. We granted certiorari in the present case to decide whether this "plain view" doctrine may be invoked when the police have less than probable cause to believe that the item in question is evidence of a crime or is contraband.

On April 18, 1984, a bullet was fired through the floor of respondent's apartment, striking and injuring a man in the apartment below. Police officers arrived and entered respondent's apartment to search for the shooter, for other victims, and for weapons. They found and seized three weapons, including a sawed-off rifle, and in the course of their search also discovered a stocking-cap mask.

One of the policemen, Officer Nelson, noticed two sets of expensive stereo components, which seemed out of place in the squalid and otherwise ill-appointed four-room apartment. Suspecting that they were stolen, he read and recorded their serial numbers — moving some of the components ... in order to do so — which he then reported by phone to his headquarters. On being advised that the turntable had been taken in an armed robbery, he seized it immediately. ... Respondent was subsequently indicted for the robbery.

The state trial court granted respondent's motion to suppress the evidence that had been seized. The Court of Appeals of Arizona affirmed. It was conceded that the initial entry and search, although warrantless, were justified by the exigent circumstance of the shooting. The Court of Appeals viewed the obtaining of the serial numbers, however, as an additional search, unrelated to that exigency ... the Court of Appeals held that the police conduct violated the Fourth Amendment, requiring the evidence derived from that conduct to be excluded. ... Both courts — the trial court explicitly and the Court of Appeals by necessary implication — rejected the State's contention that Officer Nelson's actions were justified under the "plain view" doctrine of *Coolidge v. New Hampshire, supra.* The Arizona Supreme Court denied review, and the State filed this petition.

As an initial matter, the State argues that Officer Nelson's actions constituted neither a "search" nor a "seizure" within the meaning of the Fourth Amendment. We agree that the mere recording of the serial numbers did not constitute a seizure ... it did not "meaningfully interfere" with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure.

Officer Nelson's moving of the equipment, however, did constitute a "search" separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment. Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest. But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry. This is why, contrary to JUSTICE POWELL's suggestion, the "distinction between 'looking' at a suspicious object in plain view and `moving' it even a few inches" is much more than trivial for purposes of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to respondent — serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

The remaining question is whether the search was "reasonable" under the Fourth Amendment.

On this aspect of the case, we reject, at the outset, the apparent position of the Arizona Court of Appeals that, because the officers' action directed to the stereo equipment was unrelated to the justification for their entry into respondent's apartment, it was *ipso facto* unreasonable. ...

We turn, then, to application of the doctrine to the facts of this case. "It is well established that, under certain circumstances, the police may *seize* evidence in plain view without a warrant," *Coolidge v. New Hampshire*. ...

It would be absurd to say that an object could lawfully be seized and taken from the premises, but could not be moved for closer examination. It is clear, therefore, that the search here was valid if the "plain view" doctrine would have sustained a seizure of the equipment.

There is no doubt it would have done so if Officer Nelson had probable cause to believe that the equipment was stolen. The State has conceded, however, that he had only a "reasonable suspicion," by which it means something less than probable cause. We have not ruled on the question whether probable cause is required in order to invoke the "plain view" doctrine. ...

We now hold that probable cause is required. To say otherwise would be to cut the "plain view" doctrine loose from its theoretical and practical moorings. The theory of that doctrine consists of extending to nonpublic places such as the home, where searches and seizures without a warrant are presumptively unreasonable, the police's longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband. And the practical justification for that extension is the desirability of sparing police ... the risk — to themselves or to preservation of the evidence — of going to obtain a warrant. Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of *cause* for the seizure than a warrant would require. ...

We do not say, of course, that a seizure can never be justified on less than probable cause. We have held that it can — where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime. ...

The same considerations preclude us from holding that, even though probable cause would have been necessary for a *seizure,* the *search* of objects in plain view that occurred here could be sustained on lesser grounds. A dwellingplace search, no less than a dwellingplace seizure, requires probable cause, and there is no reason in theory or practicality why application of the "plain view" doctrine would supplant that requirement. ...

In short, whether legal authority to move the equipment could be found only as an inevitable concomitant of the authority to seize it, or also as a consequence of some independent power to search certain objects in plain view, probable cause to believe the equipment was stolen was required.

JUSTICE O'CONNOR's dissent suggests that we uphold the action here on the ground that it was a "cursory inspection," rather than a "full-blown search," and could therefore be justified by reasonable suspicion instead of probable cause. As already noted, a truly cursory inspection — one that involves merely looking at what is already exposed to view, without disturbing it — is not a "search" for Fourth Amendment purposes, and therefore does not even require reasonable suspicion.

JUSTICE POWELL's dissent reasonably asks what it is we would have had Officer Nelson do in these circumstances. The answer depends, of course, upon whether he had probable cause to conduct a search, a question that was not preserved in this case. If he had, then he should have done precisely what he did. If not, then he should have followed up his suspicions, if possible, by means other than a search ... But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all. ...

The State contends that, even if Officer Nelson's search violated the Fourth Amendment, the court below should have admitted the evidence thus obtained under the "good faith" exception to the exclusionary rule. That was not the question on which certiorari was granted, and we decline to consider it.

For the reasons stated, the judgment of the Court of Appeals of Arizona is

Affirmed.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

I join JUSTICE O'CONNOR's dissenting opinion, and write briefly to highlight what seem to me the unfortunate consequences of the Court's decision.

Today the Court holds for the first time that the requirement of probable cause operates as a separate limitation on the application of the plain view doctrine. The plurality opinion in *Coolidge v. New Hampshire,* required only that it be

"immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

There was no general exploratory search in this case, and I would not approve such a search. All the pertinent objects were in plain view, and could be identified as objects frequently stolen. There was no looking into closets, opening of drawers or trunks, or other "rummaging around." JUSTICE O'CONNOR properly emphasizes that the moving of a suspicious object in plain view results in a minimal invasion of privacy. The Court nevertheless holds that "merely looking at" an object in plain view is lawful but "moving" or "disturbing" the object to investigate a reasonable suspicion is not. The facts of this case well illustrate the unreasonableness of this distinction.

The officers' suspicion that the stereo components at issue were stolen was both reasonable and based on specific, articulable facts. Indeed, the State was unwise to concede the absence of probable cause. The police lawfully entered respondent's apartment under exigent circumstances that arose when a bullet fired through the floor of the apartment struck a man in the apartment below. What they saw in the apartment hardly suggested that it was occupied by law-abiding citizens. A .25-caliber automatic pistol lay in plain view on the living room floor. During a concededly lawful search, the officers found a .45-caliber automatic, a .22-caliber, sawed-off rifle, and a stocking-cap mask. The apartment was littered with drug paraphernalia. The officers also observed two sets of expensive stereo components of a type that frequently was stolen.

It is fair to ask what Officer Nelson should have done in these circumstances. Accepting the State's concession that he lacked probable cause, he could not have obtained a warrant to seize the stereo components. Neither could he have remained on the premises and forcibly prevented their removal. Officer Nelson's testimony indicates that he was able to read some of the serial numbers without moving the components. To read the serial number on a Bang and Olufsen turntable, however, he had to "turn it around or turn it upside down." Officer Nelson noted the serial numbers on the stereo components and telephoned the National Crime Information Center to check them against the Center's computerized listing of stolen property. The computer confirmed his suspicion that at least the Bang and Olufsen turntable had been stolen. On the basis of this information, the officers obtained a warrant to seize the turntable and other stereo components that also proved to be stolen.

The Court holds that there was an unlawful search of the turntable. It agrees that the "mere recording of the serial numbers did not constitute a seizure." Thus, if the computer had identified as stolen property a component with a visible serial number, the evidence would have been admissible. But the Court further holds that "Officer Nelson's moving of the equipment ... did constitute a 'search.' ... " It perceives a constitutional distinction between reading a serial number on an object and moving or picking up an identical object to see its serial number. To make its position unmistakably clear, the Court concludes that a "search is a search, even if it happens to disclose nothing but the bottom of a turntable." With all respect, this distinction between "looking" at a suspicious object in plain view and "moving" it even a few inches trivializes the Fourth Amendment. The Court's new rule will cause uncertainty, and could deter conscientious police officers from lawfully obtaining evidence necessary to convict guilty persons. Apart from the importance of rationality in the interpretation of the Fourth Amendment, today's decision may handicap law enforcement without enhancing privacy interests. Accordingly, I dissent.

Excerpted by Jacob Staab

Horton v. California

496 U.S. 128 (1990)

> Vote: 7-2
> Decision: Affirmed
> Majority: Stevens, joined by Rehnquist, White, Blackmun, O'Connor, Scalia, and Kennedy
> Dissent: Brennan, joined by Marshall

Justice STEVENS delivered the opinion of the Court.

In this case, we revisit an issue that was considered, but not conclusively resolved, in *Coolidge v. New Hampshire* (1971): Whether the warrantless seizure of evidence of crime in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent. We conclude that even though inadvertence is a characteristic of most legitimate "plain view" seizures, it is not a necessary condition.

Petitioner was convicted of the armed robbery of Erwin Wallaker, the treasurer of the San Jose Coin Club. When Wallaker returned to his home after the Club's annual show, he entered his garage and was accosted by two masked men, one armed with a machine gun and the other with an electrical shocking device, sometimes referred to as a "stun gun." The two men shocked Wallaker, bound and handcuffed him, and robbed him of jewelry and cash. ...

Sergeant LaRault, an experienced police officer, investigated the crime and determined that there was probable cause to search petitioner's home for the proceeds of the robbery and for the weapons used by the robbers. His affidavit for a search warrant referred to police reports that described the weapons as well as the proceeds, but the warrant issued by the Magistrate only authorized a search for the proceeds. ...

LaRault searched petitioner's residence, but he did not find the stolen property. During the course of the search, however, he discovered the weapons in plain view and seized them. ... LaRault testified that, while he was searching ... he also was interested in finding other evidence connecting petitioner to the robbery. Thus, the seized evidence was not discovered "inadvertently."

The trial court refused to suppress the evidence found in petitioner's home and, after a jury trial, petitioner was found guilty and sentenced to prison. The California Court of Appeal affirmed. It rejected petitioner's argument that our decision in *Coolidge* required suppression of the seized evidence that had not been listed in the warrant because its discovery was not inadvertent. ...

Because the California courts' interpretation of the "plain view" doctrine conflicts with the view of other courts, and because the unresolved issue is important, we granted certiorari.

The Fourth Amendment provides:

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

The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. *United States v. Jacobsen,* (1984). The "plain view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. *Arizona v. Hicks*, (1987). A seizure of the article, however, would obviously invade the owner's possessory interest. If "plain view" justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures, rather than by searches.

The criteria that generally guide "plain view" seizures were set forth in *Coolidge v. New Hampshire*, (1971). ...

"What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

. ...

Justice Stewart's analysis of the "plain view" doctrine did not command a majority, and a plurality of the Court has since made clear that the discussion is "not a binding precedent." *Texas v. Brown* [1983]. ...

Justice Stewart concluded that the inadvertence requirement was necessary to avoid a violation of the express constitutional requirement that a valid warrant must particularly describe the things to be seized. ...

We find two flaws in this reasoning. First, even-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. ...

Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive, because that interest is already served by the requirements that no warrant issue unless it "particularly describ[es] the place to be searched and the persons or things to be seized," *Maryland v. Garrison*, (1987). ...

Thus, in the case of a search incident to a lawful arrest,

"[i]f the police stray outside the scope of an authorized *Chimel* [*v. California*, (1969)] search, they are already in violation of the Fourth Amendment, and evidence so seized will be excluded; adding a second reason for excluding evidence hardly seems worth the candle." *Coolidge*. ...

In this case, the scope of the search was not enlarged in the slightest by the omission of any reference to the weapons in the warrant. ...

Again, Justice WHITE's dissenting opinion in *Coolidge* is instructive:

"Police with a warrant for a rifle may search only places where rifles might be, and must terminate the search once the rifle is found; the inadvertence rule will in no way reduce the number of places into which they may lawfully look."

As we have already suggested, by hypothesis the seizure of an object in plain view does not involve an intrusion on privacy. If the interest in privacy has been invaded, the violation must have occurred before the object came into plain view, and there is no need for an inadvertence limitation on seizures to condemn it. ...

In this case, the items seized from petitioner's home were discovered during a lawful search authorized by a valid warrant. When they were discovered, it was immediately apparent to the officer that they constituted incriminating evidence. He had probable cause not only to obtain a warrant to search for the stolen property, but also to believe that the weapons and handguns had been used in the crime he was investigating. The search was authorized by the warrant, the seizure was authorized by the "plain view" doctrine. The judgment is affirmed.

Excerpted by Jacob Staab

Oliver v. United States

466 U.S. 170 (1984)

> Vote: 6-3
> Decision: Affirmed
> Majority: Powell, joined by Burger, Blackmun, Rehnquist, O'Connor, and White, in part
> Concurrence: White
> Dissent: Marshall, joined by Brennan and Stevens

JUSTICE POWELL delivered the opinion of the Court.

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

Acting on reports that marihuana was being raised on the farm of petitioner Oliver, two narcotics agents of the Kentucky State Police went to the farm to investigate. Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper. At that point, someone standing in front of the camper

shouted: "No hunting is allowed, come back up here." The officers shouted back that they were Kentucky State Police officers, but found no one when they returned to the camper. The officers resumed their investigation of the farm and found a field of marihuana over a mile from petitioner's home.

Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance." After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field. Applying *Katz v. United States, (1967),* the court found that petitioner had a reasonable expectation that the field would remain private because petitioner "had done all that could be expected of him to assert his privacy in the area of farm that was searched." He had posted "No Trespassing" signs at regular intervals and had locked the gate at the entrance to the center of the farm. Further, the court noted that the field itself is highly secluded: it is bounded on all sides by woods, fences, and embankments, and cannot be seen from any point of public access. The court concluded that this was not an "open" field that invited casual intrusion.

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

. ...

The rule announced in *Hester v. United States* was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style:

"[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

Nor are the open fields "effects" within the meaning of the Fourth Amendment. In this respect, it is suggestive that James Madison's proposed draft of what became the Fourth Amendment preserves

"[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures. ... "

Although Congress' revisions of Madison's proposal broadened the scope of the Amendment in some respects, the term "effects" is less inclusive than "property," and cannot be said to encompass open fields. We conclude, as did the Court in deciding *Hester v. United States,* that the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.

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

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

In this light, the rule of *Hester v. United States,* that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. ... The Court, since the enactment of the Fourth Amendment, has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."

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

. ...

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

. ... Initially, we reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate. ... The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. ...

Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate. ...

Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

We conclude that the open fields doctrine, as enunciated in *Hester,* is consistent with the plain language of the Fourth Amendment and its historical purposes. Moreover, Justice Holmes' interpretation of the Amendment in *Hester* accords

with the "reasonable expectation of privacy" analysis developed in subsequent decisions of this Court. We therefore affirm *Oliver v. United States; Maine v. Thornton* is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Jacob Staab

Electronic Searches

Olmstead v. United States

277 U.S. 438 (1928)

> Vote: 5-4
> Decision: Affirmed
> Majority: Taft, joined by Van Devanter, McReynolds, Sutherland, and Sanford
> Dissent: Brandeis
> Dissent: Butler
> Dissent: Holmes
> Dissent: Stone

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These cases are here by certiorari from the Circuit Court of Appeals for the Ninth Circuit. They were granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wiretapping amounted to a violation of the Fourth and Fifth Amendments.

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others in addition to the petitioners were indicted. Some were not apprehended, some were acquitted, and others pleaded guilty.

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess and sell liquor unlawfully.

It involved the employment of not less than fifty persons, of two seagoing vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors and an attorney. In a bad month, sales amounted to $176,000; the aggregate for a year must have exceeded two millions of dollars.

Olmstead was the leading conspirator and the general manager of the business. ... Of the several offices in Seattle, the chief one was in a large office building. In this there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. ...

One of the chief men was always on duty at the main office to receive orders by telephones and to direct their filling by a corps of men stationed in another room — the " bull pen." The call numbers of the telephones were given to those known to be likely customers. At times, the sales amounted to 200 cases of liquor per day.

The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers.

Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

The gathering of evidence continued for many months. Conversations of the conspirators, of which refreshing stenographic notes were currently made, were testified to by the government witnesses. They revealed the large business transactions of the partners and their subordinates. Men at the wires heard the orders given for liquor by customers and the acceptances; they became auditors of the conversations between the partners. All this disclosed the conspiracy charged in the indictment. Many of the intercepted conversations were not merely reports, but parts of the criminal acts. The evidence also disclosed the difficulties to which the conspirators were subjected, the reported news of the capture of vessels, the arrest of their men and the seizure of cases of liquor in garages and other places. It showed the dealing by Olmstead, the chief conspirator, with members of the Seattle police, the messages to them which secured the release of arrested members of the conspiracy, and also direct promises to officers of payments as soon as opportunity offered.

The Fourth Amendment provides —

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

And the Fifth: "No person ... shall be compelled, in any criminal case, to be a witness against himself."

It will be helpful to consider the chief cases in this Court which bear upon the construction of these Amendments.

Boyd v. United States ... the court held the Act of 1874 repugnant to the Fourth and Fifth Amendments. As to the Fourth Amendment, Justice Bradley said:

"But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that, if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production. ... It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure."

The statute provided an official demand for the production of a paper or document by the defendant for official search and use as evidence on penalty that, by refusal, he should be conclusively held to admit the incriminating character of the document as charged. It was certainly no straining of the language to construe the search and seizure under the Fourth Amendment to include such official procedure.

The next case, and perhaps the most important, is *Weeks v. United States,* a conviction for using the mails to transmit coupons or tickets in a lottery enterprise. The defendant was arrested by a police officer without a warrant. After his arrest, other police officers and the United States marshal went to his house, got the key from a neighbor, entered the defendant's room and searched it, and took possession of various papers and articles. Neither the marshal nor the police officers had a search warrant. ... This court held that such taking of papers by an official of the United States, acting under color of his office, was in violation of the constitutional rights of the defendant, and, upon making seasonable application, he was entitled to have them restored, and that, by permitting their use upon the trial, the trial court erred.

The opinion cited with approval language of Mr. Justice Field in *Ex parte Jackson* saying that the Fourth Amendment, as a principle of protection, was applicable to sealed letters and packages in the mail, and that, consistently with it, such matter could only be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized. ...

In *Amos v. United States,* the defendant was convicted of concealing whiskey on which the tax had not been paid. At the trial, he presented a petition asking that private property seized in a search of his house and store "within his curtilage" without warrant should be returned. ... It was held that this action constituted a violation of the Fourth Amendment. ...

There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones, They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment.

The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. ...

The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects, and to prevent their seizure against his will. This phase of the misuse of governmental power of compulsion is the emphasis of the opinion of the Court in the *Boyd* case. This appears too in the *Weeks* case. ...

Gouled v. United States carried the inhibition against unreasonable searches and seizures to the extreme limit. ... A representative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant, and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.

The Amendment itself shows that the search is to be of material things — the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized.

. ...

By the invention of the telephone fifty years ago and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

This Court, in *Carroll v. United States*, declared:

"The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

Justice Bradley, in the *Boyd* case, and Justice Clark in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

. ...

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here, those who intercepted the projected voices were not in the house of either party to the conversation.

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

We think, therefore, that the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment. ...

The judgments of the Circuit Court of Appeals are affirmed. The mandates will go down forthwith under Rule 31.

Affirmed.

Excerpted by Jacob Staab

Katz v. United States

389 U.S. 347 (1967)

> Vote: 7-1
> Decision: Reversed
> Majority: Stewart, joined by Warren, Douglas, Harlan, Brennan, White, and Fortas
> Dissent: Black
> Not participating: Marshall

Mr. Justice STEWART delivered the opinion of the Court.

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

The petitioner has phrased those questions as follows.

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

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

The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not.

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this

case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. ... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. ...

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. ... One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication. ...

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry. ... But "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Warden v. Hayden* (1967). Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under ... local property law." *Silverman v. United States* (1961). Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people — and not simply "areas" — against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

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

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: they did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself. ...

The Government urges that, because its agents relied upon the decisions in *Olmstead v. United States* (1928) and *Goldman v. United States* (1942), and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. ... In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end ... 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. ...

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest. ... Nor could the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit.". ...

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the ... search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio* (1964). And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police."

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification ... that is central to the Fourth Amendment," a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks v. United States* (1914), and unlike a field, *Hester v. United States* (1924), a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic, as well as physical, intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment, and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My

understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected," because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

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

In *Silverman v. United States* (1961), we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment.

That case established that interception of conversations reasonably intended to be private could constitute a "search and seizure." and that the examination or taking of physical property was not required. ... This case requires us to reconsider *Goldman v. United States* (1942), and I agree that it should now be overruled. Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion. ...

MR. JUSTICE BLACK, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a "search" or "seizure," I would be happy to join the Court's opinion. For on that premise, my Brother STEWART sets out methods in accord with the Fourth Amendment to guide States in the enactment and enforcement of laws passed to regulate wiretapping by government. ... Notwithstanding these good efforts of the Court, I am still unable to agree with its interpretation of the Fourth Amendment.

My basic objection is two-fold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times," and thus reach a result that many people believe to be desirable. While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me, the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

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

The first clause protects "persons, houses, papers, and effects against unreasonable searches and seizures. ... " These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things

by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. ... Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

. ...

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

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

For these reasons, I respectfully dissent.

Excerpted by Sloan Harmel, Alex Nobiletti, Makenna Perry, Sobhi Sidhani, and Jacob Staab

United States v. Jones

565 U.S. 400 (2012)

> Vote: 9-0
> Decision: Affirmed
> Majority: Scalia joined by Roberts, Kennedy, Thomas, and Sotomayor
> Concurring: Sotomayor
> Concurring: Alito, joined by Ginsburg, Breyer and Kagan

Justice Scalia delivered the opinion of the Court.

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

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

... [I]n 2005 the Government applied to the United States District Court for the District of Columbia for a warrant authorizing the use of an electronic tracking device on the Jeep Grand Cherokee registered to Jones's wife. A warrant issued, authorizing installation of the device in the District of Columbia and within 10 days.

On the 11th day, and not in the District of Columbia but in Maryland, agents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements.

The Government ultimately obtained a multiple-count indictment charging Jones and several alleged co-conspirators with, as relevant here, conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine. ... Before trial, Jones filed a motion to suppress evidence obtained through the GPS device. The District Court granted the motion only in part, suppressing the data obtained while the vehicle was parked in the garage adjoining Jones's residence. It held the remaining data admissible. ...

In March 2007, a grand jury returned another indictment, charging Jones and others with the same conspiracy. The Government introduced at trial the same GPS-derived locational data admitted in the first trial ... returned a guilty verdict, and the District Court sentenced Jones to life imprisonment.

The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. ...

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

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. ...

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

Our later cases, of course, have deviated from that exclusively property-based approach. In *Katz v. United States*, (1967), we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. ...

The Government contends that ... no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads,

which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. Katz did not repudiate that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between other people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no Fourth Amendment violation "unless the conversational privacy of the homeowner himself is invaded." *Alderman v. United States*, (1969), "[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home. ... "

More recently, in *Soldal v. Cook County*, (1992), the Court unanimously rejected the argument that although a "seizure" had occurred "in a 'technical' sense" when a trailer home was forcibly removed, no Fourth Amendment violation occurred because law enforcement had not "invade[d] the [individuals'] privacy,". *Katz*, the Court explained, established that "property rights are not the sole measure of Fourth Amendment violations," but did not "snuf[f] out the previously recognized protection for property." As Justice Brennan explained in his concurrence in [*United States v.*] *Knotts* [(1983)], *Katz* did not erode the principle "that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.". We have embodied that preservation of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota v. Carter*, (1998). *Katz* did not narrow the Fourth Amendment's scope.

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

The second "beeper" case, *United States* v. *Karo* (1984), does not suggest a different conclusion. There we addressed the question left open by *Knotts*, whether the installation of a beeper in a container amounted to a search or seizure. As in *Knotts*, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later. ... Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing.

. ...

The Government also points to our exposition in *New York v. Class*, (1986), that "[t]he exterior of a car ... is thrust into the public eye, and thus to examine it does not constitute a 'search.' " That statement is of marginal relevance here since, as the Government acknowledges, "the officers in this case did more than conduct a visual inspection of respondent's vehicle." By attaching the device to the Jeep, officers encroached on a protected area. ...

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

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

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

It is so ordered.

Justice Alito, with whom Justice Ginsburg, Justice, Breyer, and Justice Kagan, join, concurring in judgment.

This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Po-sitioning System (GPS) device to monitor a vehicle's move-ments for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. By attaching a small GPS device to the underside of the vehicle that respondent drove, the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels. And for this reason, the Court concludes, the installation and use of the GPS device constituted a search.

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

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

The Fourth Amendment prohibits "unreasonable searches and seizures," and the Court makes very little effort to explain how the attachment or use of the GPS device fits within these terms. The Court does not contend that there was a seizure. ... Indeed, the success of the surveillance technique that the officers employed was dependent on the fact that the GPS did not interfere in any way with the operation of the vehicle, for if any such interference had been detected, the device might have been discovered.

The Court does claim that the installation and use of the GPS constituted a search, but this con-clusion is dependent on the questionable proposition that these two procedures cannot be separated for purposes of Fourth Amendment analy-

sis. If these two procedures are analyzed separately, it is not at all clear from the Court's opinion why either should be regarded as a search. It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained. And the Court does not contend that the use of the device constituted a search either. ...

The Court argues—and I agree—that "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' ". ... But it is almost impossible to think of late- 18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?[3]) The Court's theory seems to be that the concept of a search, as originally un-derstood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is in-correct. At common law, any unauthorized intrusion on private property was actionable ... but a trespass on open fields, as opposed to the "curtilage" of a home, does not fall within the scope of the Fourth Amendment because private property outside the curtilage is not part of a "hous[e]" within the meaning of the Fourth Amendment. ...

The Court's reasoning in this case is very similar to that in the Court's early decisions involving wiretapping and electronic eavesdropping, namely, that a technical trespass followed by the gathering of evidence constitutes a search. ...

By contrast, in cases in which there was no trespass, it was held that there was no search. ...

This trespass-based rule was repeatedly criticized. ...

Katz v. *United States* finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation. *Katz* in-volved the use of a listening device that was attached to the outside of a public telephone booth and that allowed police officers to eavesdrop on one end of the target's phone conversation. This procedure did not physically intrude on the area occupied by the target, but the *Katz* Court, "repudiate[ed]" the old doctrine, *Rakas* v. *Illinois,* (1978), and held that "[t]he fact that the electronic device employed ... did not happen to penetrate the wall of the booth can have no constitutional significance,". ... What mattered, the Court now held, was whether the conduct at issue "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Katz.* ...

Under this approach, as the Court later put it when addressing the relevance of a technical trespass, "an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation." *United States* v. *Karo,* (1984) (emphasis added). In *Oliver,* the Court wrote:

"The existence of a property right is but one element in determining whether expectations of privacy are legitimate. 'The premise that property interests control the right of the Government to search and seize has been discredited.' *Katz*, (quoting *Warden* v. *Hayden* (1967); some internal quotation marks omitted)."

The majority suggests that two post-*Katz* decisions—*Soldal* v. *Cook County* [(1992)] and *Alderman* v. *United States* [(1969)]—show that a technical trespass is sufficient to establish the existence of a search, but they provide little support.

In *Soldal*, the Court held that towing away a trailer home without the owner's consent constituted a seizure even if this did not invade the occupants' personal privacy. But in the present case, the Court does not find that there was a seizure, and it is clear that none occurred.

In *Alderman,* the Court held that the Fourth Amendment rights of homeowners were implicated by the use of a surreptitiously planted listening device to monitor third-party conversations that occurred within their home. *Alderman* is best understood to mean that the homeowners had a legitimate expectation of privacy in all conversations that took place under their roof. ...

In sum, the majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory.

III

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

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

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

In the present case, the Fourth Amendment applies, the Court concludes, because the officers installed the GPS device after respondent's wife, to whom the car was registered, turned it over to respondent for his exclusive use. But if the GPS had been attached prior to that time, the Court's theory would lead to a different result. ...

. ...

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

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

On the other hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping ... and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law. In an ironic sense, although *Katz* overruled *Olmstead*, Chief Justice Taft's suggestion in the latter case that the regulation of wiretapping was a matter better left for Congress ... has been borne out.

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

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

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

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

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

* * *

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

Excerpted by Jacob Staab

Searches Incident to a Valid Arrest

Chimel v. California

395 U.S. 752 (1969)

> Vote: 6-2
> Decision: Reversed
> Majority: Stewart, joined by Warren, Douglas, Harlan, Brennan, and Marshall
> Concurrence: Harlan
> Dissent: White, joined by Black
> Not participating: Fortas

MR. JUSTICE STEWART delivered the opinion of the Court.

This case raises basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest.

The relevant facts are essentially undisputed. Late in the afternoon of September 13, 1965, three police officers arrived at the Santa Ana, California, home of the petitioner with a warrant authorizing his arrest for the burglary of a coin shop. The officers knocked on the door, identified themselves to the petitioner's wife, and asked if they might come inside. She ushered them into the house, where they waited 10 or 15 minutes until the petitioner returned home from work. When the petitioner entered the house, one of the officers handed him the arrest warrant and asked for permission to "look around." The petitioner objected, but was advised that, "on the basis of the lawful arrest," the officers would nonetheless conduct a search. No search warrant had been issued.

Accompanied by the petitioner's wife, the officers then looked through the entire three-bedroom house. ... [T]he officers directed the petitioner's wife to open drawers and "to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary."

After completing the search, they seized numerous items. ... The entire search took between 45 minutes and an hour. At the petitioner's subsequent state trial on two charges of burglary, the items taken from his house were admitted into evidence against him over his objection that they had been unconstitutionally seized. He was convicted, and the judgments of conviction were affirmed by both the California Court of Appeals ... and the California Supreme Court. ... Both courts accepted the petitioner's contention that the arrest warrant was invalid because the supporting affidavit was set out in conclusory terms, but held that, since the arresting officers had procured the warrant "in good faith," ... that arrest had been lawful. From this conclusion, the appellate courts went on to hold that the search ... had been incident to a valid arrest. We granted certiorari in order to consider ... whether the warrantless search of the petitioner's entire house can be constitutionally justified as incident to that arrest. ...

Approval of a warrantless search incident to a lawful arrest seems first to have been articulated by ... *Weeks v. United States* ... but was limited to a right to search the "person." Eleven years later, the case of *Carroll v. United States,* brought the following embellishment of the *Weeks* statement: "When a man is legally arrested for an offense, whatever is found upon his person *or in his control* which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."

... [T]he principle emerged in expanded form a few months later in *Agnello v. United States* ... : "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made ... is not to be doubted. ... "

And in *Marron v. United States,* two years later ... [t]he Court upheld the seizure of [a] ledger by holding that, since the agents had made a lawful arrest, "[t]hey had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."

That the *Marron* opinion did not mean all that it seemed to say became evident, however, a few years later ... in *Lefkowitz,* a case in which the Court held unlawful a search of desk drawers and a cabinet despite the fact that the search had accompanied a lawful arrest.

... [I]n *Harris v. United States* ... officers had obtained a warrant for Harris' arrest on the basis of ... a forged check. He was arrested in the living room of his four-room apartment ... the officers undertook a thorough search of the entire apartment. Inside a desk drawer, they found a sealed envelope marked ... which was ... found to contain altered Selective Service documents, and those documents were used to secure Harris' conviction. ... The Court rejected Harris' Fourth Amendment claim, sustaining the search as "incident to arrest."

Only a year after *Harris,* however, the pendulum swung again. In *Trupiano v. United States,* agents raided the site of an illicit distillery, saw one of several conspirators operating the still, and arrested him, contemporaneously "seiz[ing] the illicit distillery." The Court held that the arrest and others made subsequently had been valid, but that the unexplained failure of the agents to procure a search warrant — in spite of the fact that they had had more than enough time before the raid to do so — rendered the search unlawful. ...

In 1950, two years after *Trupiano,* came *United States v. Rabinowitz,* the decision upon which California primarily relies in the case now before us. ... The test, said the Court, "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

Rabinowitz has come to stand for the proposition that a warrantless search "incident to a lawful arrest" may generally extend to the area that is considered to be in the "possession" or under the "control" of the person arrested. And it was on the basis of that proposition that the California courts upheld the search of the petitioner's entire house in this case. That doctrine, however, at least in the broad sense in which it was applied by the California courts in this case, can withstand neither historical nor rational analysis.

Nor is the rationale by which the State seeks here to sustain the search of the petitioner's house supported by a reasoned view of the background and purpose of the Fourth Amendment. ... The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence ... the requirement that "no Warrants shall issue, but upon probable cause," plays a crucial part. ...

Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and "the burden is on those seeking [an] exemption [from the requirement] to show the need for it. ... " *United States v. Jeffers*.

Only last Term, in *Terry v. Ohio*, we emphasized that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," and that "[t]he scope of [a] search must be *strictly tied to and justified by the circumstances which rendered its initiation permissible. ... "*

A similar analysis underlies the "search incident to arrest" principle, and marks its proper extent. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. ... There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs — or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less. ...

It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively "reasonable" to search a man's house when he is arrested on his front lawn — or just down the street — than it is when he happens to be in the house at the time of arrest. As Mr. Justice Frankfurter put it: "To say that the search must be reasonable is to require some criterion of reason. ... The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded. ... " *United States v. Rabinowitz* (dissenting opinion).

Thus, although "[t]he recurring questions of the reasonableness of searches" depend upon "the facts and circumstances ... of the case," (opinion of the Court), those facts and circumstances must be viewed in the light of established Fourth Amendment principles. ... The petitioner correctly points out that one result of decisions such as *Rabinowitz* and *Harris* is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home, rather than elsewhere. ... [H]ad he been arrested earlier in the day, at his place of employment, rather than at home, no search of his house could have been made without a search warrant. ...

Rabinowitz and *Harris* have been the subject of critical commentary for many years, and have been relied upon less and less in our own decisions. It is time, for the reasons we have stated, to hold that ... they are no longer to be followed.

Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand.

Reversed.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with these remarks concerning a factor to which the Court has not alluded.

The only thing that has given me pause in voting to overrule *Harris* and *Rabinowitz* is that as a result of *Mapp v. Ohio* (1961), and *Ker v. California* (1963), every change in Fourth Amendment law must now be obeyed by state officials facing widely different problems of local law enforcement. We simply do not know the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision; nor can we say with assurance that, in each and every local situation, the warrant requirement plays an essential role in the protection of those fundamental liberties protected against state infringement by the Fourteenth Amendment.

Thus, one is now faced with the dilemma, envisioned in my separate opinion in *Ker* ... of choosing between vindicating sound Fourth Amendment principles at the possible expense of state concerns, long recognized to be consonant with the Fourteenth Amendment before *Mapp* and *Ker* came on the books, or diluting the Federal Bill of Rights in the interest of leaving the States at least some elbow room in their methods of criminal law enforcement. No comparable dilemma exists, of course, with respect to the impact of today's decision within the federal system itself.

This federal-state factor has not been an easy one for me to resolve, but in the last analysis, I cannot in good conscience vote to perpetuate bad Fourth Amendment law.

I add only that this case, together with *Benton v. Maryland, post, North Carolina v. Pearce, ante,* and *Simpson v. Rice, ante,* all decided today, serve to point up, as few other cases have, the profound changes that the "incorporation doctrine" has wrought both in the workings of our federal system and upon the adjudicative processes of this Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK joins, dissenting.

. ... The rule which has prevailed, but for very brief or doubtful periods of aberration, is that a search incident to an arrest may extend to those areas under the control of the defendant and where items subject to constitutional seizure may be found. The justification for this rule must, under the language of the Fourth Amendment, lie in the reasonableness of the rule. ...

In terms, then, the Court must decide whether a given search is reasonable ... it seems to me unreasonable to require the police to leave the scene in order to obtain a search warrant when they are already legally there to make a valid arrest, and when there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search. ...

This case provides a good illustration of my point that it is unreasonable to require police to leave the scene of an arrest in order to obtain a search warrant when they already have probable cause to search and there is a clear danger that the items for which they may reasonably search will be removed before they return with a warrant. Petitioner was arrested in his home after an arrest. ... There was doubtless probable cause not only to arrest petitioner, but also to search his house. He had obliquely admitted, both to a neighbor and to the owner of the burglarized store, that he had committed the burglary ... there was surely probable cause on which a warrant could have issued to search the house for the stolen coins. Moreover, had the police simply arrested petitioner, taken him off to the station house, and later returned with a warrant, it seems very likely that petitioner's wife, who, in view of petitioner's generally garrulous nature, must have known of the robbery, would have removed the coins. For the police to search the house while the evidence they had probable cause to search out and seize was still there cannot be considered unreasonable.

This line of analysis, supported by the precedents of this Court, hinges on two assumptions. One is that the arrest of petitioner without a valid warrant was constitutional as the majority assumes; the other is that the police were not required to obtain a search warrant in advance, even though they knew that the effect of the arrest might well be to alert petitioner's wife that the coins had better be removed soon. ...

I would follow past cases and permit such a search to be carried out without a warrant, since the fact of arrest supplies an exigent circumstance justifying police action before the evidence can be removed. ...

It is agreed that such a warrant would be required absent exigent circumstances. I would hold that the fact of arrest supplies such an exigent circumstance. ...

... I would uphold the constitutionality of this search contemporaneous with an arrest, since there were probable cause both for the search and for the arrest, exigent circumstances involving the removal or destruction of evidence, and satisfactory opportunity to dispute the issues of probable cause shortly thereafter. In this case, the search was reasonable.

Excerpted by Alex Nobiletti and Sobhi Sidani

Maryland v. Buie

494 U.S. 325 (1990)

> Vote: 7-2
> Decision: Vacated and remand
> Majority: White, joined by Rehnquist, Blackmun, Stevens, O'Connor, Scalia, and Kennedy
> Concurrence: Stevens
> Concurrence: Kennedy
> Dissent: Brennen, joined by Marshall

Justice WHITE delivered the opinion of the Court.

A "protective sweep" is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. In this case we must decide what level of justification is required by the Fourth and Fourteenth Amendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises. The Court of Appeals of Maryland held that a running suit seized in plain view during such a protective sweep should have been suppressed at respondent's armed robbery trial because the officer who conducted the sweep did not have probable cause to believe that a serious and demonstrable potentiality for danger existed. We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer "possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing," *Michigan v. Long*, (1983) (quoting *Terry v. Ohio*, (1968)), that the area swept harbored an individual posing a danger to the officer or others. We accordingly vacate the judgment below and remand for application of this standard.

On February 3, 1986, two men committed an armed robbery of a Godfather's Pizza restaurant in Prince George's County, Maryland. One of the robbers was wearing a red running suit. That same day, Prince George's County police obtained arrest warrants for respondent Jerome Edward Buie and his suspected accomplice in the robbery, Lloyd Allen. ...

On February 5, the police executed the arrest warrant for Buie. ... Six or seven officers proceeded to Buie's house. Once inside, the officers fanned out through the first and second floors. Corporal James Rozar announced that he would "freeze" the basement so that no one could come up and surprise the officers. With his service revolver drawn, Rozar twice shouted into the basement, ordering anyone down there to come out. When a voice asked who was calling, Rozar announced three times: "this is the police, show me your hands." Eventually, a pair of hands appeared around the bottom of the stairwell and Buie emerged from the basement. He was arrested, searched, and handcuffed by Rozar. Thereafter, Detective Joseph Frolich entered the basement "in case there was someone else" down there. He noticed a red running suit lying in plain view on a stack of clothing and seized it.

The trial court denied Buie's motion to suppress the running suit. ... The State introduced the running suit into evidence at Buie's trial. A jury convicted Buie of robbery with a deadly weapon and using a handgun in the commission of a felony.

The Court of Special Appeals of Maryland affirmed the trial court's denial of the suppression motion. The court stated that Detective Frolich did not go into the basement to search for evidence, but to look for the suspected accomplice or anyone else who might pose a threat to the officers on the scene. ...

" ... [I]f there is reason to believe that the arrestee had accomplices who are still at large, something less than probable cause — reasonable suspicion — should be sufficient to justify a limited additional intrusion to investigate the possibility of their presence."

The Court of Appeals of Maryland reversed ... The court acknowledged that ... when the sanctity of the home is involved, the exceptions to the warrant requirement are few, and held: "[T]o justify a protective sweep of a home, the government must show that there is probable cause to believe that "a serious and demonstrable potentiality for danger"' exists." The court went on to find that the State had not satisfied that probable-cause requirement.

. ... The issue in this case is what level of justification the Fourth Amendment required before Detective Frolich could legally enter the basement to see if someone else was there.

Petitioner, the State of Maryland, argues that, under a general reasonableness balancing test, police should be permitted to conduct a protective sweep whenever they make an in-home arrest for a violent crime. ... [T]he State contends that protective sweeps fall within the ambit of the doctrine announced in *Terry v. Ohio*, (1968), and that such sweeps may be conducted in conjunction with a valid in-home arrest whenever the police reasonably suspect a risk of danger. ... The United States, as amicus curiae, supporting the State, also argues for a *Terry*-type standard of reasonable, articulable suspicion of risk to the officer, and contends that that standard is met here. ...

According to Buie ... there is no justification for relaxing the probable-cause standard. If something less than probable cause is sufficient, respondent argues that it is no less than individualized suspicion — specific, articulable facts supporting a reasonable belief that there are persons on the premises who are a threat to the officers. According to Buie, there were no such specific, articulable facts to justify the search of his basement.

It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures. ... Our cases show that in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. ... Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause. There are other contexts, however, where the public interest is such that neither a warrant nor probable cause is required. ...

The *Terry* case is most instructive for present purposes. There we held that an on-the-street "frisk" for weapons must be tested by the Fourth Amendment's general proscription against unreasonable searches because such a frisk involves ". ... swift action predicated upon the on-the-spot observations ... and as a practical matter could not be, subjected to the warrant procedure."

We stated that there is "no ready test for determining reasonableness other than by balancing the need to search ... against the invasion which the search ... entails.'" (quoting *Camara v. Municipal Court,* (1967)). ...

We therefore authorized a limited patdown for weapons where a reasonably prudent officer would be warranted in the belief, based on "specific and articulable facts," and not on a mere "inchoate and unparticularized suspicion or hunch,'" "that he is dealing with an armed and dangerous individual."

In *Michigan v. Long* ... [t]he ... Court expressly rejected the contention that *Terry* restricted preventative searches to the person of a detained suspect. ... In a sense, *Long* authorized a "frisk" of an automobile for weapons.

The ingredients to apply the balance struck in *Terry* and *Long* are present in this case. ...

That Buie had an expectation of privacy ... does not mean such rooms were immune from entry. In *Terry* and *Long* we were concerned with the immediate interest of the police officers in taking steps to assure themselves that the persons with whom they were dealing were not armed with or able to gain immediate control of a weapon that could unexpectedly and fatally be used against them. In the instant case, there is an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being or has just been arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. ... A protective sweep ... occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

... [We] are quite sure ... that the arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest. That interest is sufficient to outweigh the intrusion such procedures may entail.

We agree with the State, as did the court below, that a warrant was not required. We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in *Terry* and *Long*, and as in those cases, we think this balance is the proper one.

. ...

Affirmance is not required by *Chimel v. California*, (1969), where it was held that in the absence of a search warrant, the justifiable search incident to an in-home arrest could not extend beyond the arrestee's person and the area from within which the arrestee might have obtained a weapon. First, Chimel was concerned with a full-blown search of the entire house for evidence of the crime for which the arrest was made, not the more limited intrusion contemplated by a protective sweep. Second, the justification for the search incident to arrest considered in Chimel was the threat posed by the arrestee, not the safety threat posed by ... by unseen third parties in the house. ...

The type of search we authorize today is far removed from the "top-to-bottom" search involved in Chimel; moreover, it is decidedly not "automati[c]," but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.

We conclude that, by requiring a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed, the Court of Appeals of Maryland applied an unnecessarily strict Fourth Amendment standard. The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. We therefore vacate the judgment below and remand this case to the Court of Appeals of Maryland for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Today the Court for the first time extends *Terry v. Ohio*, into the home, dispensing with the Fourth Amendment's general requirements of a warrant and probable cause and carving a "reasonable suspicion" exception for protective sweeps in private dwellings. ...

. ...

The Court today holds that *Terry's* "reasonable suspicion" standard "strikes the proper balance between officer safety and citizen privacy" for protective sweeps in private dwellings. I agree with the majority that officers executing an arrest warrant within a private dwelling have an interest in protecting themselves against potential ambush by third parties, but the majority offers no support for its assumption that the danger of ambush during planned home arrests approaches the danger of unavoidable "on-the-beat" confrontations in "the myriad daily situations in which policemen and citizens confront each other on the street." *Terry*, supra. In any event, the Court's implicit judgment that a protective sweep constitutes a "minimally intrusive" search akin to that involved in Terry markedly undervalues the nature and scope of the privacy interests involved.

While the Fourth Amendment protects a person's privacy interests in a variety of settings, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, (1972). The Court discounts the nature of the intrusion because it believes that the scope of the intrusion is limited. The Court explains that a protective sweep's scope is "narrowly confined to a cursory visual inspection of those places in which a person might be hiding," and confined in duration to a period "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." But these spatial and temporal restrictions are not particularly limiting. ... Police officers searching for potential ambushers might enter every room including basements and attics; open up closets, lockers, chests, wardrobes, and cars; and peer under beds and behind furniture. The officers will view letters, documents and personal effects that are on tables or desks or are visible inside open drawers; books, records, tapes, and pictures on shelves; and clothing, medicines, toiletries and other paraphernalia not carefully stored in dresser drawers or bathroom cupboards. While perhaps not a "full-blown" or "top-to-bottom" search, a protective sweep is much closer to it than to a "limited patdown for weapons" or a " frisk' of an automobile.". ...

In light of the special sanctity of a private residence and the highly intrusive nature of a protective sweep, I firmly believe that police officers must have probable cause to fear that their personal safety is threatened by a hidden confederate of an arrestee before they may sweep through the entire home. Given the state court determination that the officers searching Buie's home lacked probable cause to perceive such a danger and therefore were not lawfully present in the basement, I would affirm the state court's decision to suppress the incriminating evidence. I respectfully dissent.

Excerpted by Alex Nobiletti

Knowles v. Iowa

525 U.S. 113 (1998)

> Vote: 9-0
> Decision: Reversed and remanded
> Majority: Rehnquist, joined by Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

An Iowa police officer stopped petitioner Knowles for speeding, but issued him a citation rather than arresting him. The question presented is whether such a procedure authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car. We answer this question "no."

Knowles was stopped in Newton, Iowa, after having been clocked driving 43 miles per hour on a road where the speed limit was 25 miles per hour. The police officer issued a citation to Knowles, although under Iowa law he might have arrested him. The officer then conducted a full search of the car, and under the driver's seat he found a bag of marijuana and a "pot pipe." Knowles was then arrested and charged with violation of state laws dealing with controlled substances.

Before trial, Knowles moved to suppress the evidence so obtained. He argued that the search could not be sustained under the "search incident to arrest" exception recognized in *United States* v. *Robinson* (1973) because he had not been placed under arrest. At the hearing on the motion to suppress, the police officer conceded that he had neither Knowles' consent nor probable cause to conduct the search. He relied on Iowa law dealing with such searches.

Iowa Code Ann. § 321.485(1)(a) provides that Iowa peace officers having cause to believe that a person has violated any traffic or motor vehicle equipment law may arrest the person and immediately take the person before a magistrate. Iowa law also authorizes the far more usual practice of issuing a citation in lieu of arrest or in lieu of continued custody after an initial arrest.1 See Iowa Code Ann. § 805.1(1). Section 805.1(4) provides that the issuance of a citation in lieu of an arrest "does not affect the officer's authority to conduct an otherwise lawful search." The Iowa Supreme Court has interpreted this provision as providing authority to officers to conduct a full-blown search of an automobile and driver in those cases where police elect not to make a custodial arrest and instead issue a citation-that is, a search incident to citation. ...

Based on this authority, the trial court denied the motion to suppress and found Knowles guilty. The Supreme Court of Iowa ... affirmed by a divided vote. Relying on its earlier opinion in *State* v. *Doran,* (1997), the Iowa Supreme Court upheld the constitutionality of the search under a bright-line "search incident to citation" exception to the Fourth Amendment's warrant requirement, reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest. We granted certiorari, and we now reverse.

. ... The question we ... address is whether the search at issue, authorized as it was by state law, nonetheless violates the Fourth Amendment.

In *Robinson, supra,* we noted the two historical rationales for the "search incident to arrest" exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. ... But neither of these underlying rationales for the search incident to arrest exception is sufficient to justify the search in the present case.

We have recognized that the first rationale-officer safety-is "'both legitimate and weighty,'" *Maryland* v. *Wilson,* (1997) (quoting *Pennsylvania* v. *Mimms,* (1977)*).* The threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a custodial arrest. In *Robinson*, we stated that a custodial arrest involves "danger to an officer" because of "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." We recognized that "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." A routine traffic stop, on the other hand, is a relatively brief encounter and "is more analogous to a so-called *'Terry* stop' ... than to a formal arrest." *Berkemer* v. *McCarty,* (1984). ...

This is not to say that the concern for officer safety is absent in the case of a routine traffic stop. It plainly is not. ... But while the concern for officer safety in this context may justify the "minimal" additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search. Even without the search authority Iowa urges, officers have other, independent bases to search for weapons and protect themselves from danger. For example, they may order out of a vehicle both the driver, *Mimms,* and any passengers, *Wilson,*; perform a "patdown" of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous, *Terry* v. *Ohio,* (1968); conduct a *"Terry* pat down" of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon, *Michigan* v. *Long,* (1983); and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest, *New York* v. *Belton,* (1981).

Nor has Iowa shown the second justification for the authority to search incident to arrest-the need to discover and preserve evidence. Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.

Iowa nevertheless argues that a "search incident to citation" is justified because a suspect who is subject to a routine traffic stop may attempt to hide or destroy evidence related to his identity (e.g., a driver's license or vehicle registration), or destroy evidence of another, as yet undetected crime. As for the destruction of evidence relating to identity, if a police

officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation. As for destroying evidence of other crimes, the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote.

In *Robinson,* we held that the authority to conduct a full field search as incident to an arrest was a "bright-line rule," which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern. Here we are asked to extend that "bright-line rule" to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all. We decline to do so. The judgment of the Supreme Court of Iowa is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Alex Nobiletti

Loss of Evidence Searches

Cupp v. Murphy

412 U.S. 291 (1973)

> Vote:7-2
> Decision: Reversed
> Majority: Stewart, joined by Burger, White, Marshall, Blackmun, Powell, and Rehnquist
> Concurrence: White
> Concurrence: Marshall
> Concurrence: Blackmun, joined by Burger
> Concurrence: Powell, joined by Burger and Rehnquist
> Dissent in part: Douglas
> Dissent in part: Brennan

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Daniel Murphy, was convicted by a jury in an Oregon court of the second-degree murder of his wife. The victim died by strangulation in her home in the city of Portland, and abrasions and lacerations were found on her throat. There was no sign of a break-in or robbery. Word of the murder was sent to the respondent, who was not then living with his wife. Upon receiving the message, Murphy promptly telephoned the Portland police and voluntarily came into Portland for questioning. Shortly after the respondent's arrival at the station house, where he was met by retained counsel, the police noticed a dark spot on the respondent's finger. Suspecting that the spot might be dried blood, and knowing that evidence of strangulation is often found under the assailant's fingernails, the police asked Murphy if they could take a sample of scrapings from his fingernails. He refused. Under protest and without a warrant, the police proceeded to take the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown. This incriminating evidence was admitted at the trial.

The respondent appealed his conviction, claiming that the fingernail scrapings were the product of an unconstitutional search under the Fourth and Fourteenth Amendments. The Oregon Court of Appeals affirmed the conviction. ... The Court of Appeals assumed the presence of probable cause to search or arrest, but held that in the absence of an arrest or other exigent circumstances, the search was unconstitutional. We granted certiorari to consider the constitutional question presented.

The trial court, the Oregon Court of Appeals, and the Federal District Court all agreed that the police had probable cause to arrest the respondent at the time they detained him and scraped his fingernails. As the Oregon Court of Appeals said,

"At the time the detectives took these scrapings they knew: "

"The bedroom in which the wife was found dead showed no signs of disturbance, which fact tended to indicate a killer known to the victim rather, than to a burglar or other stranger."

. ...

"The defendant and his deceased wife had had a stormy marriage, and did not get along well."

"The defendant had, in fact, been at his home on the night of the murder. He left and drove back to central Oregon, claiming that he did not enter the house or see his wife. He volunteered a great deal of information without being asked, yet expressed no concern or curiosity about his wife's fate."

The Court of Appeals for the Ninth Circuit did not disagree with the conclusion that the police had probable cause to make an arrest, nor do we.

It is also undisputed that the police did not obtain an arrest warrant or formally "arrest" the respondent. ... The respondent was detained only long enough to take the fingernail scrapings, and was not formally "arrested" until approximately one month later. Nevertheless, the detention of the respondent against his will constituted a seizure of his person, and the Fourth Amendment guarantee of freedom from "unreasonable searches and seizures" is clearly implicated. As the Court said in *Davis v. Mississippi,* [(1969)],

"Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"

. ...

The respondent in this case, like Davis, was briefly detained at the station house. Yet here there was, as three courts have found, probable cause to believe that the respondent had committed the murder. ...

The inquiry does not end here, however, because Murphy was subjected to a search as well as a seizure of his person. Unlike the fingerprinting in *Davis* ... or the handwriting exemplar obtained in *United States v. Mara,* [(1973)], the search of the respondent's fingernails went beyond mere "physical characteristics ... constantly exposed to the public," and constituted the type of "severe, though brief, intrusion upon cherished personal security" that is subject to constitutional scrutiny. ...

We believe this search was constitutionally permissible under the principles of *Chimel v. California,* [(1969)]. *Chimel* stands in a long line of cases recognizing an exception to the warrant requirement when a search is incident to a valid arrest. The basis for this exception is that, when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession. The Court recognized in *Chimel* that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement. Thus, a warrantless search incident to arrest, the Court held in *Chimel,* must be limited to the area "into which an arrestee might reach."

. ...

At the time Murphy was being detained at the station house, he was obviously aware of the detectives' suspicions. Though he did not have the full warning of official suspicion that a formal arrest provides, Murphy was sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy what evidence he could without attracting further attention. Testimony at trial indicated that, after he refused to consent to the taking of fingernail samples, he put his hands behind his back and appeared to rub them together. He then put his hands in his pockets, and a "metallic sound, such as keys or change rattling" was heard. The rationale of *Chimel,* in these circumstances, justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails.

On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments. Accordingly, the judgment of the Court of Appeals is

Reversed.

Original excerpt from Justia.com. Further excerpted by Alex Nobiletti

Kentucky v. King

563 U.S. 452 (2011)

> Vote: 8-1
> Decision: Reversed and remanded
> Majority: Alito, joined by Roberts, Scalia, Kennedy, Thomas, Breyer, Sotomayor, and Kagan
> Dissent: Justice Ginsburg

JUSTICE ALITO delivered the opinion of the Court.

It is well established that "exigent circumstances," including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant. In this case, we consider whether this rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. The Kentucky Supreme Court held that the exigent circumstances rule does not apply in the case at hand because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. We reject this interpretation of the exigent circumstances rule. The conduct of the police prior to their entry into the apartment was entirely lawful. They did not violate the Fourth Amendment or threaten to do so. In such a situation, the exigent circumstances rule applies.

This case concerns the search of an apartment in Lexington, Kentucky. Police officers set up a controlled buy of crack cocaine outside an apartment complex. Undercover Officer Gibbons watched the deal take place from an unmarked car

in a nearby parking lot. After the deal occurred, Gibbons radioed uniformed officers to move in on the suspect. He told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and he urged them to "hurry up and get there" before the suspect entered an apartment.

In response to the radio alert, the uniformed officers drove into the nearby parking lot, left their vehicles, and ran to the breezeway. Just as they entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana. At the end of the breezeway, the officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered. ... Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment.

Officer Steven Cobb, one of the uniformed officers who approached the door, testified that the officers banged on the left apartment door "as loud as [they] could" and announced, " 'This is the police' " or " 'Police, police, police.' ". Cobb said that "[a]s soon as [the officers] started banging on the door," they "could hear people inside moving," and "[i]t sounded as [though] things were being moved inside the apartment." These noises, Cobb testified, led the officers to believe that drug-related evidence was about to be destroyed.

At that point, the officers announced that they "were going to make entry inside the apartment." Cobb then kicked in the door, the officers entered the apartment, and they found three people in the front room: respondent Hollis King, respondent's girlfriend, and a guest who was smoking marijuana. The officers performed a protective sweep of the apartment during which they saw marijuana and powder cocaine in plain view. ...

Police eventually entered the apartment on the right. Inside, they found the suspected drug dealer who was the initial target of their investigation.

In the Fayette County Circuit Court, a grand jury charged respondent with trafficking in marijuana, first-degree trafficking in a controlled substance, and second-degree persistent felony offender status. Respondent filed a motion to suppress the evidence from the warrantless search, but the Circuit Court denied the motion. The Circuit Court concluded that the officers had probable cause to investigate the marijuana odor and that the officers "properly conducted [the investigation] by initially knocking on the door of the apartment unit and awaiting the response or consensual entry." Exigent circumstances justified the warrantless entry, the court held, because "there was no response at all to the knocking," and because "Officer Cobb heard movement in the apartment which he reasonably concluded were persons in the act of destroying evidence, particularly narcotics because of the smell. ... "

The Kentucky Court of Appeals affirmed. It held that exigent circumstances justified the warrantless entry because the police reasonably believed that evidence would be destroyed. The police did not impermissibly create the exigency, the court explained, because they did not deliberately evade the warrant requirement.

The Supreme Court of Kentucky reversed. ...

. ... First, the court held, police cannot "deliberately creat[e] the exigent circumstances with the bad faith intent to avoid the warrant requirement." Second, even absent bad faith, the court concluded, police may not rely on exigent circumstances if "it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent cir-

cumstances." Although the court found no evidence of bad faith, it held that exigent circumstances could not justify the search because it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence.

We granted certiorari.

The Fourth Amendment provides:

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

The text of the Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity.

Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured. ... But we have also recognized that this presumption may be overcome in some circumstances because "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.' " Accordingly, the warrant requirement is subject to certain reasonable exceptions.

One well-recognized exception applies when " 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, (1978). ...

This Court has identified several exigencies that may justify a warrantless search of a home. ... [F]or example ... [p]olice officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. And—what is relevant here—the need "to prevent the imminent destruction of evidence" has long been recognized as a sufficient justification for a warrantless search. ...

Over the years, lower courts have developed an exception to the exigent circumstances rule, the so-called "police-created exigency" doctrine. Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was "created" or "manufactured" by the conduct of the police. ...

In applying this exception for the "creation" or "manufacturing" of an exigency by the police, courts require something more than mere proof that fear of detection by the police caused the destruction of evidence. An additional showing is obviously needed because, as the Eighth Circuit has recognized ... [p]ersons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police. Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.

. ...

Despite the welter of tests devised by the lower courts, the answer to the question presented in this case follows directly and clearly from the principle that permits warrantless searches in the first place. As previously noted, warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.

. ...

Respondent argues for a rule ... but his rule is also flawed. Respondent contends that law enforcement officers impermissibly create an exigency when they "engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." In respondent's view, relevant factors include the officers' tone of voice in announcing their presence and the forcefulness of their knocks. But the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.

Police officers may have a very good reason to announce their presence loudly and to knock on the door with some force. A forceful knock may be necessary to alert the occupants that someone is at the door. ... Furthermore, unless police officers identify themselves loudly enough, occupants may not know who is at their doorstep. Officers are permitted—indeed, encouraged—to identify themselves to citizens. ... Citizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.

If respondent's test were adopted, it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. The Fourth Amendment does not require the nebulous and impractical test that respondent proposes.

For these reasons, we conclude that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment. This holding provides ample protection for the privacy rights that the Amendment protects.

When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. ... And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.

Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.

We now apply our interpretation of the police-created exigency doctrine to the facts of this case.

We need not decide whether exigent circumstances existed in this case. Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency. The trial court and the Kentucky Court of Appeals found that there was a real exigency in this case, but the Kentucky Supreme Court expressed doubt on this issue, observing that there was "certainly some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed." The Kentucky Supreme Court "assum[ed] for the purpose of argument that exigent circumstances existed," and it held that the police had impermissibly manufactured the exigency.

We, too, assume for purposes of argument that an exigency existed. We decide only the question on which the Kentucky Supreme Court ruled and on which we granted certiorari: Under what circumstances do police impermissibly create an exigency? Any question about whether an exigency actually existed is better addressed by the Kentucky Supreme Court on remand.

In this case, we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment. Officer Cobb testified without contradiction that the officers "banged on the door as loud as [they] could" and announced either " 'Police, police, police' " or " 'This is the police.' " This conduct was entirely consistent with the Fourth Amendment, and we are aware of no other evidence that might show that the officers either violated the Fourth Amendment or threatened to do so (for example, by announcing that they would break down the door if the occupants did not open the door voluntarily).

. ...

Finally, respondent claims that the officers "explained to [the occupants that the officers] were going to make entry inside the apartment," but the record is clear that the officers did not make this statement until after the exigency arose. ... Given that this announcement was made after the exigency arose, it could not have created the exigency.

Like the court below, we assume for purposes of argument that an exigency existed. Because the officers in this case did not violate or threaten to violate the Fourth Amendment prior to the exigency, we hold that the exigency justified the warrantless search of the apartment.

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

It is so ordered.

Justice Ginsburg, dissenting.

The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant. I dissent from the Court's reduction of the Fourth Amendment's force.

The Fourth Amendment guarantees to the people "[t]he right ... to be secure in their ... houses ... against unreasonable searches and seizures." Warrants to search, the Amendment further instructs, shall issue only upon a showing of "probable cause" to believe criminal activity is afoot. These complementary provisions are designed to ensure that police will

seek the authorization of a neutral magistrate before undertaking a search or seizure. Exceptions to the warrant requirement, this Court has explained, must be "few in number and carefully delineated," if the main rule is to remain hardy. *United States v. United States Dist. Court for Eastern Dist. of Mich.*, (1972). ...

This case involves a principal exception to the warrant requirement, the exception applicable in "exigent circumstances." "[C]arefully delineated," the exception should govern only in genuine emergency situations. Circumstances qualify as "exigent" when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape. *Brigham City v. Stuart*, (2006). The question presented: May police, who could pause to gain the approval of a neutral magistrate, dispense with the need to get a warrant by themselves creating exigent circumstances? I would answer no, as did the Kentucky Supreme Court. The urgency must exist, I would rule, when the police come on the scene, not subsequent to their arrival, prompted by their own conduct.

Two pillars of our Fourth Amendment jurisprudence should have controlled the Court's ruling: First, "whenever practical, [the police must] obtain advance judicial approval of searches and seizures through the warrant procedure," *Terry v. Ohio*, (1968); second, unwarranted "searches and seizures inside a home" bear heightened scrutiny, *Payton v. New York*, (1980). ... "[T]he police bear a heavy burden," the Court has cautioned, "when attempting to demonstrate an urgent need that might justify warrantless searches." *Welsh v. Wisconsin*, (1984).

That heavy burden has not been carried here. There was little risk that drug-related evidence would have been destroyed had the police delayed the search pending a magistrate's authorization. As the Court recognizes, "[p]ersons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police." Nothing in the record shows that, prior to the knock at the apartment door, the occupants were apprehensive about police proximity.

In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as " 'entitled to special protection.' " *Georgia v. Randolph*, (2006); *Minnesota v. Carter*, (1998) (Kennedy, J., concurring). Home intrusions, the Court has said, are indeed "the chief evil against which ... the Fourth Amendment is directed." *Payton*, (internal quotation marks omitted). ... How "secure" do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?

. ...

The existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on "actions taken by the police preceding the warrantless search." *United States v. Coles*, (2006). "[W]asting a clear opportunity to obtain a warrant," therefore, "disentitles the officer from relying on subsequent exigent circumstances." S. Saltzburg & D. Capra, American Criminal Procedure 376 (8th ed. 2007).

Under an appropriately reined-in "emergency" or "exigent circumstances" exception, the result in this case should not be in doubt. The target of the investigation's entry into the building, and the smell of marijuana seeping under the apartment door into the hallway, the Kentucky Supreme Court rightly determined, gave the police "probable cause ... sufficient ... to obtain a warrant to search the ... apartment." As that court observed, nothing made it impracticable for the police to post officers on the premises while proceeding to obtain a warrant authorizing their entry. Before this Court, Kentucky does not urge otherwise. ...

. ...

I agree, and would not allow an expedient knock to override the warrant requirement. Instead, I would accord that core requirement of the Fourth Amendment full respect. When possible, "a warrant must generally be secured," the Court acknowledges. There is every reason to conclude that securing a warrant was entirely feasible in this case, and no reason to contract the Fourth Amendment's dominion. ...

Original excerpt from Justia.com. Further excerpted by Alex Nobiletti

Missouri v. McNeely

569 U.S. 141 (2013)

> Vote: 5-4
> Decision: Affirmed
> Plurality: Sotomayor, joined by Scalia, Ginsburg, Kagan, and Kennedy (part)
> Concurrence in part: Kennedy
> Concurrence/Dissent: Roberts, joined by Breyer and Alito
> Dissent: Thomas

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In *Schmerber v. California* (1966), this Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." (internal quotation marks omitted). The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

While on highway patrol at approximately 2:08 a.m., a Missouri police officer stopped Tyler McNeely's truck after observing it exceed the posted speed limit and repeatedly cross the centerline. The officer noticed several signs that McNeely was intoxicated, including McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. McNeely acknowledged to the officer that he had consumed "a couple of beers" at a bar, and he appeared unsteady on his feet when he exited the truck. After McNeely performed poorly on a battery of field-sobriety tests and declined to use a portable breath-test device to measure his blood alcohol concentration (BAC), the officer placed him under arrest.

The officer began to transport McNeely to the station house. But when McNeely indicated that he would again refuse to provide a breath sample, the officer changed course and took McNeely to a nearby hospital for blood testing. The officer

did not attempt to secure a warrant. Upon arrival at the hospital, the officer asked McNeely whether he would consent to a blood test. Reading from a standard implied consent form, the officer explained to McNeely that under state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. McNeely nonetheless refused. The officer then directed a hospital lab technician to take a blood sample, and the sample was secured at approximately 2:35 a.m. Subsequent laboratory testing measured McNeely's BAC at 0.154 percent, which was well above the legal limit of 0.08 percent.

McNeely was charged with driving while intoxicated (DWI). ... He moved to suppress the results of the blood test, arguing in relevant part that, under the circumstances, taking his blood for chemical testing without first obtaining a search warrant violated his rights under the Fourth Amendment. The trial court agreed. It concluded that the exigency exception to the warrant requirement did not apply because, apart from the fact that "[a]s in all cases involving intoxication, [McNeely's] blood alcohol was being metabolized by his liver," there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant. ...

The Missouri Supreme Court affirmed [and] held that "*Schmerber* directs lower courts to engage in a totality of the circumstances analysis when determining whether exigency permits a nonconsensual, warrantless blood draw." The court further concluded that *Schmerber* "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case.". ... Finding that this was "unquestionably a routine DWI case" ... the court held that the nonconsensual warrantless blood draw violated McNeely's Fourth Amendment right to be free from unreasonable searches of his person.

We granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations. We now affirm.

. ... Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." *Winston v. Lee* (1985).

We first considered the Fourth Amendment restrictions on such searches in *Schmerber* ... [n]oting that "[s]earch warrants are ordinarily required for searches of dwellings," we reasoned that "absent an emergency, no less could be required where intrusions into the human body are concerned," even when the search was conducted following a lawful arrest. We explained that the importance of requiring authorization by a "'neutral and detached magistrate'" before allowing a law enforcement officer to "invade another's body in search of evidence of guilt is indisputable and great." (quoting *Johnson v. United States*, (1948)).

As noted, the warrant requirement is subject to exceptions. "One well-recognized exception," and the one at issue in this case, "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, (2011) (internal quotation marks and

brackets omitted). A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search. ... While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant." [*Michigan v. Tyler*, (1978)].

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. ...

Our decision in *Schmerber* applied this totality of the circumstances approach. In that case, the petitioner had suffered injuries in an automobile accident and was taken to the hospital. While he was there receiving treatment, a police officer arrested the petitioner for driving while under the influence of alcohol and ordered a blood test over his objection. After explaining that the warrant requirement applied generally to searches that intrude into the human body, we concluded that the warrantless blood test "in the present case" was nonetheless permissible because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.*, at 770 (quoting *Preston* v. *United States* (1964).

In support of that conclusion, we observed that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." We added that "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." "Given these special facts," we found that it was appropriate for the police to act without a warrant. We further held that the blood test at issue was a reasonable way to recover the evidence because it was highly effective, "involve[d] virtually no risk, trauma, or pain," and was conducted in a reasonable fashion "by a physician in a hospital environment according to accepted medical practices." And in conclusion, we noted that our judgment that there had been no Fourth Amendment violation was strictly based "on the facts of the present record."

Thus, our analysis in *Schmerber* fits comfortably within our case law applying the exigent circumstances exception. In finding the warrantless blood test reasonable in *Schmerber*, we considered all of the facts and circumstances of the particular case and carefully based our holding on those specific facts.

... [T]he State nevertheless seeks a per se rule for blood testing in drunk-driving cases. The State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent. As a result, the State claims that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant.

It is true that as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated. Testimony before the trial court in this case indicated that the percentage of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed. More precise calculations of the rate at which alcohol dissipates depend on various individual characteristics (such as weight, gender, and alcohol tolerance) and the circumstances in which the alcohol was consumed. ... Regardless of the exact elimination rate, it is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. This fact was essential to our holding in

Schmerber, as we recognized that, under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence.

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its amici. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. ... We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, not to accept the "considerable overgeneralization" that a per se rule would reflect.

The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a "'now or never'" situation. In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner. Moreover, because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant. This reality undermines the force of the State's contention ... that we should recognize a categorical exception to the warrant requirement because BAC evidence "is actively being destroyed with every minute that passes." Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

The State's proposed per se rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple. ... Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means ... [a]nd in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process. ...

Of course, there are important countervailing concerns. While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process. But adopting the State's per se approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions "to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement." *State v. Rodriguez*, 2007.

In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

. ...

The remaining arguments advanced in support of a per se exigency rule are unpersuasive.

The State and several of its amici, including the United States, express concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers deciding whether to conduct a blood test of a drunk-driving suspect without a warrant. The Chief Justice and the dissent also raise this concern. While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. Moreover, a case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments. ... [W]e see no valid substitute for careful case-by-case evaluation of reasonableness here.

Next, the State and the United States contend that the privacy interest implicated by blood draws of drunk-driving suspects is relatively minimal. That is so, they claim, both because motorists have a diminished expectation of privacy and because our cases have repeatedly indicated that blood testing is commonplace in society and typically involves "virtually no risk, trauma, or pain." *Schmerber*.

But the fact that people are "accorded less privacy in ... automobiles because of th[e] compelling governmental need for regulation," *California v. Carney*, (1985), does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin. As to the nature of a blood test conducted in a medical setting by trained personnel, it is concededly less intrusive than other bodily invasions we have found unreasonable. ... For that reason, we have held that medically drawn blood tests are reasonable in appropriate circumstances. We have never retreated, however, from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests.

Finally, the State and its amici point to the compelling governmental interest in combating drunk driving and contend that prompt BAC testing, including through blood testing, is vital to pursuit of that interest. ...

But the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. ...

As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

It is also notable that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily

injury) or prohibit nonconsensual blood tests altogether. Among these States, several lift restrictions on nonconsensual blood testing if law enforcement officers first obtain a search warrant or similar court order. We are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them. And in fact, field studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence.

. ...

The State argued before this Court that the fact that alcohol is naturally metabolized by the human body creates an exigent circumstance in every case. The State did not argue that there were exigent circumstances in this particular case because a warrant could not have been obtained within a reasonable amount of time. In his testimony before the trial court, the arresting officer did not identify any other factors that would suggest he faced an emergency or unusual delay in securing a warrant. He testified that he made no effort to obtain a search warrant before conducting the blood draw even though he was "sure" a prosecuting attorney was on call and even though he had no reason to believe that a magistrate judge would have been unavailable. The officer also acknowledged that he had obtained search warrants before taking blood samples in the past without difficulty. He explained that he elected to forgo a warrant application in this case only because he believed it was not legally necessary to obtain a warrant. Based on this testimony, the trial court concluded that there was no exigency and specifically found that, although the arrest took place in the middle of the night, "a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant."

. ...

Here and in its own courts the State based its case on an insistence that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a nonconsensual blood test without any precondition for a warrant. That is incorrect.

. ...

Because this case was argued on the broad proposition that drunk-driving cases present a per se exigency, the arguments and the record do not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant. ... But that inquiry ought not to be pursued here where the question is not properly before this Court. Having rejected the sole argument presented to us challenging the Missouri Supreme Court's decision, we affirm its judgment.

We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

The judgment of the Missouri Supreme Court is affirmed.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER and JUSTICE ALITO join, concurring in part and dissenting in part.

. ...

In my view, the proper rule is straightforward. Our cases establish that there is an exigent circumstances exception to the warrant requirement. That exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant. The natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence. That would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant.

. ...

The Court is correct when it says that every case must be considered on its particular facts. But the pertinent facts in drunk driving cases are often the same, and the police should know how to act in recurring factual situations. Simply put, when a drunk driving suspect fails field sobriety tests and refuses a breathalyzer, whether a warrant is required for a blood draw should come down to whether there is time to secure one.

Schmerber itself provides support for such an analysis. The Court there made much of the fact that "there was no time to seek out a magistrate and secure a warrant." It did so in an era when cell phones and e-mail were unknown. It follows quite naturally that if cell phones and e-mail mean that there is time to contact a magistrate and secure a warrant, that must be done. At the same time, there is no need to jettison the well-established exception for the imminent destruction of evidence, when the officers are in a position to do something about it.

Because the Missouri courts did not apply the rule I describe above, and because this Court should not do so in the first instance, I would vacate and remand for further proceedings in the Missouri courts.

JUSTICE THOMAS, dissenting.

This case requires the Court to decide whether the Fourth Amendment prohibits an officer from obtaining a blood sample without a warrant when there is probable cause to believe that a suspect has been driving under the influence of alcohol. Because the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance. As a result, I would hold that a warrantless blood draw does not violate the Fourth Amendment.
...

For the foregoing reasons, I respectfully dissent.

Excerpted by Alex Nobiletti

Safety Searches

Terry v. Ohio

392 U.S. 1 (1968)

> Vote:8-1
> Decision: Affirmed
> Majority: Warren, joined by Black, Harlan, Brennan, Stewart, White, Fortas, and Marshall
> Concurrence: Black
> Concurrence: Harlan
> Concurrence: White
> Dissent: Douglas

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary. Following the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton, by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that, while he was patrolling in plain clothes in downtown Cleveland ... his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. ...

His interest aroused, Officer McFadden took up a post of observation in the entrance to a store. ... He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on ... turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions. ... The two men repeated this ritual alternately between five and six times apiece. ... At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. ...

By this time, Officer McFadden had become thoroughly suspicious. He testified that, after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun.". ... Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified himself as a police officer and asked for their names. ... When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry ... and patted down the outside of his clothing. In the left breast

pocket of Terry's overcoat, Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38 caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in ... Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns, the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer McFadden had probable cause to arrest the men before he patted them down for weapons. ... Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for, without it, "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The court adjudged them guilty, and the Court of Appeals ... affirmed. We granted certiorari to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp v. Ohio*, (1961). We affirm the conviction.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. ... " This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For as this Court has always recognized,

"No right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, (1891).

We have recently held that "the Fourth Amendment protects people, not places," *Katz v. United States*, (1967), and wherever an individual may harbor a reasonable "expectation of privacy," (MR. JUSTICE HARLAN, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*, (1960). Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. The question is whether, in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

. ...

. ... The State has characterized the issue here as "the right of a police officer ... to make an on-the-street stop, interrogate and pat down for weapons (known ... as 'stop and frisk')." But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. Thus, its major thrust is a deterrent one, and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that, without it, the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp v. Ohio*, (1961). The rule also serves another vital function — "the imperative of judicial integrity." *Elkins v. United States*, (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. ... A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence. ...

The exclusionary rule has its limitations, however, as a tool of judicial control. ... Regardless of how effective the rule may be ... it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. ... Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. ...

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest. ...

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry, and whether and when he conducted a "search.". ... It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the stationhouse and prosecution for crime — "arrests" in traditional terminology. It must be recognized that, whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless ... is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

. ... This Court has held, in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. ...

. ... We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

In this case, there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search". ... We must decide whether, at that point, it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did. And, in determining whether the seizure and search were "unreasonable," our inquiry is a dual one — whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure ... or that, in most instances, failure to comply with the warrant requirement can only be excused by exigent circumstances. But we deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat. ... [T]he conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

... [T]he notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct ... it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara v. Municipal Court*, (1967). And, in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that, at some point, the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And, in making that assessment, it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? *Cf. Carroll v. United States*, (1925); *Beck v. Ohio*, (1964). ...

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is, of course, that of effective crime prevention and detection. ... It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which, taken together, warranted further investigation. ... It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but, rather, whether there was justification for McFadden's invasion of Terry's personal security by

searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. ...

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is ... carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. ... Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers ... may find themselves confronting persons who might well be armed and dangerous. ... Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. ...

There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon ... is also justified on other grounds, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. ... Thus, it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

. ... The protective search for weapons ... constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that, because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. ... Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment.

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer. ... The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man, in the circumstances, would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given ... to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a "stick-up." We think, on the facts and circumstances Officer McFadden detailed before the trial judge, a reasonably prudent man would have been warranted in believing petitioner was armed, and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery — which, it is reasonable to assume, would be likely to involve the use of weapons — and nothing in their conduct ... gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men ... he had observed enough to make it quite reasonable to fear that they were armed, and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination ... the record evidences the tempered act of a policeman who, in the course of an investigation, had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation. The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States v. Poller*, (1930). Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation. *Warden v. Hayden*, (1967) (MR. JUSTICE FORTAS, concurring).

. ... The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. ...

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. ... We merely hold today that, where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where, in the course of investigating this behavior, he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards unless there was "probable cause" to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

The opinion of the Court disclaims the existence of "probable cause." If loitering were in issue and that was the offense charged, there would be "probable cause" shown. But the crime here is carrying concealed weapons; and there is no basis for concluding that the officer had "probable cause" for believing that that crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of "probable cause."

. ...

The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. ...

To give the police greater power than a magistrate is to take a long step down the totalitarian path. ... Until the Fourth Amendment ... is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.

. ...

... [I]f the individual is no longer to be sovereign ... if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

MR. JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in *Katz v. United States*and the concurring opinion in *Warden v. Hayden.*

Excerpted by Alex Nobiletti

Brown v. Texas

443 U.S. 47 (1979)

> Vote:9-0
> Decision: Reversed
> Majority: Chief Justice Burger, joined by Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, and Stevens

MR CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether appellant was validly convicted for refusing to comply with a policeman's demand that he identify himself pursuant to a provision of the Texas Penal Code which makes it a crime to refuse such identification on request.

At 12:45 in the afternoon of December 9, 1977, Officers Venegas and Sotelo of the El Paso Police Department were cruising in a patrol car. They observed appellant and another man walking in opposite directions away from one another in an alley. Although the two men were a few feet apart when they first were seen, Officer Venegas later testified that both officers believed the two had been together or were about to meet until the patrol car appeared.

The car entered the alley, and Officer Venegas got out and asked appellant to identify himself and explain what he was doing there. The other man was not questioned or detained. The officer testified that he stopped appellant because the situation "looked suspicious, and we had never seen that subject in that area before." The area of El Paso where appellant was stopped has a high incidence of drug traffic. However, the officers did not claim to suspect appellant of any specific misconduct, nor did they have any reason to believe that he was armed.

Appellant refused to identify himself and angrily asserted that the officers had no right to stop him. Officer Venegas replied that he was in a "high drug problem area"; Officer Sotelo then "frisked" appellant, but found nothing.

When appellant continued to refuse to identify himself, he was arrested for violation of Tex.Penal Code Ann., Tit. 8, § 38.02(a) (1974), which makes it a criminal act for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information." Following the arrest, the officers searched appellant; nothing untoward was found.

While being taken to the El Paso County Jail, appellant identified himself. Nonetheless, he was held in custody and charged with violating § 38.02(a). ... He then exercised his right under Texas law to a trial de novo in the El Paso County Court. There, he moved to set aside the information on the ground that § 38.02(a) of the Texas Penal Code violated the First, Fourth, and Fifth Amendments and was unconstitutionally vague in violation of the Fourteenth Amendment. The motion was denied. Appellant waived a jury, and the court convicted him and imposed a fine of $45 plus court costs.

Under Texas law, an appeal from an inferior court to a county court is subject to further review only if a fine exceeding $100 is imposed. ... Accordingly, the County Court's rejection of appellant's constitutional claims was a decision "by the highest court of a State in which a decision could be had. ... " We reverse.

When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. In convicting appellant, the County Court necessarily found as a matter of fact that the officers "lawfully stopped" appellant. See Tex.Penal Code Ann., Tit. 8, § 38.02 (1974). The Fourth Amendment, of course,

"applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, (1969); *Terry v. Ohio*, (1968). "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has seized' that person," and the Fourth Amendment requires that the seizure be "reasonable."" *United States v. Brignoni-Ponce*, (1975).

The reasonableness of seizures that are less intrusive than a traditional arrest ... depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pennsylvania v. Mimms*, (1977). Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with, individual liberty.

A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. ...

The State does not contend that appellant was stopped pursuant to a practice embodying neutral criteria, but rather maintains that the officers were justified in stopping appellant because they had a "reasonable, articulable suspicion that a crime had just been, was being, or was about to be committed." We have recognized that, in some circumstances, an officer may detain a suspect briefly for questioning although he does not have "probable cause" to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

The flaw in the State's case is that none of the circumstances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal conduct. Officer Venegas testified at appellant's trial that the situation in the alley "looked suspicious," but he was unable to point to any facts supporting that conclusion. There is no indication in the record that it was unusual for people to be in the alley. The fact that appellant was in a neighborhood

frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. In short, the appellant's activity was no different from the activity of other pedestrians in that neighborhood. When pressed, Officer Venegas acknowledged that the only reason he stopped appellant was to ascertain his identity. The record suggests an understandable desire to assert a police presence; however, that purpose does not negate Fourth Amendment guarantees.

In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

The application of Tex.Penal Code Ann., Tit. 8, § 38.02 (1974), to detain appellant and require him to identify himself violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct. Accordingly, appellant may not be punished for refusing to identify himself, and the conviction is

Reversed.

Excerpted by Alex Nobiletti

Adams v. Williams

407 U.S. 143 (1972)

> Vote: 6-3
> Decision: Reversed
> Majority: Justice Rehnquist, joined by Burger, Stewart, White, Blackmun, and Powell
> Dissent: Justice Douglas, joined by Marshall
> Dissent: Justice Brennan
> Dissent: Justice Marshall, joined by Douglas

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Robert Williams was convicted in a Connecticut state court of illegal possession of a handgun found during a "stop and frisk," as well as of possession of heroin that was found during a full search incident to his weapons arrest. After respondent's conviction was affirmed by the Supreme Court of Connecticut ... Williams' petition for federal

habeas corpus relief was denied. ... [O]n rehearing en banc, the Court of Appeals granted relief. That court held that evidence introduced at Williams' trial had been obtained by an unlawful search of his person and car. ... Since we conclude that the policeman's actions here conformed to the standards this Court laid down in *Terry v. Ohio*, (1968), we reverse.

Police Sgt. John Connolly was alone early in the morning on car patrol duty in a high-crime area of Bridgeport, Connecticut. At approximately 2:15 a.m., a person known to Sgt. Connolly approached his cruiser and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist.

After calling for assistance on his car radio, Sgt. Connolly approached the vehicle to investigate the informant's report. Connolly tapped on the car window and asked the occupant, Robert Williams, to open the door. When Williams rolled down the window instead, the sergeant reached into the car and removed a fully loaded revolver from Williams' waistband. The gun had not been visible to Connolly from outside the car, but it was in precisely the place indicated by the informant. Williams was then arrested by Connolly for unlawful possession of the pistol. A search incident to that arrest was conducted after other officers arrived. They found substantial quantities of heroin on Williams' person and in the car, and they found a machete and a second revolver hidden in the automobile.

Respondent contends that the initial seizure of his pistol, upon which rested the later search and seizure of other weapons and narcotics, was not justified by the informant's tip to Sgt. Connolly. He claims that, absent a more reliable informant or some corroboration of the tip, the policeman's actions were unreasonable under the standards set forth in *Terry v. Ohio*.

In *Terry*, this Court recognized that ... [t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

The Court recognized in *Terry* that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect ... he may conduct a limited protective search for concealed weapons. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.

Applying these principles to the present case, we believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally, and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. ... Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.

In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations – ... when a credible informant warns of a specific impending crime — the subtleties of the hearsay rule should not thwart an appropriate police response.

While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly had ample reason to fear for his safety. When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances, the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable. The loaded gun seized as a result of this intrusion was therefore admissible at Williams' trial. *Terry v. Ohio*.

. ... In the present case, the policeman found Williams in possession of a gun in precisely the place predicted by the informant. This tended to corroborate the reliability of the informant's further report of narcotics and, together with the surrounding circumstances, certainly suggested no lawful explanation for possession of the gun. ...

Under the circumstances surrounding Williams' possession of the gun seized by Sgt. Connolly, the arrest on the weapons charge was supported by probable cause, and the search of his person and of the car incident to that arrest was lawful. The fruits of the search were therefore properly admitted at Williams' trial, and the Court of Appeals erred in reaching a contrary conclusion.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

My views have been stated in substance by Judge Friendly, dissenting, in the Court of Appeals. Connecticut allows its citizens to carry weapons, concealed or otherwise, at will, provided they have a permit. Connecticut law gives its police no authority to frisk a person for a permit. Yet the arrest was for illegal possession of a gun. The only basis for that arrest was the informer's tip on the narcotics. Can it be said that a man in possession of narcotics will not have a permit for his gun ... ?

. ... I share with Judge Friendly a concern that the easy extension of *Terry v. Ohio*, to "possessory offenses" is a serious intrusion on Fourth Amendment safeguards.

"If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows 'that criminal activity may be afoot.'" quoting *Terry v. Ohio*.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Four years have passed since we decided *Terry v. Ohio*, (1968), and its companion cases, *Sibron v. New York* and *Peters v. New York*, (1968). They were the first cases in which this Court explicitly recognized the concept of "stop and frisk" and squarely held that police officers may, under appropriate circumstances, stop and frisk persons suspected of criminal activity even though there is less than probable cause for an arrest. This case marks our first opportunity to give some flesh to the bones of *Terry* et al. Unfortunately, the flesh provided by today's decision cannot possibly be made to fit on *Terry's* skeletal framework.

"[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption ... that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'" *Coolidge v. New Hampshire*, (1971). ...

. ...

In today's decision, the Court ignores the fact that *Terry* begrudgingly accepted the necessity for creating an exception from the warrant requirement of the Fourth Amendment and treats this case as if warrantless searches were the rule, rather than the "narrowly drawn" exception. This decision betrays the careful balance that *Terry* sought to strike between a citizen's right to privacy and his government's responsibility for effective law enforcement, and expands the concept of warrantless searches far beyond anything heretofore recognized as legitimate. I dissent.

. ...

The Court erroneously attempts to describe the search for the gun as a protective search incident to a reasonable investigatory stop. But, as in *Terry*, *Sibron* and *Peters*, there is no occasion in this case to determine whether or not police officers have a right to seize and to restrain a citizen in order to interrogate him. The facts are clear that the officer intended to make the search as soon as he approached the respondent. He asked no questions; he made no investigation; he simply searched. There was nothing apart from the information supplied by the informant to cause the officer to search. Our inquiry must focus, therefore, as it did in *Terry*, on whether the officer had sufficient facts from which he could reasonably infer that respondent was not only engaging in illegal activity, but also that he was armed and dangerous. The focus falls on the informant.

The only information that the informant had previously given the officer involved homosexual conduct in the local railroad station.

. ...

. ... In the recent case of *Spinelli v. United States*, (1969), Mr. Justice Harlan made it plain beyond any doubt that, where police rely on an informant to make a search and seizure, they must know that the informant is generally trustworthy and that he has obtained his information in a reliable way. Since the testimony of the arresting officer in the instant case patently fails to demonstrate that the informant was known to be trustworthy, and since it is also clear that the officer had no idea of the source of the informant's "knowledge," a search and seizure would have been illegal.

Assuming ... that this case truly involves not an arrest and a search incident thereto, but a stop and frisk, we must decide whether or not the information possessed by the officer justified this interference with respondent's liberty. *Terry*, our only case to actually uphold a stop and frisk, is not directly in point, because the police officer in that case acted on the basis of his own personal observations. No informant was involved. But the rationale of *Terry* is still controlling, and it requires that we condemn the conduct of the police officer in encountering the respondent.

Terry did not hold that, whenever a policeman has a hunch that a citizen is engaging in criminal activity, he may engage in a stop and frisk. It held that, if police officers want to stop and frisk, they must have specific facts from which they can reasonably infer that an individual is engaged in criminal activity and is armed and dangerous. It was central to our decision in *Terry* that the police officer acted on the basis of his own personal observations, and that he carefully scrutinized the conduct of his suspects before interfering with them in any way. When we legitimated the conduct of the officer in *Terry*, we did so because of the substantial reliability of the information on which the officer based his decision to act.

If the Court does not ignore the care with which we examined the knowledge possessed by the officer in *Terry* when he acted, then I cannot see how the actions of the officer in this case can be upheld. The Court explains what the officer knew about respondent before accosting him. But what is more significant is what he did not know. With respect to the scene generally, the officer had no idea how long respondent had been in the car, how long the car had been parked, or to whom the car belonged. With respect to the gun, the officer did not know if or when the informant had ever seen the gun, or whether the gun was carried legally, as Connecticut law permitted, or illegally. And with respect to the narcotics, the officer did not know what kind of narcotics respondent allegedly had, whether they were legally or illegally possessed, what the basis of the informant's knowledge was, or even whether the informant was capable of distinguishing narcotics from other substances.

Unable to answer any of these questions, the officer nevertheless determined that it was necessary to intrude on respondent's liberty. I believe that his determination was totally unreasonable.

. ...

Even if I could agree with the Court that the stop and frisk in this case was proper, I could not go further and sustain the arrest and the subsequent searches. It takes probable cause to justify an arrest and search and seizure incident thereto. ...

Once the officer seized the gun from respondent, it is uncontradicted that he did not ask whether respondent had a license to carry it, or whether respondent carried it for any other legal reason under Connecticut law. Rather, the officer placed him under arrest immediately and hastened to search his person. Since Connecticut has not made it illegal for private citizens to carry guns, there is nothing in the facts of this case to warrant a man "of prudence and caution" to believe that any offense had been committed merely because respondent had a gun on his person. Any implication that respondent's silence was some sort of a tacit admission of guilt would be utterly absurd.

. ...

. ... As a result of today's decision, the balance struck in Terry is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent the kind of arbitrary and oppressive police

action involved herein, is dealt a serious blow. Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.

Excerpted by Alex Nobiletti

Florida v. J.L.

529 U.S. 266 (2000)

> Vote: 9-0
> Decision: Affirmed
> Majority: Ginsberg, joined by Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer
> Concurrence: Kennedy, joined by Rehnquist

JUSTICE GINSBURG delivered the opinion of the Court.

The question presented in this case is whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer's stop and frisk of that person. We hold that it is not.

On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun ... nothing is known about the informant. Sometime after the police received the tip ... they arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]." One of the three, respondent J. L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J. L. made no threatening or otherwise unusual movements. One of the officers approached J. L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J. L.'s pocket. The second officer frisked the other two individuals, against whom no allegations had been made, and found nothing.

. ...

. ... J. L. ... was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. He moved to suppress the gun as the fruit of an unlawful search, and the trial court granted his motion. The intermediate appellate court reversed, but the Supreme Court of Florida ... held the search invalid under the Fourth Amendment.

Anonymous tips, the Florida Supreme Court stated, are generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject's "'not easily predicted'" movements. The tip leading to the frisk of J. L., the court observed, provided

no such predictions, nor did it contain any other qualifying indicia of reliability. Two justices dissented. The safety of the police and the public, they maintained, justifies a "firearm exception" to the general rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips.

Seeking review in this Court, the State of Florida noted that the decision of the State's Supreme Court conflicts with decisions of other courts declaring similar searches compatible with the Fourth Amendment. We granted certiorari, and now affirm the judgment of the Florida Supreme Court.

Our "stop and frisk" decisions begin with *Terry v. Ohio*, (1968). This Court held in *Terry*:

"[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

In the instant case, the officers' suspicion that J. L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated ... "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," *Alabama v. White* [(1990)]. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." The question we here confront is whether the tip pointing to J. L. had those indicia of reliability.

In *White*, the police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel. Standing alone, the tip would not have justified a *Terry* stop. Only after police observation showed that the informant had accurately predicted the woman's movements, we explained, did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine. Although the Court held that the suspicion in *White* became reasonable after police surveillance, we regarded the case as borderline. Knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband. We accordingly classified *White* as a "close case."

The tip in the instant case lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case. The anonymous call concerning J. L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J. L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J. L. If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.

Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. ... The United States as amicus curiae makes a similar argument, proposing that a stop and frisk should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip. ... ". ... These contentions misapprehend the reliability needed for a tip to justify a *Terry* stop.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person ... however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. ...

A second major argument advanced by Florida and the United States as amicus is, in essence, that the standard *Terry* analysis should be modified to license a "firearm exception." Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry*'s rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. But an automatic firearm exception ... would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call. ...

Finally, the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped. We speak in to day's decision only of cases in which the officer's authority to make the initial stop is at issue. In that context, we hold that an anonymous tip lacking indicia of reliability of the kind contemplated in *Adams* and *White* does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.

The judgment of the Florida Supreme Court is affirmed.

It is so ordered.

Excerpted by Alex Nobiletti

Minnesota v. Dickerson

508 U.S. 366 (1993)

> Vote: 9-0
> Decision: Affirmed
> Majority: White, joined by Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, and Thomas (Parts I and II); Stevens, O'Connor, Scalia, Kennedy, and Souter (Parts III and IV)
> Concurrence: Scalia
> Concurrence/Dissent: Rehnquist, joined by Blackmun and Thomas

JUSTICE WHITE delivered the opinion of the Court.

On the evening of November 9, 1989, two Minneapolis police officers were patrolling an area on the city's north side in a marked squad car. At about 8:15 p.m., one of the officers observed respondent leaving a 12-unit apartment building on Morgan Avenue North. The officer, having previously responded to complaints of drug sales in the building's hallways and having executed several search warrants on the premises, considered the building to be a notorious "crack house." According to testimony credited by the trial court, respondent began walking toward the police but, upon spotting the squad car and making eye contact with one of the officers, abruptly halted and began walking in the opposite direction. His suspicion aroused, this officer watched as respondent turned and entered an alley on the other side of the apartment building. Based upon respondent's seemingly evasive actions and the fact that he had just left a building known for cocaine traffic, the officers decided to stop respondent and investigate further.

The officers pulled their squad car into the alley and ordered respondent to stop and submit to a patdown search. The search revealed no weapons, but the officer conducting the search did take an interest in a small lump in respondent's nylon jacket.

. ...

The officer then reached into respondent's pocket and retrieved a small plastic bag containing one fifth of one gram of crack cocaine. Respondent was arrested and charged in Hennepin County District Court with possession of a controlled substance.

Before trial, respondent moved to suppress the cocaine.

The trial court first concluded that the officers were justified under *Terry v. Ohio*, (1968), in stopping respondent to investigate whether he might be engaged in criminal activity. The court further found that the officers were justified in frisking respondent to ensure that he was not carrying a weapon. Finally, analogizing to the "plain-view" doctrine, under which officers may make a warrantless seizure of contraband found in plain view during a lawful search for other items, the trial court ruled that the officers' seizure of the cocaine did not violate the Fourth Amendment. ...

His suppression motion having failed, respondent proceeded to trial and was found guilty.

On appeal, the Minnesota Court of Appeals reversed.

The court agreed with the trial court that the investigative stop and protective patdown search of respondent were lawful under *Terry* because the officers had a reasonable belief based on specific and articulable facts that respondent was engaged in criminal behavior and that he might be armed and dangerous. The court concluded, however, that the officers had overstepped the bounds allowed by *Terry* in seizing the cocaine. ...

The Minnesota Supreme Court affirmed. ... The court thus appeared to adopt a categorical rule barring the seizure of any contraband detected by an officer through the sense of touch during a patdown search for weapons. ...

We granted certiorari to resolve a conflict among the state and federal courts over whether contraband detected through the sense of touch during a patdown search may be admitted into evidence. We now affirm.

The Fourth Amendment, made applicable to the States by way of the Fourteenth Amendment, *Mapp v. Ohio*, (1961), guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Time and again, this Court has observed that searches and seizures" '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.'" One such exception was ... recognized in *Terry v. Ohio*, (1968), which held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot ... ," the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions.

Terry further held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. ... " *Adams* [(1972)]. Rather, a protective search-permitted without a warrant and on the basis of reasonable suspicion less than probable cause-must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*. ... If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.

These principles were settled 25 years ago when, on the same day, the Court announced its decisions in *Terry* and *Sibron*. The question presented today is whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by *Terry*. We think the answer is clearly that they may, so long as the officers' search stays within the bounds marked by *Terry*.

. ...

We think that [plain-view] doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment-or at least no search independent of the initial intrusion that gave the officers their vantage point. The warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amend-

ment. ... The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

The Minnesota Supreme Court rejected an analogy to the plain-view doctrine. ... We have a somewhat different view. First, *Terry* itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch and *Terry* upheld precisely such a seizure. ... Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures. The court's second concern-that touch is more intrusive into privacy than is sight-is inapposite in light of the fact that the intrusion the court fears has already been authorized by the lawful search for weapons. The seizure of an item whose identity is already known occasions no further invasion of privacy. Accordingly, the suspect's privacy interests are not advanced by a categorical rule barring the seizure of contraband plainly detected through the sense of touch.

It remains to apply these principles to the facts of this case. Respondent has not challenged the finding made by the trial court and affirmed by both the Court of Appeals and the State Supreme Court that the police were justified under *Terry* in stopping him and frisking him for weapons. Thus, the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent's jacket was contraband. ... The Minnesota Supreme Court, after "a close examination of the record," held that the officer's own testimony "belies any notion that he 'immediately'" recognized the lump as crack cocaine. Rather, the court concluded, the officer determined that the lump was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket"-a pocket which the officer already knew contained no weapon.

Under the State Supreme Court's interpretation of the record before it, it is clear that the court was correct in holding that the police officer in this case overstepped the bounds of the "strictly circumscribed" search for weapons allowed under *Terry*. Where, as here, "an officer who is executing a valid search for one item seizes a different item," this Court rightly "has been sensitive to the danger ... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." *Texas v. Brown*, (STEVENS, J., concurring in judgment). Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to "[t]he sole justification of the search ... the protection of the police officer and others nearby." It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize, and that we have condemned in subsequent cases. Once again, the analogy to the plain-view doctrine is apt.

In *Arizona v. Hicks*, (1987), this Court held invalid the seizure of stolen stereo equipment found by police while executing a valid search for other evidence. Although the police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment to permit officers to read its serial numbers. The subsequent seizure of the equipment could not be justified by the plain-view doctrine, this Court explained, because the incriminating character of the stereo equipment was not immediately apparent; rather, probable cause to believe that the equipment was stolen arose only as a result of a further search-the moving of the equipment-

that was not authorized by a search warrant or by any exception to the warrant requirement. The facts of this case are very similar. Although the officer was lawfully in a position to feel the lump in respondent's pocket, because *Terry* entitled him to place his hands upon respondent's jacket, the court below determined that the incriminating character of the object was not immediately apparent to him. Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement. Because this further search of respondent's pocket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional.

For these reasons, the judgment of the Minnesota Supreme Court is

Affirmed.

JUSTICE SCALIA, concurring.

I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification. Thus, when the Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated" (emphasis added), it "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted," *Carroll v. United States*, (1925); see also *California v. Acevedo*, (1991) (SCALIA, J., concurring in judgment). The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted-even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."

My problem with the present case is that I am not entirely sure that the physical search-the "frisk"-that produced the evidence at issue here complied with that constitutional standard. The decision of ours that gave approval to such searches, *Terry v. Ohio*, (1968), made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was "reasonable" by current estimations.

There is good evidence, I think, that the "stop" portion of the *Terry* "stop-and-frisk" holding accords with the common law-that it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves. ...

I am unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning. ...

. ...

As a policy matter, it may be desirable to permit "frisks" for weapons, but not to encourage "frisks" for drugs by admitting evidence other than weapons.

I adhere to original meaning, however. And though I do not favor the mode of analysis in *Terry*, I cannot say that its result was wrong. Constitutionality of the "frisk" in the present case was neither challenged nor argued. Assuming, therefore, that the search was lawful, I agree with the Court's premise that any evidence incidentally discovered in the course of it would be admissible, and join the Court's opinion in its entirety.

Excerpted by Alex Nobiletti

Illinois v. Wardlow

528 U.S. 119 (2000)

> Vote: 5-4
> Decision: Reversed and remanded
> Majority: Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas
> Concurrence in part/Dissent in part: Stevens, joined by Souter, Ginsburg, and Breyer

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Wardlow fled upon seeing police officers patrolling an area known for heavy narcotics trafficking. Two of the officers caught up with him, stopped him, and conducted a protective patdown search for weapons. Discovering a .38-caliber handgun, the officers arrested Wardlow. We hold that the officers' stop did not violate the Fourth Amendment to the United States Constitution.

On September 9, 1995, Officers Nolan and Harvey were working as uniformed officers in the special operations section of the Chicago Police Department. The officers were driving the last car of a four-car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions. ...

As the caravan passed 4035 West Van Buren, Officer Nolan observed respondent Wardlow standing next to the building holding an opaque bag. Respondent looked in the direction of the officers and fled. Nolan and Harvey turned their car southbound ... and eventually cornered him on the street. Nolan then exited his car and stopped respondent. He immediately conducted a protective patdown search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions. During the frisk, Officer Nolan squeezed the bag respondent was carrying and felt a heavy, hard object similar to the shape of a gun. The officer then opened the bag and discovered a .38-caliber handgun with five live rounds of ammunition. The officers arrested Wardlow.

The Illinois trial court denied respondent's motion to suppress, finding the gun was recovered during a lawful stop and frisk. Following a stipulated bench trial, Wardlow was convicted of unlawful use of a weapon by a felon. The Illinois Appellate Court reversed Wardlow's conviction, concluding that the gun should have been suppressed because Officer Nolan did not have reasonable suspicion sufficient to justify an investigative stop pursuant to *Terry v. Ohio*, (1968).

The Illinois Supreme Court agreed ... [and] determined that sudden flight in such an area does not create a reasonable suspicion justifying a *Terry* stop. ... We granted certiorari, and now reverse.

This case, involving a brief encounter between a citizen and a police officer on a public street, is governed by the analysis we first applied in *Terry*. In *Terry*, we held that an officer may ... conduct a brief, investigatory stop when the officer has a

reasonable, articulable suspicion that criminal activity is afoot. While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity. *Terry*.

Nolan and Harvey were among eight officers in a four-car caravan that was converging on an area known for heavy narcotics trafficking, and the officers anticipated encountering a large number of people in the area, including drug customers and individuals serving as lookouts. It was in this context that Officer Nolan decided to investigate Wardlow after observing him flee. An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a "high crime area" among the relevant contextual considerations in a *Terry* analysis. *Adams v. Williams*, (1972).

In this case, moreover, it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight ... is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. We conclude Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.

Such a holding is entirely consistent with our decision in *Florida v. Royer*, (1983), where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, (1991). But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Respondent and amici also argue that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity. This fact is undoubtedly true, but does not establish a violation of the Fourth Amendment. Even in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation. The officer observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring. All of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. *Terry* recognized that the officers could detain the individuals to resolve the ambiguity.

In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply

allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way. But in this case the officers found respondent in possession of a handgun, and arrested him for violation of an Illinois firearms statute. ...

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

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and dissenting in part.

The State of Illinois asks this Court to announce a "bright-line rule" authorizing the temporary detention of anyone who flees at the mere sight of a police officer. Respondent counters by asking us to adopt the opposite per se rule-that the fact that a person flees upon seeing the police can never, by itself, be sufficient to justify a temporary investigative stop of the kind authorized by *Terry v. Ohio*, (1968).

The Court today wisely endorses neither per se rule. Instead, it rejects the proposition that "flight is ... necessarily indicative of ongoing criminal activity," adhering to the view that "[t]he concept of reasonable suspicion ... is not readily, or even usefully, reduced to a neat set of legal rules," but must be determined by looking to "the totality of the circumstances-the whole picture," *United States v. Sokolow*, (1989) (internal quotation marks and citation omitted). Abiding by this framework, the Court concludes that "Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity."

Although I agree with the Court's rejection of the per se rules proffered by the parties, unlike the Court, I am persuaded that in this case the brief testimony of the officer who seized respondent does not justify the conclusion that he had reasonable suspicion to make the stop. ...

. ...

Guided by that totality-of-the-circumstances test, the Court concludes that Officer Nolan had reasonable suspicion to stop respondent. In this respect, my view differs from the Court's. The entire justification for the stop is articulated in the brief testimony of Officer Nolan. Some facts are perfectly clear; others are not. This factual insufficiency leads me to conclude that the Court's judgment is mistaken.

. ... Nolan was part of an eight officer, four-car caravan patrol team. The officers were headed for "one of the areas in the 11th District [of Chicago] that's high [in] narcotics traffic." . ...

Officer Nolan and his partner were in the last of the four patrol cars that "were all caravaning eastbound down Van Buren." Wardlow "looked in our direction and began fleeing." Nolan then "began driving southbound down the street observing [respondent] running through the gangway and the alley southbound," and observed that Wardlow was carrying a white, opaque bag under his arm. After the car turned south and intercepted respondent as he "ran right towards us," Officer Nolan stopped him and conducted a "protective search," which revealed that the bag under respondent's arm contained a loaded handgun.

This terse testimony is most noticeable for what it fails to reveal. Though asked whether he was in a marked or unmarked car, Officer Nolan could not recall the answer. He was not asked whether any of the other three cars in the caravan were marked, or whether any of the other seven officers were in uniform. Though he explained that the size of the caravan was because "[n]ormally in these different areas there's an enormous amount of people, sometimes lookouts, customers," Officer Nolan did not testify as to whether anyone besides Wardlow was nearby 4035 West Van Buren. Nor is it clear that that address was the intended destination of the caravan. As the Appellate Court of Illinois interpreted the record, "it appears that the officers were simply driving by, on their way to some unidentified location, when they noticed defendant standing at 4035 West Van Buren," 287 Ill. App. 3d 367, 370—371, 678 N. E. 2d 65, 67 (1997). Officer Nolan's testimony also does not reveal how fast the officers were driving. It does not indicate whether he saw respondent notice the other patrol cars. And it does not say whether the caravan, or any part of it, had already passed Wardlow by before he began to run.

Indeed, the Appellate Court thought the record was even "too vague to support the inference that ... defendant's flight was related to his expectation of police focus on him." Presumably, respondent did not react to the first three cars, and we cannot even be sure that he recognized the occupants of the fourth as police officers. The adverse inference is based entirely on the officer's statement: "He looked in our direction and began fleeing."

No other factors sufficiently support a finding of reasonable suspicion. Though respondent was carrying a white, opaque bag under his arm, there is nothing at all suspicious about that. Certainly the time of day-shortly after noon does not support Illinois' argument. Nor were the officers "responding to any call or report of suspicious activity in the area." Officer Nolan did testify that he expected to find "an enormous amount of people," including drug customers or lookouts, and the Court points out that "[i]t was in this context that Officer Nolan decided to investigate Wardlow after observing him flee." This observation, in my view, lends insufficient weight to the reasonable suspicion analysis; indeed, in light of the absence of testimony that anyone else was nearby when respondent began to run, this observation points in the opposite direction.

The State, along with the majority of the Court, relies as well on the assumption that this flight occurred in a high crime area. Even if that assumption is accurate, it is insufficient because even in a high crime neighborhood unprovoked flight does not invariably lead to reasonable suspicion. On the contrary, because many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so. Like unprovoked flight itself, presence in a high crime neighborhood is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry.

It is the State's burden to articulate facts sufficient to support reasonable suspicion. In my judgment, Illinois has failed to discharge that burden. I am not persuaded that the mere fact that someone standing on a sidewalk looked in the direction of a passing car before starting to run is sufficient to justify a forcible stop and frisk.

I therefore respectfully dissent from the Court's judgment to reverse the court below.

Excerpted by Alex Nobiletti

Hiibel v. Sixth Judicial District of Nevada, Humboldt County

542 U.S. 177 (2004)

> Vote: 5-4
> Decision: Affirmed
> Majority: Kennedy, joined by Rehnquist, O'Connor, Scalia, and Thomas
> Dissent: Stevens
> Dissent: Breyer, joined by Souter and Ginsburg

Justice Kennedy delivered the opinion of the Court.

The petitioner was arrested and convicted for refusing to identify himself during a stop allowed by *Terry v. Ohio*, (1968). He challenges his conviction under the Fourth and Fifth Amendments to the United States Constitution, applicable to the States through the Fourteenth Amendment.

The sheriff's department in Humboldt County, Nevada, received an afternoon telephone call reporting an assault. The caller reported seeing a man assault a woman in a red and silver GMC truck on Grass Valley Road. Deputy Sheriff Lee Dove was dispatched to investigate ... he found the truck parked on the side of the road. A man was standing by the truck, and a young woman was sitting inside it. The officer observed skid marks in the gravel behind the vehicle, leading him to believe it had come to a sudden stop.

The officer approached the man and explained that he was investigating a report of a fight. The man appeared to be intoxicated. The officer asked him if he had "any identification on [him]," which we understand as a request to produce a driver's license or some other form of written identification. The man refused and asked why the officer wanted to see identification. The officer responded that he was conducting an investigation and needed to see some identification. ... After continued refusals to comply with the officer's request for identification, the man began to taunt the officer by placing his hands behind his back and telling the officer to arrest him and take him to jail ... the officer asked for identification 11 times and was refused each time. After warning the man that he would be arrested if he continued to refuse to comply, the officer placed him under arrest.

We now know that the man arrested on Grass Valley Road is Larry Dudley Hiibel. Hiibel was charged with "willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office.". ... The government reasoned that Hiibel had obstructed the officer in carrying out his duties. ...

Hiibel was tried in the Justice Court of Union Township. The court agreed that Hiibel's refusal to identify himself as required by [Nevada statute]. ... Hiibel was convicted and fined $250. The Sixth Judicial District Court affirmed. ... On

review the Supreme Court of Nevada rejected the Fourth Amendment challenge in a divided opinion. Hiibel petitioned for rehearing, seeking explicit resolution of his Fifth Amendment challenge. The petition was denied without opinion. We granted certiorari.

NRS §171.123(3) is an enactment sometimes referred to as a "stop and identify" statute. ...

. ... In *Brown v. Texas*, (1979), the Court invalidated a conviction for violating a Texas stop and identify statute on Fourth Amendment grounds. The Court ruled that the initial stop was not based on specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity. Absent that factual basis for detaining the defendant, the Court held, the risk of "arbitrary and abusive police practices" was too great and the stop was impermissible. Four Terms later, the Court invalidated a modified stop and identify statute on vagueness grounds ... The California law in *Kolender* [*v. Lawson* (1983)] required a suspect to give an officer " 'credible and reliable' " identification when asked to identify himself. The Court held that the statute was void because it provided no standard for determining what a suspect must do to comply with it, resulting in " 'virtually unrestrained power to arrest and charge persons with a violation.' " (quoting *Lewis v. New Orleans*, (1974) (Powell, J., concurring in result)).

The present case begins where our prior cases left off. ... [T]he Nevada Supreme Court has interpreted NRS §171.123(3) to require only that a suspect disclose his name. As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means ... the statute is satisfied and no violation occurs.

Hiibel argues that his conviction cannot stand because the officer's conduct violated his Fourth Amendment rights. We disagree.

Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment. ... Beginning with *Terry v. Ohio*, (1968), the Court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. ... To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be " 'justified at its inception, and ... reasonably related in scope to the circumstances which justified the interference in the first place.' " *United States v. Sharpe*, (1985) (quoting *Terry*). For example, the seizure cannot continue for an excessive period of time, see *United States v. Place*, (1983), or resemble a traditional arrest, see *Dunaway v. New York*, (1979).

Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops. ...

Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.

Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer. Petitioner draws our attention to statements in prior opinions that, according to him, answer the question in his favor. In *Terry*, Justice White stated in a concurring opinion that a person detained in an investigative stop can be questioned but is "not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest.". ...

. ... This case concerns a different issue, however. Here, the source of the legal obligation arises from Nevada state law, not the Fourth Amendment ... we cannot view the dicta in *Berkemer* or Justice White's concurrence in *Terry* as answering the question whether a State can compel a suspect to disclose his name during a *Terry* stop.

The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop. The reasonableness of a seizure under the Fourth Amendment is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Delaware v. Prouse*, (1979).

The Nevada statute satisfies that standard. The request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop. ... A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures.

Petitioner argues that the Nevada statute circumvents the probable cause requirement, in effect allowing an officer to arrest a person for being suspicious. ... Petitioner's concerns are met by the requirement that a *Terry* stop must be justified at its inception and "reasonably related in scope to the circumstances which justified" the initial stop. Under these principles, an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop. ... It is clear in this case that the request for identification was "reasonably related in scope to the circumstances which justified" the stop. *Terry*. The officer's request was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. The stop, the request, and the State's requirement of a response did not contravene the guarantees of the Fourth Amendment.

Petitioner further contends that his conviction violates the Fifth Amendment's prohibition on compelled self-incrimination. The Fifth Amendment states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled.

Respondents urge us to hold that the statements [the statute] requires are nontestimonial, and so outside the Clause's scope. We decline to resolve the case on that basis. "[T]o be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, (1988). Stating one's name may qualify as an assertion of fact relating to identity. Production of identity documents might meet the definition as well. As we noted in [*U.S.*] *Hubbell* [(2000)], acts of production may yield testimony establishing "the existence, authenticity, and custody of items [the police seek]." Even if these required actions are testimonial, however, petitioner's challenge must fail because in this case disclosure of his name presented no reasonable danger of incrimination.

The Fifth Amendment prohibits only compelled testimony that is incriminating. ...

. ...

In this case petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it "would furnish a link in the chain of evidence needed to prosecute" him. *Hoffman v. United States*, (1951). As best we can tell, petitioner refused to identify himself only because he thought his name was none of the officer's business. ...

The narrow scope of the disclosure requirement is also important. One's identity is, by definition, unique; yet it is, in another sense, a universal characteristic. Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances. Even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand. Still, a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow. We need not resolve those questions here.

The judgment of the Nevada Supreme Court is

Affirmed.

Justice Stevens, dissenting.

The Nevada law at issue in this case imposes a narrow duty to speak upon a specific class of individuals. The class includes only those persons detained by a police officer "under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime"—persons who are, in other words, targets of a criminal investigation. The statute therefore is directed not "at the public at large," but rather "at a highly selective group inherently suspect of criminal activities." *Albertson v. Subversive Activities Control Bd.*, (1965).

Under the Nevada law, a member of the targeted class "may not be compelled to answer" any inquiry except a command that he "identify himself." Refusal to identify oneself upon request is punishable as a crime. ... In my judgment, the broad constitutional right to remain silent ... does not admit even of the narrow exception defined by the Nevada statute.

"[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda v. Arizona*, (1966). It is a "settled principle" that "the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes," but "they have no right to compel them to answer." *Davis v. Mississipi*, (1969). ... In a criminal trial, the indicted defendant has an unqualified right to refuse to testify and may not be punished for invoking that right. The unindicted target of a grand jury investigation enjoys the same constitutional protection even if he has been served with a subpoena. So does an arrested suspect during custodial interrogation in a police station.

There is no reason why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser protection. Indeed, we have said that the Fifth Amendment's protections apply with equal force in the context of *Terry* stops ... where an officer's inquiry "must be 'reasonably related in scope to the justification for [the stop's] initiation.' " *Berkemer v. McCarty*, (1984) (some internal quotation marks omitted). "Typically, this means that

the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." See also *Terry*, (White, J., concurring). Given our statements to the effect that citizens are not required to respond to police officers' questions during a *Terry* stop, it is no surprise that petitioner assumed, as have we, that he had a right not to disclose his identity.

. ... It has "long been settled that [the Fifth Amendment's] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *United States v. Hubbell*, (2000). By "incriminating" we have meant disclosures that "could be used in a criminal prosecution or could lead to other evidence that might be so used," *Kastigar v. United States*, (1972)—communications, in other words, that "would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," *Hoffman v. United States*, (1951). Thus, "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *Hubbell*, (citing *Doe [v. United States, (1988)]*).

Given a proper understanding of the category of "incriminating" communications that fall within the Fifth Amendment privilege, it is clear that the disclosure of petitioner's identity is protected. The Court reasons that we should not assume that the disclosure of petitioner's name would be used to incriminate him or that it would furnish a link in a chain of evidence needed to prosecute him. But why else would an officer ask for it? And why else would the Nevada Legislature require its disclosure only when circumstances "reasonably indicate that the person has committed, is committing or is about to commit a crime"? If the Court is correct, then petitioner's refusal to cooperate did not impede the police investigation. ... I think that, on the contrary, the Nevada Legislature intended to provide its police officers with a useful law enforcement tool, and that the very existence of the statute demonstrates the value of the information it demands.

A person's identity obviously bears informational and incriminating worth, "even if the [name] itself is not inculpatory." *Hubbell*. A name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases. And that information, in turn, can be tremendously useful in a criminal prosecution. It is therefore quite wrong to suggest that a person's identity provides a link in the chain to incriminating evidence "only in unusual circumstances."

. ... Accordingly, I respectfully dissent.

Excerpted by Alex Nobiletti

Consent Searches

Bumper v. North Carolina

391 U.S. 543 (1968)

> Vote: 7-2
> Decision: Reversed and remanded
> Plurality: Stewart, joined by Brennan, Douglas, Fortas, Harlan, Marshall, and Warren
> Concurrence: Harlan
> Dissent: Black
> Dissent: White

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial in a North Carolina court upon a charge of rape, an offense punishable in that State by death unless the jury recommends life imprisonment. Among the items of evidence introduced ... was a .22-caliber rifle allegedly used in the commission of the crime. The jury found the petitioner guilty, but recommended a sentence of life imprisonment. The trial court-imposed that sentence, and the Supreme Court of North Carolina affirmed the judgment. We granted certiorari to consider two separate constitutional claims pressed unsuccessfully by the petitioner. ... First, the petitioner argues that his constitutional right to an impartial jury was violated in this capital case when the prosecution was permitted to challenge for cause all prospective jurors who stated that they were opposed to capital punishment or had conscientious scruples against imposing the death penalty. Secondly, the petitioner contends that the .22-caliber rifle introduced in evidence against him was obtained by the State in a search and seizure violative of the Fourth and Fourteenth Amendments.

In *Witherspoon v. Illinois* (1968), we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty. Our decision in *Witherspoon* does not govern the present case, because here, the jury recommended a sentence of life imprisonment. ... The petitioner adduced no evidence to support the claim that a jury selected as this one was is necessarily "prosecution prone," and the materials referred to in his brief are no more substantial than those brought to our attention in *Witherspoon*. Accordingly, we decline to reverse the judgment of conviction upon this basis.

The petitioner lived with his grandmother, Mrs. Hattie Leath. ... Two days after the alleged offense, but prior to the petitioner's arrest, four white law enforcement officers ... went to this house and found Mrs. Leath there. ... She met the officers at the front door. One of them announced, "I have a search warrant to search your house." Mrs. Leath responded, "Go ahead," and opened the door. In the kitchen the officers found the rifle that was later introduced in evidence at the petitioner's trial after a motion to suppress had been denied.

At the hearing on this motion, the prosecutor informed the court that he did not rely upon a warrant to justify the search, but upon the consent of Mrs. Leath. She testified at the hearing, stating, among other things: "Four of them came. I was busy about my work, and they walked into the house and one of them walked up and said, 'I have a search warrant to search your house,' and I walked out and told them to come on in. ... He just told me he had a search warrant, but he didn't read it to me. He did tell me he had a search warrant."

" ... He said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word. ... "

Upon the basis of Mrs. Leath's testimony, the trial court found that she had given her consent to the search, and denied the motion to suppress. The Supreme Court of North Carolina approved the admission of the evidence on the same basis.

The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.

When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion. ... Where there is coercion, there cannot be consent.

We hold that Mrs. Leath did not consent to the search, and that it was constitutional error to admit the rifle in evidence against the petitioner. Because the rifle was plainly damaging evidence against the petitioner with respect to all three of the charges against him, its admission at the trial was not harmless error.

The judgment of the Supreme Court of North Carolina is, accordingly, reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, dissenting.

This case, like *Witherspoon v. Illinois* (1968), decided today, was brought to this Court primarily to decide the question whether the constitutional rights of a criminal defendant are violated when prospective jurors who state they are opposed to capital punishment or who have conscientious scruples against imposing the death penalty are excluded for cause. As the Court in *Witherspoon* limited its holding to the question of punishment, and not of guilt, the jury issue became moot in this case. ... Passing over the jury issue, the Court still reverses the conviction in this case and sends it back for a new trial on the ground that the rifle, which the record shows was used to shoot the victims, and which is held by the majority to

have been obtained through an unconstitutional search and seizure, was admitted into evidence at petitioner's trial. One of the reasons that I cannot agree with the Court's reversal is because I believe the searching officers had valid permission to conduct their search. The facts surrounding the search are these: Petitioner had been raised by his grandmother, Mrs. Hattie Leath, with whom he was living at the time the rape and assaults were committed. Shortly after the victims were able to recount to the police what had happened to them, the county sheriff, with two of his deputies and a state police officer, went to Mrs. Leath's house. One of the deputies went up on the porch of the house and stated to Mrs. Leath, who was standing inside the screen door, that he had a warrant to search her house. ... Mrs. Leath's immediate response, without mentioning anything about a warrant or asking to see it or read it or have it read to her, was to tell the deputy "to come on in." At the trial, Mrs. Leath described her reaction to the visit of the law officers as follows:

". ... I let them search, and it was all my own free will. Nobody forced me at all."

My study of the record in this case convinces me that Mrs. Leath voluntarily consented to this search, and in fact that she actually wanted the officers to search her house — to prove to them that she had nothing to hide. Mrs. Leath's readiness to permit the search was the action of a person so conscious of her innocence, so proud of her own home, that she was not going to require a search warrant, thus indicating a doubt about the rectitude of her household. There are such people in this world of ours, and the evidence in this case causes me to believe Mrs. Leath is one of them. As she herself testified, "I just give them a free will to look, because I felt like the boy wasn't guilty."

Despite the statements of Mrs. Leath cited above, and despite the clear finding of consent by the trial judge, who personally saw and heard Mrs. Leath testify, this Court, refusing to accept Mrs. Leath's sworn testimony that she did freely consent and, overruling the trial judge's findings, concludes on its own that she did not consent. I do not believe the Court should substitute what it believes Mrs. Leath should have said for what she actually said — "it was all my own free will." I cannot accept what I believe to be an unwarranted conclusion by the Court.

Excerpted by Sloan Harmel

Florida v. Bostick

501 U.S. 429 (1991)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: O'Connor, joined by Kennedy, Rehnquist, Scalia, Souter, and White
> Dissent: Marshall, joined by Blackmun, and Stevens
> Dissent: White

JUSTICE O'CONNOR delivered the opinion of the Court.

We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate. This case requires us to determine whether the same rule applies to police encounters that take place on a bus.

. ...

In this case, two officers discovered cocaine when they searched a suitcase belonging to Terrance Bostick. The underlying facts of the search are in dispute, but the Florida Supreme Court, whose decision we review here, stated explicitly the factual premise for its decision:

"'Two officers, complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol, boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. Eyeing the passengers, the officers admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification. The ticket, from Miami to Atlanta, matched the defendant's identification and both were immediately returned to him ... [h]owever, the two police officers persisted, and explained their presence as narcotics agents on the lookout for illegal drugs. In pursuit of that aim, they then requested the defendant's consent to search his luggage. Needless to say, there is a conflict in the evidence about whether the defendant consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. ... '"

Two facts are particularly worth noting. First, the police specifically advised Bostick that he had the right to refuse consent. Bostick appears to have disputed the point, but, as the Florida Supreme Court noted explicitly, the trial court resolved this evidentiary conflict in the State's favor. Second, at no time did the officers threaten Bostick with a gun. The Florida Supreme Court indicated that one officer carried a zipper pouch containing a pistol — the equivalent of carrying a gun in a holster — but the court did not suggest that the gun was ever removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner. ...

Bostick was arrested and charged with trafficking in cocaine. He moved to suppress the cocaine on the grounds that it had been seized in violation of his Fourth Amendment rights. The trial court denied the motion, but made no factual findings. Bostick subsequently entered a plea of guilty, but reserved the right to appeal the denial of the motion to suppress.

The Florida District Court of Appeal affirmed, but considered the issue sufficiently important that it certified a question to the Florida Supreme Court. The Supreme Court reasoned that Bostick had been seized because a reasonable passenger in his situation would not have felt free to leave the bus to avoid questioning by the police. ...

The sole issue presented for our review is whether a police encounter on a bus of the type described above necessarily constitutes a "seizure" within the meaning of the Fourth Amendment. The State concedes ... that the officers lacked the reasonable suspicion required to justify a seizure and that, if a seizure took place, the drugs found in Bostick's suitcase must be suppressed as tainted fruit.

Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free "to disregard the police and go about his business," *Cali-*

fornia v. Hodari D (1991), the encounter is consensual, and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in *Terry v. Ohio (*1968):

"Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

. ...

There is no doubt that, if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure. The Court has dealt with similar encounters in airports, and has found them to be "the sort of consensual encounter[s] that implicat[e] no Fourth Amendment interest." *Florida v. Rodriguez* (1984). We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage — as long as the police do not convey a message that compliance with their requests is required.

Bostick insists that this case is different because it took place in the cramped confines of a bus. ... Bostick claims to find support in language from *Michigan v. Chesternut* (1988) ... indicating that a seizure occurs when a reasonable person would believe that he or she is not "free to leave." Bostick maintains that a reasonable bus passenger would not have felt free to leave under the circumstances of this case because there is nowhere to go on a bus. ...

The Florida Supreme Court found this argument persuasive, so much so that it adopted a per se rule prohibiting the police from randomly boarding buses as a means of drug interdiction. The state court erred, however, in focusing on whether Bostick was "free to leave," rather than on the principle that those words were intended to capture. ...

Here, for example, the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were "confined" in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.

In this respect, the Court's decision in *INS v. Delgado, supra*, is dispositive. At issue there was the INS' practice of visiting factories at random and questioning employees to determine whether any were illegal aliens. Several INS agents would stand near the building's exits, while other agents walked through the factory questioning workers. The Court acknowledged that the workers may not have been free to leave their worksite, but explained that this was not the result of police activity:

"Ordinarily, when people are at work, their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."

The present case is analytically indistinguishable from Delgado. Like the workers in that case, Bostick's freedom of movement was restricted by a factor independent of police conduct — i.e., by his being a passenger on a bus. Accordingly, the "free to leave" analysis on which Bostick relies is inapplicable. In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. ... We have said

before that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Chesternut*, *supra*. Where the encounter takes place is one factor, but it is not the only one. And, as the Solicitor General correctly observes, an individual may decline an officer's request without fearing prosecution. ...

. ... Here, the facts recited by the Florida Supreme Court indicate that the officers did not point guns at Bostick or otherwise threaten him, and that they specifically advised Bostick that he could refuse consent.

Nevertheless, we refrain from deciding whether or not a seizure occurred in this case. The trial court made no express findings of fact, and the Florida Supreme Court rested its decision on a single fact — that the encounter took place on a bus — rather than on the totality of the circumstances. We remand so that the Florida courts may evaluate the seizure question under the correct legal standard. We do reject, however, Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the "reasonable person" test presupposes an innocent person.

... [T]his Court is not empowered to forbid law enforcement practices simply because it considers them distasteful. The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation. The cramped confines of a bus are one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary. We cannot agree, however, with the Florida Supreme Court that this single factor will be dispositive in every case.

We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus. The Florida Supreme Court erred in adopting a per se rule.

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

It is so ordered.

Excerpted by Sloan Harmel

Stoner v. California

376 U.S. 483 (1964)

> Vote: 8-1
> Decision: Reversed
> Majority: Stewart, joined by Black, Brennan, Clark, Douglas, Goldberg, Warren, and White
> Concurrence/Dissent: Harlan

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted of armed robbery after a jury trial in the Superior Court of Los Angeles County, California. At the trial, several articles which had been found by police officers in a search of the petitioner's hotel room during his absence were admitted into evidence over his objection. A District Court of Appeal of California affirmed the conviction, and the Supreme Court of California denied further review. We granted certiorari, limiting review "to the question of whether evidence was admitted which had been obtained by an unlawful search and seizure." For the reasons which follow, we conclude that the petitioner's conviction must be set aside.

The essential facts are not in dispute. On the night of October 25, 1960, the Budget Town Food Market ... was robbed by two men, one of whom was described by eyewitnesses as carrying a gun and wearing horn-rimmed glasses and a grey jacket. Soon after the robbery, a checkbook belonging to the petitioner was found in an adjacent parking lot ... [and] [t]wo of the stubs in the checkbook indicated that checks had been drawn to the order of the Mayfair Hotel in Pomona, California. Pursuing this lead, the officers learned from the Police Department of Pomona that the petitioner had a previous criminal record, and they obtained from the Pomona police a photograph of the petitioner. They showed the photograph to the two eyewitnesses to the robbery, who both stated that the picture looked like the man who had carried the gun. On the basis of this information, the officers went to the Mayfair Hotel in Pomona ... on the night of October 27. They had neither search nor arrest warrants. There then transpired the following events, as later recounted by one of the officers:

"We approached the desk, the night clerk, and asked him if there was a party by the name of Joey L. Stoner living at the hotel. He checked his records and stated, 'Yes, there is.' And we asked him what room he was in. He stated he was in Room 404, but he was out at this time."

"We asked him how he knew that he was out. He stated that the hotel regulations required that the key to the room would be placed in the mail box each time they left the hotel. The key was in the mail box, that he therefore knew he was out of the room."

"We asked him if he would give us permission to enter the room, explaining our reasons for this."

"Q. What reasons did you explain to the clerk?"

"A. We explained that we were there to make an arrest of a man who had possibly committed a robbery ... and that we were concerned about the fact that he had a weapon. He stated 'In this case, I will be more than happy to give you permission, and I will take you directly to the room.'"

"Q. Is that what the clerk told you?"

"A. Yes, sir."

"Q. What else happened?"

"A. We left one detective in the lobby, and Detective Oliver, Officer Collins, and myself, along with the night clerk, got on the elevator and proceeded to the fourth floor, and went to Room 404. The night clerk placed a key in the lock, unlocked the door, and says, 'Be my guest.'"

The officers entered, and made a thorough search of the room and its contents. They found a pair of horn-rimmed glasses and a grey jacket in the room, and a .45-caliber automatic pistol with a clip and several cartridges. ... The petitioner was arrested two days later in Las Vegas, Nevada. ... The gun, the cartridges and clip, the horn-rimmed glasses, and the grey jacket were all used as evidence against him at his trial.

The search of the petitioner's room by the police officers was conducted without a warrant of any kind, and it therefore "can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. *Jones v. United States* (1958); *United States v. Jeffers* (1951)." The District Court of Appeal thought the search was justified as an incident to a lawful arrest. But a search can be incident to an arrest only if it is substantially contemporaneous with the arrest, and is confined to the immediate vicinity of the arrest.

Whatever room for leeway there may be in these concepts, it is clear that the search of the petitioner's hotel room in Pomona, California, on October 27 was not incident to his arrest in Las Vegas, Nevada, on October 29. The search was completely unrelated to the arrest, both as to time and as to place.

. ... Accordingly, the respondent has made no argument that the search can be justified as an incident to the petitioner's arrest. Instead, the argument is made that the search of the hotel room, although conducted without the petitioner's consent, was lawful because it was conducted with the consent of the hotel clerk. We find this argument unpersuasive.

Even if it be assumed that a state law which gave a hotel proprietor blanket authority to authorize the police to search the rooms of the hotel's guests could survive constitutional challenge, there is no intimation in the California cases cited by the respondent that California has any such law. Nor is there any substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search. Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority."

. ...

It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.

At least twice this Court has explicitly refused to permit an otherwise unlawful police search of a hotel room to rest upon consent of the hotel proprietor. *Lustig v. United States* (1949); *United States v. Jeffers* (1951). In *Lustig*, the manager of a hotel allowed police to enter and search a room without a warrant in the occupant's absence, and the search was held unconstitutional. In Jeffers, the assistant manager allowed a similar search, and that search was likewise held unconstitutional.

It is true, as was said in *Jeffers*, that, when a person engages a hotel room, he undoubtedly gives "implied or express permission" to "such persons as maids, janitors or repairmen" to enter his room "in the performance of their duties." But the conduct of the night clerk and the police in the police in the present case was of an entirely different order. In a closely analogous situation, the Court has held that a search by police officers of a house occupied by a tenant invaded the tenant's constitutional right, even though the search was authorized by the owner of the house, who presumably had not only apparent, but actual, authority to enter the house for some purposes, such as to "view waste." *Chapman v. United States* (1961). The Court pointed out that the officers' purpose in entering was not to view waste, but to search for distilling equipment, and concluded that to uphold such a search without a warrant would leave tenants' homes secure only in the discretion of their landlords.

No less than a tenant of a house, or the occupant of a room in a boarding house, *McDonald v. United States* (1948), a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. *Johnson v. United States* (1948). That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel.

It follows that this search without a warrant was unlawful. Since evidence obtained through the search was admitted at the trial, the judgment must be reversed.

It is so ordered.

Excerpted by Sloan Harmel

United States v. Matlock

415 U.S. 164 (1974)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: White, joined by Blackmun, Burger, Powell, Rehnquist, Stewart, and White
> Dissent: Douglas
> Dissent: Brennan, joined by Marshall

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Schneckloth v. Bustamonte* (1973), the Court reaffirmed the principle that the search of property, without warrant and without probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment. The question now before us is whether the evidence presented by the United States with respect to the voluntary consent of a third party to search the living quarters of the respondent was legally sufficient to render the seized materials admissible in evidence at the respondent's criminal trial.

Respondent Matlock was indicted in February, 1971, for the robbery of a federally insured bank in Wisconsin. ... A week later, he filed a motion to suppress evidence seized by law enforcement officers from a home ... in which he had been living. Suppression hearings followed. As found by the District Court ... respondent was arrested in the yard in front of the ... home on November 12, 1970. ... Living in the home were ... Mrs. Gayle Graff, Gayle's three-year-old son, and respondent. Although the officers were aware at the time of the arrest that respondent lived in the house, they did not ask him which room he occupied or whether he would consent to a search. Three of the arresting officers went to the door of the house and were admitted by Mrs. Graff. ... it was found that she consented voluntarily to the search of the house, including the east bedroom on the second floor which she said was jointly occupied by Matlock and herself. The east bedroom was searche[d], and the evidence at issue here, $4,995 in cash, was found in a diaper bag. ... The issue came to be whether Mrs. Graff's relationship to the east bedroom was sufficient to make her consent to the search valid against respondent Matlock.

The District Court ruled that, before the seized evidence could be admitted at trial, the Government had to prove, first, that it reasonably appeared to the searching officers, "just prior to the search, that facts exist which will render the consenter's consent binding on the putative defendant," and, second, that, "just prior to the search, facts do exist which render the consenter's consent binding on the putative defendant." ... it was sufficient to show her authority to consent in her own right by reason of her relationship to the premises. The first requirement was held satisfied because of respondent's presence in the yard of the house at the time of his arrest, because of Gayle Graff's residence in the house for some time and her presence in the house just prior to the search, and because of her statement to the officers that she and the respondent occupied the east bedroom.

The District Court concluded, however, that the Government had failed to satisfy the second requirement and had not satisfactorily proved Mrs. Graff's actual authority to consent to the search. ... [T]he District Court held that, although Gayle Graff's statements to the officers that she and the respondent occupied the east bedroom were admissible to prove the good faith belief of the officers, they were nevertheless extrajudicial statements inadmissible to prove the truth of the facts. ... The same was true of Mrs. Graff's additional statements to the officers later on November 12 that she and the respondent had been sleeping together in the east bedroom regularly ... and that she and respondent shared the use of a dresser in the room. There was also testimony that both Gayle Graff and respondent ... had made statements that they were wife and husband. These statements were deemed inadmissible to prove that respondent and Gayle Graff were married. ... Having excluded these declarations, the District Court then concluded that the remaining evidence was insufficient to prove

"to a reasonable certainty, by the greater weight of the credible evidence, that, at the time of the search, and for some period of reasonable length theretofore, Gayle Graff and the defendant were living together in the east bedroom."

The remaining evidence, briefly stated, was that Mrs. Graff and respondent had lived together ... in Florida from April to August, 1970; that they lived at the Marshall home ... from August to November 12, 1970; that they were several times seen going up or down stairs in the house together; and that the east bedroom, which respondent was shown to have rented from Mr. and Mrs. Marshall, contained evidence that it was also lived in by a man and a woman. The District Court thought these items of evidence created an "inference" or at least a "mild inference" that respondent and Gayle Graff at times slept together in the east bedroom, but it deemed them insufficient to satisfy the Government's burden of proof. The District Court also rejected the Government's claim that it was required to prove only that, at the time of the search, the officers could reasonably have concluded that Gayle Graff's relationship to the east bedroom was sufficient to make her consent binding on respondent.

The Court of Appeals affirmed the judgment of the District Court in all respects.

. ...

It has been assumed by the parties and the courts below that the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial. This basic proposition was accepted by the Seventh Circuit in this case ... and has generally been applied in similar circumstances by other courts of appeals, and various state courts. This Court left open, in *Amos v. United States* (1921), the question whether a wife's permission to search the residence in which she lived with her husband could "waive his constitutional rights," but more recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person. ...

More generally, in *Schneckloth v. Bustamonte (1973),* we noted that our prior recognition of the constitutional validity of "third party consent" searches in cases like *Frazier* and *Coolidge v. New Hampshire* (1971), supported the view that a consent search is fundamentally different in nature from the waiver of a trial right. These cases at least make clear that, when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. ...

The District Court excluded from evidence at the suppression hearings, as inadmissible hearsay, the out-of-court statements of Mrs. Graff with respect to her and respondent's joint occupancy and use of the east bedroom, as well as the evidence that both respondent and Mrs. Graff ... had represented themselves as husband and wife. The Court of Appeals affirmed the ruling. Both courts were in error.

. ...

There is, therefore, much to be said for the proposition that, in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel. However that may be, certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings, and it seems equally clear to us that the trial judge should not have excluded Mrs. Graff's statements in the circumstances present here.

In the first place, the court was quite satisfied that the statements had, in fact, been made.

Second, there is nothing in the record to raise serious doubts about the truthfulness of the statements themselves. Mrs. Graff harbored no hostility or bias against respondent that might call her statements into question. Indeed, she testified on his behalf at the suppression hearings. Mrs. Graff responded to inquiry at the time of the search that she and respondent occupied the east bedroom together. A few minutes later, having led the officers to the bedroom, she stated that she and respondent shared the one dresser in the room and that the woman's clothing in the room was hers. Later the same day, she stated to the officers that she and respondent had slept together regularly in the room, including the early morning of that very day. These statements were consistent with one another. They were also corroborated by other evidence received at the suppression hearings: Mrs. Graff and respondent had lived together in Florida for several months immediately prior to coming to Wisconsin, where they lived in the house in question and where they were seen going upstairs together in the evening; respondent was the tenant of the east bedroom, and that room bore every evidence that it was also occupied by a woman; respondent indicated in prior statements to various people that he and Mrs. Graff were husband and wife. Under these circumstances, there was no apparent reason for the judge to distrust the evidence and to exclude Mrs. Graff's declarations from his own consideration for whatever they might be worth in resolving, one way or another, the issues raised at the suppression hearings.

If there is remaining doubt about the matter, it should be dispelled by another consideration: cohabitation out of wedlock would not seem to be a relationship that one would falsely confess. Respondent and Gayle Graff were not married, and cohabitation out of wedlock is a crime in the State of Wisconsin. Mrs. Graff's statements were against her penal interest, and they carried their own indicia of reliability. This was sufficient in itself, we think, to warrant admitting them to evidence for consideration by the trial judge. ...

It appears to us, given the admissibility of Mrs. Graff's and respondent's out-of-court statements, that the Government sustained its burden of proving by the preponderance of the evidence that Mrs. Graff's voluntary consent to search the east bedroom was legally sufficient to warrant admitting into evidence the $4,995 found in the diaper bag. ... The judgment of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals with directions to remand the case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Sloan Harmel

Georgia v. Randolph

547 U.S. 103 (2006)

> Vote: 5-3
> Decision: Affirmed
> Majority: Souter, joined by Breyer, Ginsburg, Kennedy, and Stevens
> Not Participating: Alito
> Concurrence: Stevens
> Concurrence: Breyer
> Dissent: Roberts, joined by Scalia
> Dissent: Scalia
> Dissent: Thomas

MR. JUSTICE SOUTER delivered the opinion of the Court.

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.

. ...

On the morning of July 6, [Janet Randolph] complained to the police that after a domestic dispute her husband took their son away, and ... told them that her husband was a cocaine user whose habit had caused financial troubles. ... Shortly after the police arrived, Scott Randolph returned ... denied cocaine use, and countered that it was in fact his wife who abused drugs and alcohol.

One of the officers, Sergeant Murray, went with Janet Randolph to reclaim the child ... [who] also volunteered that there were "'items of drug evidence'" in the house. Sergeant Murray asked Scott Randolph for permission to search the house, which he unequivocally refused.

The sergeant turned to Janet Randolph for consent to search, which she readily gave. She led the officer upstairs to a bedroom that she identified as Scott's, where the sergeant noticed a section of a drinking straw with a powdery residue he suspected was cocaine. He then left the house to get an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search and apply for a warrant. When Sergeant Murray returned to the house, Janet Randolph withdrew her consent. The police took the straw to the police station, along with the Randolphs. After getting a search warrant, they returned to the house and seized further evidence of drug use, on the basis of which Scott Randolph was indicted for possession of cocaine.

He moved to suppress the evidence, as products of a warrantless search of his house unauthorized by his wife's consent over his express refusal. The trial court denied the motion, ruling that Janet Randolph had common authority to consent to the search.

The Court of Appeals of Georgia reversed, and was itself sustained by the State Supreme Court, principally on the ground that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search.". ... The State Supreme Court stressed that the officers in *Matlock* had not been "faced with the physical presence of joint occupants, with one consenting to the search and the other objecting." It held that an individual who chooses to live with another assumes a risk no greater than "'an inability to control access to the premises during [his] absence,'" and does not contemplate that his objection to a request to search commonly shared premises, if made, will be overlooked.

We granted certiorari to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search. We now affirm.

To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable ... one "jealously and carefully drawn" exception, *Jones v. United States* (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority. That person might be the householder against whom evidence is sought, *Schneckloth v. Bustamonte* (1973), or a fellow occupant who shares common authority over property, when the suspect is absent, *Matlock* (1974), and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant. None of our co-occupant consent-to-search cases, however, has presented the further fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained. The significance of such a refusal turns on the underpinnings of the co-occupant consent rule, as recognized since *Matlock*.

The defendant in that case was arrested in the yard of a house where he lived with Mrs. Graff ... and was detained in a squad car parked nearby. When the police went to the door, Mrs. Graff admitted them and consented to a search of the house. In resolving the defendant's objection to use of the evidence taken in the warrantless search, we said that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."

. ...

The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules. ... *Matlock* accordingly not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests.

. ... Although we have not dealt directly with the reasonableness of police entry in reliance on consent by one occupant subject to immediate challenge by another, we took a step toward the issue in an earlier case dealing with the Fourth Amendment rights of a social guest arrested at premises the police entered without a warrant or the benefit of any excep-

tion to the warrant requirement. *Minnesota v. Olson* (1990), held that overnight houseguests have a legitimate expectation of privacy in their temporary quarters because "it is unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest." If that customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim.

. ...

Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. Accordingly, in the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches, *Camara v. Municipal Court of City and County of San Francisco* (1967), the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place. Since we hold to the "centuries-old principle of respect for the privacy of the home," *Wilson v. Layne* (1999), "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people," *Minnesota v. Carter* (1998) (Kennedy, J., concurring). We have, after all, lived our whole national history with an understanding of "the ancient adage that a man's home is his castle [to the point that the poorest man may in his cottage bid defiance to all the forces of the Crown," *Miller v. United States* (1958).

Disputed permission is thus no match for this central value of the Fourth Amendment, and the State's other countervailing claims do not add up to outweigh it. ...

... [N]othing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection. We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.

There are two loose ends, the first being the explanation given in *Matlock* for the constitutional sufficiency of a co-tenant's consent to enter and search: it "rests ... on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right ... ." If Matlock's co-tenant is giving permission "in his own right," how can his "own right" be eliminated by another tenant's objection? The answer appears in the very footnote from which the quoted statement is taken: the "right" to admit the police to which Matlock refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. Thus, to ask whether the consenting tenant has the right to admit the police when a physically present fellow tenant objects is not to question whether some property right may be divested by the mere objection of another. It is, rather, the question whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection. The Matlock Court did not purport to answer this question ... the Court described the co-tenant's consent as good against "the absent, nonconsenting" resident."

The second loose end is the significance of *Matlock* and *Rodriguez* after today's decision. Although the Matlock defendant was not present with the opportunity to object, he was in a squad car not far away; the Rodriguez defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search. ...

. ... So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. For the very reason that *Rodriguez* held it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, we think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. ... The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent, albeit imprudently, a fact that undercuts any argument that the police should try to locate a suspected inhabitant because his denial of consent would be a foregone conclusion.

This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained.

The judgment of the Supreme Court of Georgia is therefore affirmed.

It is so ordered.

Excerpted by Sloan Harmel

Fifth Amendment

Case List

Coerced Confessions and Testimony

Brown v. Mississippi (1936)
Spano v. New York (1959)

Protecting the Privilege

Escobedo v. Illinois (1964)
Miranda v. Arizona (1966)

What Constitutes Interrogation?

Brewer v. Williams (1977)
Rhode Island v. Innis (1980)

What Constitutes Custody?

Oregon v. Mathiason (1966)
Salinas v. Texas (2013)

Exceptions and Admissibility

Harris v. New York (1971)
Oregon v. Elstad (1985)
Missouri v. Seibert (2004)
New York v. Harris (1990)

Coerced Confessions and Testimony

Brown v. Mississippi

297 U.S. 278 (1936)

> Vote: 9-0
> Decision: Reversed
> Majority: Hughes, joined by Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts, and Cardoza

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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

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

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

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

The opinion of the state court did not set forth the evidence as to the circumstances in which the confessions were procured. That the evidence established that they were procured by coercion was not questioned. The state court said:

" ... [C]learly and adequately stated in the dissenting opinion of Judge Griffith ... showing both the extreme brutality of the measures to extort the confessions and the participation of the state authorities, we quote this part of his opinion ... :

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

"The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night ... the same deputy, accompanied by a number of white men, one of whom was also an officer ... came to the jail, and the two last named defendants were made to strip, and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present, and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment."

. ...

"All this having been accomplished, on the next day, that is, on Monday, April 2, when the defendants had been given time to recuperate somewhat from the tortures to which they had been subjected, the two sheriffs ... came to the jail ... to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred that he had no personal knowledge of it. He admitted that one of the defendants, when brought before him to confess, was limping and did not sit down, and that this particular defendant then and there stated that he had been strapped so severely that he could not sit down, and as already stated, the signs of the rope on the neck of another of the defendants were plainly visible to all. Nevertheless, the solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of the said three witnesses deliv-

ered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary, and the failure of the court then to exclude the confessions is sufficient to reverse the judgment. ... "

. ...

"The defendants were brought to the courthouse of the county on the following morning, April 5th, and the so-called trial was opened, and was concluded on the next day ... and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence, a peremptory instruction to find for the defendants would have been inescapable. The defendants were put on the stand, and, by their testimony, the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that, in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.'. ... "

The State stresses the statement in *Twining v. New Jersey* [*(1908])* that "exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution," and the statement in *Snyder v. Massachusetts [(1934])* that "the privilege against self-incrimination may be withdrawn, and the accused put upon the stand as a witness for the State." But the question of ... [c]ompulsion by torture to extort a confession is a different matter.

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy unless, in so doing, it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts ... Rogers v. Peck, [(1905)]. ...* The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination, where the whole proceeding is but a mask without supplying corrective process. ... Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial which, in truth, is "but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Mooney v. Holohan, [(1935)]*. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert v. Louisiana, [(1926])*. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

. ... In an earlier case, the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In *Fisher v. State,* [(1926)] the court said, "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all

countries. ... The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

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

Reversed.

Excerpted by Sobhi Sidani

Spano v. New York

360 U.S. 315 (1959)

> Vote: 9-0
> Decision: Reversed
> Majority: Warren, joined by Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, and Stewart
> Concurrence: Douglas, joined by Black and Brennan
> Concurrence: Stewart, joined by Douglas and Brennan

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment. As in all such cases, we are forced to resolve a conflict between two fundamental interests of society — its interest in prompt and efficient law enforcement and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement.

. ...

The State's evidence reveals the following: Petitioner Vincent Joseph Spano ... was drinking in a bar. The decedent, a former professional boxer weighing almost 200 pounds ... took some of petitioner's money from the bar. Petitioner followed him out of the bar to recover it. A fight ensued, with the decedent knocking petitioner down and then kicking him in the head three or four times. ... After the bartender applied some ice to his head, petitioner left the bar, walked to his apart-

ment, secured a gun, and walked eight or nine blocks to a candy store where the decedent was frequently to be found. He entered the store in which decedent ... and a boy who was supervising the store were present. He fired five shots, two of which entered the decedent's body, causing his death. The boy was the only eyewitness. ...

... [T]he Bronx County Grand Jury returned an indictment for first-degree murder against petitioner. Accordingly, a bench warrant was issued for his arrest. ...

... [P]etitioner called one Gaspar Bruno, a close friend of 8 or 10 years' standing who had attended school with him. Bruno was a fledgling police officer, having at that time not yet finished attending police academy. According to Bruno's testimony, petitioner told him "that he took a terrific beating, that the deceased hurt him real bad and he dropped him a couple of times and he was dazed; he didn't know what he was doing, and that he went and shot at him." Petitioner told Bruno that he intended to get a lawyer and give himself up. Bruno relayed this information to his superiors.

The following day ... petitioner, accompanied by counsel, surrendered himself. ... His attorney had cautioned him to answer no questions, and left him in the custody of the officers. He was promptly taken to the office of the Assistant District Attorney, and, at 7:15 p.m., the questioning began. ... The record reveals that the questioning was both persistent and continuous. Petitioner, in accordance with his attorney's instructions, steadfastly refused to answer. Detective Motta testified: "He refused to talk to me." "He just looked up to the ceiling and refused to talk to me." . ...

He asked one officer, Detective Ciccone, if he could speak to his attorney, but that request was denied. Detective Ciccone testified that he could not find the attorney's name in the telephone book. He was given two sandwiches, coffee and cake at 11 p.m.

At 12:15 a.m. ... after five hours of questioning in which it became evident that petitioner was following his attorney's instructions, on the Assistant District Attorney's orders, petitioner was transferred to the 46th Squad, Ryer Avenue Police Station. The Assistant District Attorney also went to the police station and to some extent continued to participate in the interrogation. Petitioner arrived at 12:30, and questioning was resumed at 12:40. ...

But petitioner persisted in his refusal to answer, and again requested permission to see his attorney, this time from Detective Lehrer. His request was again denied.

It was then that those in charge of the investigation decided that petitioner's close friend, Bruno, could be of use. He had been called out on the case around 10 or 11 p.m., although he was not connected with the 46th Squad or Precinct in any way. Although, in fact, his job was in no way threatened, Bruno was told to tell petitioner that petitioner's telephone call had gotten him "in a lot of trouble," and that he should seek to extract sympathy from petitioner for Bruno's pregnant wife and three children. Bruno developed this theme with petitioner without success, and petitioner, also without success, again sought to see his attorney, a request which Bruno relayed unavailingly to his superiors. After this first session with petitioner, Bruno was again directed by Lt. Gannon to play on petitioner's sympathies, but again no confession was forthcoming. But the Lieutenant a third time ordered Bruno falsely to importune his friend to confess, but again petitioner clung to his attorney's advice.

Inevitably, in the fourth such session directed by the Lieutenant, lasting a full hour, petitioner succumbed to his friend's prevarications and agreed to make a statement. Accordingly, at 3:25 a.m., the Assistant District Attorney ... took his statement in question and answer form. ... The statement was completed at 4:05 a.m.

But this was not the end. At 4:30 a.m., three detectives took petitioner to Police Headquarters in Manhattan. On the way, they attempted to find the bridge from which petitioner said he had thrown the murder weapon. ... When petitioner recognized neither bridge as the one from which he had thrown the weapon, they ... entered Manhattan via the Third Avenue Bridge, which petitioner stated was the right one, and then returned to the Bronx well after 6 a.m. During that trip, the officers also elicited a statement from petitioner that the deceased was always "on [his] back," "always pushing" him, and that he was "not sorry" he had shot the deceased. All three detectives testified to that statement at the trial.

Court opened at 10 a.m. that morning, and petitioner was arraigned at 10:15.

At the trial, the confession was introduced in evidence over appropriate objections. The jury was instructed that it could rely on it only if it was found to be voluntary. The jury returned a guilty verdict, and petitioner was sentenced to death. The New York Court of Appeals affirmed the conviction over three dissents ... and we granted certiorari to resolve the serious problem presented under the Fourteenth Amendment.

Petitioner's first contention is that his absolute right to counsel in a capital case, *Powell v. Alabama [(1932)]*, became operative on the return of an indictment against him, for at that time he was in every sense a defendant in a criminal case, the grand jury having found sufficient cause to believe that he had committed the crime. He argues accordingly that, following indictment, no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment. ... We find use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles.

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that, in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that, in recent years, law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. ... As law enforcement officers become more responsible and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made. Our judgment here is that, on all the facts, this conviction cannot stand.

Petitioner was a foreign-born young man of 25 with no past history of law violation or of subjection to official interrogation, at least insofar as the record shows. He had progressed only one-half year into high school, and the record indicates that he had a history of emotional instability. He did not make a narrative statement, but was subject to the leading questions of a skillful prosecutor in a question and answer confession. He was subjected to questioning not by a few men, but by many ... and the effect of such massive official interrogation must have been felt. Petitioner was questioned for virtually eight straight hours before he confessed, with his only respite being a transfer to an arena presumably considered more appropriate by the police for the task at hand. Nor was the questioning conducted during normal business

hours, but began in early evening, continued into the night, and did not bear fruition until the not-too-early morning. The drama was not played out, with the final admissions obtained, until almost sunrise. In such circumstances slowly mounting fatigue does, and is calculated to, play its part.

The questioners persisted in the face of his repeated refusals to answer on the advice of his attorney, and they ignored his reasonable requests to contact the local attorney whom he had already retained and who had personally delivered him into the custody of these officers in obedience to the bench warrant.

The use of Bruno, characterized in this Court by counsel for the State as a "childhood friend" of petitioner's, is another factor which deserves mention in the totality of the situation. Bruno's was the one face visible to petitioner in which he could put some trust. There was a bond of friendship between them going back a decade into adolescence. It was with this material that the officers felt that they could overcome petitioner's will. They instructed Bruno falsely to state that petitioner's telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child. And Bruno played this part of a worried father, harried by his superiors, in not one, but four different acts, the final one lasting an hour. ...

We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting. Here, a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. ... They were rather concerned primarily with securing a statement from defendant on which they could convict him. ... When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny. ... Accordingly, we hold that petitioner's conviction cannot stand under the Fourteenth Amendment.

. ... The judgment must be

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE BRENNAN join, concurring.

While I join the opinion of the Court, I add what, for me, is an even more important ground of decision.

. ...

This is a capital case, and, under the rule of *Powell v. Alabama [(1932)]*, the defendant was entitled to be represented by counsel. ...

Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.

. ... This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession

which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel. This seems to me to be a flagrant violation of the principle announced in *Powell v. Alabama,* that the right of counsel extends to the preparation for trial, as well as to the trial itself. ...

Excerpted by Sobhi Sidani

Protecting the Privilege

Escobedo v. Illinois

378 U.S. 478 (1964)

> Vote: 5-4
> Decision: Reversed and remanded
> Majority: Goldberg joined by Brennan, Douglas, Black, and Warren
> Dissent: Harlan
> Dissent: White, joined by Clark and Stewart
> Dissent: Stewart

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of "the Assistance of Counsel" in violation of the Sixth Amendment ... and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation.

On the night of January 19, 1960, petitioner's brother-in-law was fatally shot. In the early hours of the next morning, at 2:30 a.m., petitioner was arrested without a warrant and interrogated. Petitioner made no statement to the police, and was released at 5 that afternoon. ...

On January 30, Benedict DiGerlando, who was then in police custody and who was later indicted for the murder along with petitioner, told the police that petitioner had fired the fatal shots. ... [P]etitioner and his sister ... were arrested and taken to police headquarters. En route to the police station ... one of the arresting officers told defendant that DiGerlando had named him as the one who shot" the deceased. Petitioner testified, without contradiction, that the "detectives said they had us pretty well, up pretty tight, and we might as well admit to this crime," and that he replied, "I am sorry, but I would like to have advice from my lawyer." A police officer testified that, although petitioner was not formally charged, "he was in custody" and "couldn't walk out the door."

Shortly after petitioner reached police headquarters, his retained lawyer arrived. The lawyer described the ensuing events in the following terms:

". ... The first person I talked to was the Sergeant on duty at the Bureau Desk, Sergeant Pidgeon ... informed me that the boy had been taken from the lockup to the Homicide Bureau ... He called the Homicide Bureau and told them there was an attorney waiting to see Escobedo. He told me I could not see him. Then I went upstairs to the Homicide Bureau. ... I identified myself as Escobedo's attorney and asked permission to see him. They said I could not. ... The police officer told me to see Chief Flynn, who was on duty. I identified myself to Chief Flynn and asked permission to see my client.

He said I could not. ... He said I couldn't see him because they hadn't completed questioning. ... For a second or two, I spotted him in an office in the Homicide Bureau ... then the door was closed by one of the officers at Homicide. ... I waited around for another hour or two and went back again and renewed by request to see my client. He again told me I could not. ... I filed an official complaint. ... I was told at Homicide that I couldn't see him and I would have to get a writ of habeas corpus."

Petitioner testified that, during the course of the interrogation, he repeatedly asked to speak to his lawyer, and that the police said that his lawyer "didn't want to see" him. The testimony of the police officers confirmed these accounts in substantial detail. Notwithstanding repeated requests by each, petitioner and his retained lawyer were afforded no opportunity to consult during the course of the entire interrogation. ... A police officer testified that he had told the lawyer that he could not see petitioner until "we were through interrogating" him.

There is testimony by the police that, during the interrogation, petitioner, a 22-year-old of Mexican extraction with no record of previous experience with the police, "was handcuffed" in a standing position and that he "was nervous, he had circles under his eyes. ... "

Petitioner testified that he made the statement in issue because of this assurance. Officer Montejano denied offering any such assurance. A police officer testified that, during the interrogation, the following occurred: "I informed him of what DiGerlando told me, and, when I did, he told me that DiGerlando was lying, and I said, 'Would you care to tell DiGerlando that?' and he said, 'Yes, I will.' So I brought ... Escobedo in and he confronted DiGerlando and he told him that he was lying and said, 'I didn't shoot Manuel, you did it.'" In this way, petitioner for the first time admitted to some knowledge of the crime. After that, he made additional statements further implicating himself in the murder plot.

At this point, an Assistant State's Attorney, Theodore J. Cooper ... "took" petitioner's statement by asking carefully framed questions apparently designed to assure the admissibility into evidence of the resulting answers. Mr. Cooper testified that he did not advise petitioner of his constitutional rights, and it is undisputed that no one during the course of the interrogation so advised him.

Petitioner moved both before and during trial to suppress the incriminating statement, but the motions were denied. Petitioner was convicted of murder, and he appealed the conviction.

The Supreme Court of Illinois ... held the statement inadmissible and reversed the conviction. The court said: "It seems manifest to us, from the undisputed evidence and the circumstances surrounding defendant at the time of his statement and shortly prior thereto, that the defendant understood he would be permitted to go home if he gave the statement, and would be granted an immunity from prosecution." .... The State petitioned for, and the court granted, rehearing. ... The court then affirmed the conviction ... [and] also held, on the authority of this Court's decisions in *Crooker v. California* [(1958)] ... , and *Cicenia v. Lagay* [(1958)] ... that the confession was admissible even though "it was obtained after he had requested the assistance of counsel, which request was denied."

We granted a writ of certiorari to consider whether the petitioner's statement was constitutionally admissible at his trial. We conclude, for the reasons stated below, that it was not and, accordingly, we reverse the judgment of conviction. In *Massiah v. United States,* [(1964)] ... this Court observed that

"a Constitution which guarantees a defendant the aid of counsel at ... trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less ... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'", quoting DOUGLAS, J., concurring in *Spano v. New York* [(1957)]. ...

The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation. ... Petitioner had become the accused, and the purpose of the interrogation was to "get him" to confess his guilt despite his constitutional right not to do so. At the time of his arrest and throughout the course of the interrogation, the police told petitioner that they had convincing evidence that he had fired the fatal shots. Without informing him of his absolute right to remain silent in the face of this accusation, the police urged him to make a statement. As this Court observed many years ago: "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that, by denying there was hope of removing the suspicion from himself." *Bram v. United States* [(1897)]. ...

Petitioner, a layman, was undoubtedly unaware that, under Illinois law, an admission of "mere" complicity in the murder plot was legally as damaging as an admission of firing of the fatal shots. The "guiding hand of counsel" was essential to advise petitioner of his rights in this delicate situation. *Powell v. Alabama* [(1932)]. ... This was the "stage when legal aid and advice" were most critical to petitioner. *Massiah v. US* [(1964)]. ... It was a stage surely as critical as was the arraignment. ... What happened at this interrogation could certainly "affect the whole trial," *Hamilton v. Alabama* [(1961)] ... since rights "may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.". It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether, at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.

. ...

In *Gideon v. Wainwright,* [(1963)] ... , we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation, and the "right to use counsel at the formal trial a very hollow thing, for all practical purposes, the conviction is already assured by pretrial examination." *In re Groban* [(1957)]. ...

It is argued that, if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment. ... The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed *Massiah v. US* (1964). ... There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his

lawyer of his privilege against self-incrimination. ... A system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. ...

. ... We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that, if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon v. Wainwright* [(1963)] ... , and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Crooker v. California [(1958)]. ...

Nothing we have said today affects the powers of the police to investigate "an unsolved crime," *Spano v. New York* [(1959)] ... (STEWART, J., concurring), by gathering information from witnesses and by other "proper investigative efforts." *Haynes v. Washington,* [(1963)]. ... We hold only that, when the process shifts from investigatory to accusatory when its focus is on the accused and its purpose is to elicit a confession our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.

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

Reversed and remanded.

MR. JUSTICE WHITE, with whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, dissenting.

In *Massiah v. United States,* [(1964)] ... , the Court held that, as of the date of the indictment, the prosecution is disentitled to secure admissions from the accused. The Court now moves that date back to the time when the prosecution begins to "focus" on the accused. ... At the very least, the Court holds that, once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel. The decision is thus another major step in the direction of the goal which the Court seemingly has in mind — to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not. By abandoning the voluntary-involuntary test for admissibility of confessions, the Court seems driven by the notion that it is uncivilized law enforcement to use an accused's own admissions against him at his trial. ... The right to counsel now not only entitles the accused to counsel's advice and aid in preparing for trial, but stands as an impenetrable barrier to any interrogation once the accused has become a suspect. From that very moment, apparently his right to counsel attaches. ...

Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do, but I have somewhat more faith than the Court evidently has in the ability and desire of prosecutors and of the power of the appellate courts to discern and correct such violations of the law.

The Court may be concerned with a narrower matter: the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him. But this worry hardly calls for the broadside the Court has now fired. ... I do not suggest for a moment that law enforcement will be destroyed by the rule announced today. The need for peace and order is too insistent for that. But it will be crippled, and its task made a great deal more difficult, all, in my opinion, for unsound, unstated reasons which can find no home in any of the provisions of the Constitution.

Excerpted by Sobhi Sidani

Miranda v. Arizona

384 U.S. 436 (1966)

> Vote: 5-4
> Decision: Reversed
> Majority: Warren, joined by Black, Douglas, Brennan, and Fortas
> Concurrence/Dissent: Clark
> Dissent: Harlan, joined by Stewart and White
> Dissent: White

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in *Escobedo v. Illinois,* (1964). ...

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions. A wealth of scholarly material has been written tracing its ramifications and underpinnings. Police and prosecutor have speculated on its range and desirability. We granted certiorari in these cases, in order further to explore some facets of the problems thus exposed of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start ... with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough reexamination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution that "No person ... shall be compelled in any criminal case to be a witness against himself," and that "the accused shall ... have the Assistance of Counsel" — rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. ...

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems v. United States*, (1910):

" ... our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

meaning and vitality of the Constitution have developed against narrow and restrictive construction."

. ...

Our holding will be spelled out with some specificity in the pages which follow, but, briefly stated, it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features –incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights. ... We stress that the modern practice of in-custody interrogation is psychologically, rather than physically, oriented. ...

Interrogation still takes place in privacy. Privacy results in secrecy, and this, in turn, results in a gap in our knowledge as to what, in fact, goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past ... used by law enforcement agencies themselves as guides. ... These texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is privacy being alone with the person under interrogation."

. ...

... [T]he setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: to be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights. ...

This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend v. Sain* (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective,". The defendant in *Lynumn v. Illinois* (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court, as in those cases, reversed the conviction of a defendant in *Haynes v. Washington* (1963), whose persistent request during his interrogation was to phone his wife or attorney. In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In *Miranda v. Arizona* [(1966)], the police arrested the defendant and took him to a special interrogation room, where they secured a confession. In *Vignera v. New York* [(1966)], the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In *Westover v. United States* [(1966)], the defendant was handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in *California v. Stewart* [(1965)], the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

. ... In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent. ... To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. ... The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

. ... Perhaps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to ... answer to all questions posed to him on any subject. ... He resisted ... stating: "Another fundamental right I then contended for was that no man's conscience ought to be racked by oaths imposed to answer to questions concerning himself in matters criminal, or pretended to be so.". ... These sentiments worked their way over to the Colonies, and were implanted after great struggle into the Bill of Rights. ... The privilege was elevated to constitutional status, and has always been "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock,* (1892). We cannot depart from this noble heritage. Thus, we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. ...

We have recently noted that the privilege against self-incrimination — the essential mainstay of our adversary system — is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. ... Our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, (1964). The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation.

. ... We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram v. United States* (1897), this Court held: "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment ... commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

In *Bram*, the Court ... set down the Fifth Amendment standard for compulsion which we implement today:

". ... The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when, but for the improper influences, he would have remained silent. ... "

. ...

In addition to the expansive historical development of the privilege and the sound policies which have nurtured its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. ...

. ... Our decision in *Malloy v. Hogan*, (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in *Murphy v. Waterfront Comm'n* (1964), and *Griffin v. California* (1965), we applied the existing Fifth Amendment standards to the case before us. Aside from the holding itself, the reasoning in *Malloy* made clear what had already become apparent — that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege. The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice. ...

. ...

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings, and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that, without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights, and the exercise of those rights must be fully honored.

... [U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent ... Such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning, and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

. ...

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent, without more, "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae*, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

. ... The presence of counsel at the interrogation may serve several significant subsidiary functions, as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present, the likelihood that the police will practice coercion is reduced, and, if coercion is nevertheless exercised, the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police, and that the statement is rightly reported by the prosecution at trial. ...

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel.
...

. ...

Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney.

The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. ... While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. ...

In order fully to apprise a person interrogated of the extent of his rights under this system, then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that, if he is indigent, a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. ...

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. ... [A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. ... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. ...

. ...

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. This Court has always set high standards of proof for the waiver of constitutional rights ... and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place, and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given, or simply from the fact that a confession was, in fact, eventually obtained. ...

... [A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. ...

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. ...

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences. ...

. ...

. ... In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. ... Volunteered statements of any kind are not barred by the Fifth Amendment, and their admissibility is not affected by our holding today.

To summarize, we hold that, when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

. ...

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. ...

. ...

Over the years, the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice, and, more recently, that he has a right to free counsel if he is unable to pay. ...

. ...

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

Miranda v. Arizona

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. ... [H]e was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count. ... On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession, and affirmed the conviction. ...

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings, the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights. ...

Vignera v. New York

Petitioner, Michael Vignera, was picked up ... in connection with the robbery three days earlier of a Brooklyn dress shop. ... [A] detective questioned Vignera with respect to the robbery. Vignera orally admitted the robbery to the detective. ... [T]he defense was precluded from making any showing that warnings had not been given. While at the 66th Detective Squad, Vignera was identified by the store owner and a saleslady as the man who robbed the dress shop. At about 3 p.m., he was formally arrested. The police then transported him to still another station ... "for detention." At 11 p.m., Vignera was questioned by an assistant district attorney in the presence of a hearing reporter, who transcribed the questions and Vignera's answers. This verbatim account of these proceedings contains no statement of any warnings given by the assistant district attorney. At Vignera's trial on a charge of first degree robbery, the detective testified as to the oral confession. The transcription of the statement taken was also introduced in evidence. At the conclusion of the testimony, the trial judge charged the jury in part as follows:

"The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what I said? I am telling you what the law of the State of New York is."

Vignera was found guilty of first degree robbery. He was subsequently adjudged a third-felony offender and sentenced to 30 to 60 years' imprisonment. The conviction was affirmed without opinion by the Appellate Division ... and by the Court of Appeals. ... In argument to the Court of Appeals, the State contended that Vignera had no constitutional right to be advised of his right to counsel or his privilege against self-incrimination.

We reverse. The foregoing indicates that Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus, he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present, and his statements are inadmissible.

Westover v. United States

... [P]etitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and, at about 11:45 p.m., he was booked. Kansas City police interrogated Westover on the night of his arrest. He denied any knowledge of criminal activities. The next day, local officers interrogated him again throughout the morning. Shortly before noon, they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial, one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

Westover was tried by a jury in federal court and convicted of the California robberies. His statements were introduced at trial. He was sentenced to 15 years' imprisonment on each count, the sentences to run consecutively. On appeal, the conviction was affirmed by the Court of Appeals for the Ninth Circuit. ...

We reverse. On the facts of this case, we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement. At the time the FBI agents began questioning Westover, he had been in custody for over 14 hours, and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police, and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct, and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation, nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did, in fact, confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view, the warnings came at the end of the interrogation process. In these circumstances, an intelligent waiver of constitutional rights cannot be assumed.

We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings ... But here, the FBI interrogation was conducted immediately following the state interrogation in the same police station — in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances, the giving of warnings alone was not sufficient to protect the privilege.

California v. Stewart

In the course of investigating a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant, respondent, Roy Allen Stewart, was pointed out to Los Angeles police as the endorser of dividend checks taken in one of the robberies. At about 7:15 p.m., January 31, 1963, police officers went to Stewart's house and arrested him. One of the officers asked Stewart if they could search the house, to which he replied, "Go ahead." The search turned up various items taken from the five robbery victims. ... Stewart was taken to the University Station of the Los Angeles Police Department, where he was placed in a cell. During the next five days, police interrogated Stewart on nine different occasions. Except during the first interrogation session, when he was confronted with an accusing witness, Stewart was isolated with his interrogators.

During the ninth interrogation session, Stewart admitted that he had robbed the deceased and stated that he had not meant to hurt her. Police then brought Stewart before a magistrate for the first time. ...

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. ...

Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder, and fixed the penalty as death. On appeal, the Supreme Court of California reversed. ... [U]nder this Court's decision in *Escobedo*, Stewart should have been advised of his right to remain silent and of his right to counsel, and that it would not presume in the face of a silent record that the police advised Stewart of his rights.

We affirm. In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege. ...

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be, only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now, once all sides of the problem are considered.

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a four-fold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that, if indigent he has

a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If, before or during questioning, the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel

brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth. While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim, in short, is toward "voluntariness" in a utopian sense, or, to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions ,and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents, taken as a whole, do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

. ...

All four of the cases involved here present express claims that confessions were inadmissible not because of coercion in the traditional due process sense, but solely because of lack of counsel or lack of warnings concerning counsel and silence. For the reasons stated in this opinion, I would adhere to the due process test and reject the new requirements inaugurated by the Court. ...

Excerpted by Sobhi Sidani

What Constitutes Interrogation?

Brewer v. Williams

430 U.S. 387 (1977)

> Vote: 5-4
> Decision: Affirmed
> Majority: Stewart, joined by Brennan, Marshall, Stevens, and Powell
> Concurrence: Marshall
> Concurrence: Powell
> Concurrence: Stevens
> Dissent: Burger
> Dissent: White, joined by Blackmun and Rehnquist
> Dissent: Blackmun, joined by White and Rehnquist

Mr. JUSTICE STEWART delivered the opinion of the Court.

An Iowa trial jury found the respondent, Robert Williams, guilty of murder. The judgment of conviction was affirmed in the Iowa Supreme Court by a closely divided vote. In a subsequent habeas corpus proceeding, a Federal District Court ruled that, under the United States Constitution, Williams is entitled to a new trial, and a divided Court of Appeals for the Eighth Circuit agreed. The question before us is whether the District Court and the Court of Appeals were wrong.

On the afternoon of December 24, 1968, a 10-year-old girl named Pamela Powers went with her family to the YMCA in Des Moines, Iowa, to watch a wrestling tournament in which her brother was participating. When she failed to return from a trip to the washroom, a search for her began. The search was unsuccessful.

Robert Williams, who had recently escaped from a mental hospital, was a resident of the YMCA. Soon after the girl's disappearance, Williams was seen in the YMCA lobby carrying some clothing and a large bundle wrapped in a blanket. He obtained help from a 14-year-old boy in opening the street door of the YMCA and the door to his automobile parked outside. When Williams placed the bundle in the front seat of his car, the boy "saw two legs in it and they were skinny and white." Before anyone could see what was in the bundle, Williams drove away. His abandoned car was found the following day in Davenport, Iowa, roughly 160 miles east of Des Moines. A warrant was then issued in Des Moines for his arrest on a charge of abduction.

On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long-distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender that morning to the police in Davenport, and they booked him on the charge specified in the arrest warrant and gave him the warnings required by *Miranda v. Arizona* [(1966)]. ...

In the presence of the Des Moines chief of police and a police detective named Leaming, McKnight advised Williams that Des Moines police officers would be driving to Davenport to pick him up, that the officers would not interrogate him or mistreat him, and that Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines. As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip.

In the meantime, Williams was arraigned before a judge. ... The judge advised him of his Miranda rights and committed him to jail. Before leaving the courtroom, Williams conferred with a lawyer named Kelly, who advised him not to make any statements until consulting with McKnight back in Des Moines.

Detective Leaming and his fellow officer arrived in Davenport. ... [T]hey met with Williams and Kelly, who, they understood, was acting as Williams' lawyer. ...

. ...

... Kelly reiterated to Detective Leaming that Williams was not to be questioned about the disappearance of Pamela Powers until after he had consulted with McKnight back in Des Moines. When Leaming expressed some reservations, Kelly firmly stated that the agreement with McKnight was to be carried out — that there was to be no interrogation of Williams during the automobile journey to Des Moines. ...

. ... At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that "when I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.

The detective and his prisoner soon embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. ... [N]ot long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said:

"I want to give you something to think about while we're traveling down the road. ... Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I felt that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in, rather than waiting until morning and trying to come back out after a snow storm, and possibly not being able to find it at all."

. ... Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."

. ... The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

Williams was indicted for first-degree murder. Before trial, his counsel moved to suppress all evidence relating to or resulting from any statements Williams had made during the automobile ride from Davenport to Des Moines. ... The trial judge denied the motion. He found that ... Williams had "waived his right to have an attorney present during the giving of such information." The evidence in question was introduced over counsel's continuing objection at the subsequent trial. The jury found Williams guilty of murder, and the judgment of conviction was affirmed by the Iowa Supreme Court. ...

Williams then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. ... The District Court ... concluded as a matter of law that the evidence in question had been wrongly admitted at Williams' trial.

This conclusion was based on three alternative and independent grounds: (1) that Williams had been denied his constitutional right to the assistance of counsel; (2) that he had been denied the constitutional protections defined by this Court's decisions in *Escobedo v. Illinois* [(1964)] and *Miranda v. Arizona*; and (3) that, in any event, his self-incriminatory statements on the automobile trip from Davenport to Des Moines had been involuntarily made. Further, the District Court ruled that there had been no waiver by Williams of the constitutional protections in question. ... We granted certiorari to consider the constitutional issues presented. ...

. ...

As stated above, the District Court based its judgment in this case on three independent grounds. The Court of Appeals appears to have affirmed the judgment on two of those grounds. We have concluded that only one of them need be considered here ... the right to the assistance of counsel.

This right, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. ...

. ...

There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right. ... But its basic contours ... are ... the right to counsel granted by the Sixth and Fourteenth Amendments means at least that person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him. ...

There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. The State does not contend otherwise.

There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as — and perhaps more effectively than — if he had formally interrogated him. Detective

Leaming was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams' trial. ...

The state courts clearly proceeded upon the hypothesis that detective Leaming's "Christian burial speech" had been tantamount to interrogation. Both courts recognized that Williams had been entitled to the assistance of counsel at the time he made the incriminating statements. ...

. ...

The Iowa courts recognized that Williams had been denied the constitutional right to the assistance of counsel. They held, however, that he had waived that right during the course of the automobile trip from Davenport to Des Moines. ...

. ...

In the federal habeas corpus proceeding, the District Court ... held that the Iowa courts had "applied the wrong constitutional standards" in ruling that Williams had waived the protections that were his under the Constitution. The court held "that it is the *government* which bears a heavy burden ... but that is the burden which explicitly was placed on [Williams] by the state courts." (emphasis in original).

... [T]he District Court concluded:

"Under the proper standards for determining waiver, there simply is no evidence to support a waiver ... There is no affirmative indication ... that [Williams] did waive his rights ... [T]he state courts' emphasis on the absence of a demand for counsel was not only legally inappropriate, but factually unsupportable, as well, since Detective Leaming himself testified that [Williams], on several occasions during the trip, indicated that he would talk after he saw Mr. McKnight. Both these statements and Mr. Kelly's statement to Detective Leaming that would talk only after seeing Mr. McKnight in Des Moines certainly were assertions of right or desire not to give information absent the presence of his attorney. ... Moreover, the statements were obtained only after Detective Leaming's use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital — with the specific intent to elicit incriminating statements. In the face of this evidence, the State has produced no affirmative evidence whatsoever to support its claim of waiver, and ... it cannot be said that the State has met its 'heavy burden' of showing a knowing and intelligent waiver of ... Sixth Amendment rights."

The Court of Appeals approved the reasoning of the District Court.

. ...

The District Court and the Court of Appeals were correct in the view that the question of waiver was not a question of historical fact, but one ... of ... "application of constitutional principles to the facts as found ... " *Brown v. Allen* [(1953)].

The District Court and the Court of Appeals were also correct in their understanding of the proper standard to be applied in determining the question of waiver as a matter of federal constitutional law — that it was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst* [(1938)]. ... That standard has been ... that courts indulge in every reasonable presumption against waiver. ...

We conclude, finally, that the Court of Appeals was correct in holding that, judged by these standards, the record in this case falls far short of sustaining petitioner's burden. It is true that Williams had been informed of and appeared to understand his right to counsel. But waiver requires not merely comprehension, but relinquishment, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right. ... Throughout, Williams was advised not to make any statements before seeing McKnight in Des Moines, and was assured that the police had agreed not to question him. His statements while in the car that he would tell the whole story after seeing McKnight in Des Moines were the clearest expressions by Williams himself that he desired the presence of an attorney before any interrogation took place. But even before making these statements, Williams had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, acting as his agents, had made clear to the police that no interrogation was to occur during the journey. Williams knew of that agreement and, particularly in view of his consistent reliance on counsel, there is no basis for concluding that he disavowed it.

Despite Williams' express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.

. ...

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Excerpted by Sobhi Sidani

Rhode Island v. Innis

446 U.S. 291 (1980)

> Vote: 6-3
> Decision: Vacated and Remanded
> Majority: Stewart, joined by Burger, Stewart, White, Blackmun, and Rehnquist
> Concurrence: White
> Concurrence: Burger
> Dissent: Marshall, joined by Brennan.
> Dissent: Stewart

MR. JUSTICE STEWART delivered the opinion of the Court.

In *Miranda v. Arizona* [1966], the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present. The issue in this case is whether the respondent was "interrogated" in violation of the standards promulgated in the Miranda opinion.

On the night of January 12, 1975, John Mulvaney, a ... taxicab driver, disappeared after being dispatched to pick up a customer. His body was discovered four days later. ... He had died from a shotgun blast aimed at the back of his head.

... Patrolman Lovell, while cruising the streets of Mount Pleasant ... spotted the respondent standing in the street facing him. When Patrolman Lovell stopped his car, the respondent walked towards it. Patrolman Lovell then arrested the respondent, who was unarmed, and advised him of his so-called *Miranda* rights. While the two men waited in the patrol car for other police officers to arrive, Patrolman Lovell did not converse with the respondent other than to respond to the latter's request for a cigarette.

. ... Three officers, Patrolmen Gleckman, Williams, and McKenna, were assigned to accompany the respondent to the central station. They placed the respondent in the vehicle and shut the doors. Captain Leyden then instructed the officers not to question the respondent or intimidate or coerce him in any way. The three officers then entered the vehicle, and it departed.

While en route to the central station, Patrolman Gleckman initiated a conversation with Patrolman McKenna concerning the missing shotgun. As Patrolman Gleckman later testified:

"At this point, I was talking back and forth with Patrolman McKenna, stating that I frequent this area while on patrol, and [that, because a school for handicapped children is located nearby,] there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."

Patrolman McKenna apparently shared his fellow officer's concern:

"I more or less concurred with him [Gleckman] that it was a safety factor, and that we should, you know, continue to search for the weapon and try to find it."

While Patrolman Williams said nothing, he overheard the conversation between the two officers:

"He [Gleckman] said it would be too bad if the little — I believe he said a girl — would pick up the gun, maybe kill herself."

The respondent then interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. ... At the time the respondent indicated that the officers should turn back, they had traveled no more than a mile, a trip encompassing only a few minutes.

The police vehicle then returned to the scene of the arrest, where a search for the shotgun was in progress. There, Captain Leyden again advised the respondent of his *Miranda* rights. The respondent replied that he understood those rights, but that he "wanted to get the gun out of the way because of the kids in the area in the school." The respondent then led the police to a nearby field, where he pointed out the shotgun under some rocks by the side of the road.

On March 20, 1975, a grand jury returned an indictment charging the respondent with the kidnaping, robbery, and murder of John Mulvaney. Before trial, the respondent moved to suppress the shotgun and the statements he had made to the police regarding it ... the trial judge found that the respondent had been "repeatedly and completely advised of his Miranda rights." He further found that it was

"entirely understandable that [the officers in the police vehicle] would voice their concern for the safety of the handicapped children to each other."

The judge then concluded that the respondent's decision to inform the police of the location of the shotgun was "a waiver, clearly, and on the basis of the evidence that I have heard, an intelligent waiver, of his right to remain silent." Thus, without passing on whether the police officers had, in fact, "interrogated" the respondent, the trial court sustained the admissibility of the shotgun and testimony related to its discovery. That evidence was later introduced at the respondent's trial, and the jury returned a verdict of guilty on all counts.

On appeal, the Rhode Island Supreme Court ... concluded that the respondent had invoked his Miranda right to counsel, and that, contrary to Miranda's mandate that, in the absence of counsel, all custodial interrogation then cease, the police officers in the vehicle had "interrogated" the respondent without a valid waiver of his right to counsel ... even though the respondent had not been addressed personally by the police officers, the respondent nonetheless had been subjected to "subtle coercion" that was the equivalent of "interrogation" within the meaning of the Miranda opinion. ... Having concluded that both the shotgun and testimony relating to its discovery were obtained in violation of the Miranda standards, and therefore should not have been admitted into evidence, the Rhode Island Supreme Court held that the respondent was entitled to a new trial.

We granted certiorari to address for the first time the meaning of "interrogation" under *Miranda v. Arizona*.

In its *Miranda* opinion, the Court concluded that, in the context of "custodial interrogation," certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. More specifically, the Court held that

"the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

Those safeguards included the now familiar *Miranda* warnings. ...

The Court in the *Miranda* opinion also outlined in some detail the consequences that would result if a defendant sought to invoke those procedural safeguards. With regard to the right to the presence of counsel, the Court noted:

"Once warnings have been given, the subsequent procedure is clear. ... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. ... "

In the present case, the parties are in agreement that the respondent was fully informed of his *Miranda* rights, and that he invoked his *Miranda* right to counsel. ... It is also uncontested that the respondent was "in custody" while being transported to the police station.

The issue, therefore, is whether the respondent was "interrogated" by the police officers in violation of the respondent's undisputed right under *Miranda* to remain silent until he had consulted with a lawyer. In resolving this issue, we first define the term "interrogation" under *Miranda,* before turning to a consideration of the facts of this case.

The starting point for defining "interrogation" in this context is, of course, the Court's *Miranda* opinion. There the Court observed that,

"by custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

This passage and other references throughout the opinion to "questioning" might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody. We do not, however, construe the *Miranda* opinion so narrowly. The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner," and thereby undermine the privilege against compulsory self-incrimination. The police practices that evoked this concern included several that did not involve express questioning. ...

This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. ...

It is clear, therefore, that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. ... A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be

held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Turning to the facts of the present case, we conclude that the respondent was not "interrogated" within the meaning of *Miranda.* It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.

Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.

The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few off-hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative.". ... The Rhode Island Supreme Court erred, in short, in equating "subtle compulsion" with interrogation. That the officers' comments struck a responsive chord is readily apparent.

For the reasons stated, the judgment of the Supreme Court of Rhode Island is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I am substantially in agreement with the Court's definition of "interrogation" within the meaning of *Miranda v. Arizona* (1966). In my view, the *Miranda* safeguards apply whenever police conduct is intended or likely to produce a response from a suspect in custody. As I read the Court's opinion, its definition of "interrogation" for *Miranda* purposes is equivalent, for practical purposes, to my formulation, since it contemplates that,

"where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."

Thus, the Court requires an objective inquiry into the likely effect of police conduct on a typical individual, taking into account any special susceptibility of the suspect to certain kinds of pressure of which the police know or have reason to know.

I am utterly at a loss, however, to understand how this objective standard, as applied to the facts before us, can rationally lead to the conclusion that there was no interrogation. Innis was arrested at 4:30 a.m., handcuffed, searched, advised of his rights, and placed in the back seat of a patrol car. Within a short time, he had been twice more advised of his rights and driven away in a four-door sedan with three police officers. Two officers sat in the front seat, and one sat beside Innis in the back seat. Since the car traveled no more than a mile before Innis agreed to point out the location of the murder weapon, Officer Gleckman must have begun almost immediately to talk about the search for the shotgun.

The Court attempts to characterize Gleckman's statements as "no more than a few off-hand remarks" which could not reasonably have been expected to elicit a response. If the statements had been addressed to respondent, it would be impossible to draw such a conclusion. The simple message of the "talking back and forth" between Gleckman and McKenna was that they had to find the shotgun to avert a child's death.

One can scarcely imagine a stronger appeal to the conscience of a suspect, any suspect, than the assertion that, if the weapon is not found, an innocent person will be hurt or killed. And not just any innocent person, but an innocent child, a little girl, a helpless, handicapped little girl on her way to school. The notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous. As a matter of fact, the appeal to a suspect to confess for the sake of others, to "display some evidence of decency and honor," is a classic interrogation technique.

Gleckman's remarks would obviously have constituted interrogation if they had been explicitly directed to respondent, and the result should not be different because they were nominally addressed to McKenna. This is not a case where police officers, speaking among themselves, are accidentally overheard by a suspect. These officers were "talking back and forth" in close quarters with the handcuffed suspect, traveling past the very place where they believed the weapon was located. They knew respondent would hear and attend to their conversation, and they are chargeable with knowledge of and responsibility for the pressures to speak which they created.

I firmly believe that this case is simply an aberration, and that, in future cases, the Court will apply the standard adopted today in accordance with its plain meaning.

Excerpted by Alex Nobiletti and Sobhi Sidani

What Constitutes Custody?

Oregon v. Mathiason

384 U.S. 436 (1966)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: Per Curiam
> Dissent: Brennan
> Dissent: Marshall
> Dissent: Stevens

PER CURIAM

Respondent Carl Mathiason was convicted of first-degree burglary after a bench trial in which his confession was critical to the State's case. At trial, he moved to suppress the confession as the fruit of questioning by the police not preceded by the warnings required in *Miranda v. Arizona*, (1966). The trial court refused to exclude the confession because it found that Mathiason was not in custody at the time of the confession.

The Oregon Court of Appeals affirmed respondent's conviction, but, on his petition for review in the Supreme Court of Oregon, that court, by a divided vote, reversed the conviction. It found that, although Mathiason had not been arrested or otherwise formally detained, "the interrogation took place in a coercive environment'" of the sort to which *Miranda* was intended to apply. ...

The State of Oregon has ... petitioned for certiorari to review the judgment of the Supreme Court of Oregon. We think that court has read *Miranda* too broadly, and we therefore reverse its judgment.

The Supreme Court of Oregon described the factual situation surrounding the confession as follows:

"An officer of the State Police investigated a theft at a residence near Pendleton. He asked the lady of the house which had been burglarized if she suspected anyone. She replied that the defendant was the only one she could think of. The defendant was a parolee and a 'close associate' of her son. The officer tried to contact defendant on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at defendant's apartment with a note asking him to call because 'I'd like to discuss something with you.' The next afternoon, the defendant did call. The officer asked where it would be convenient to meet. The defendant had no preference, so the officer asked if the defendant could meet him at the state patrol office in about an hour and a half, about 5:00 p.m. The patrol office was about two blocks from defendant's apartment. The building housed several state agencies."

"The officer met defendant in the hallway, shook hands and took him into an office. The defendant was told he was not under arrest. The door was closed. The two sat across a desk. The police radio in another room could be heard. The offi-

cer told defendant he wanted to talk to him about a burglary, and that his truthfulness would possibly be considered by the district attorney or judge. The officer further advised that the police believed defendant was involved in the burglary and defendant's fingerprints were found at the scene. The defendant sat for a few minutes and then said he had taken the property. This occurred within five minutes after defendant had come to the office. The officer then advised defendant of his *Miranda* rights and took a taped confession."

"At the end of the taped conversation, the officer told defendant he was not arresting him at this time; he was released to go about his job and return to his family. The officer said he was referring the case to the district attorney for him to determine whether criminal charges would be brought. It was 5:30 p.m. when the defendant left the office."

"The officer gave all the testimony relevant to this issue. The defendant did not take the stand either at the hearing on the motion to suppress or at the trial."

The Supreme Court of Oregon reasoned from these facts that:

"We hold the interrogation took place in a 'coercive environment.' The parties were in the offices of the State Police; they were alone behind closed doors; the officer informed the defendant he was a suspect in a theft and the authorities had evidence incriminating him in the crime; and the defendant was a parolee under supervision. We are of the opinion that this evidence is not overcome by the evidence that the defendant came to the office in response to a request and was told he was not under arrest."

Our decision in *Miranda* set forth rules of police procedure applicable to "custodial interrogation."

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Subsequently, we have found the *Miranda* principle applicable to questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense, *Mathis v. United States* (1968), and to questioning taking place in a suspect's home after he has been arrested and is no longer free to go where he pleases, *Orozco v. Texas* (1969).

In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview, respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station

house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda*, by its terms, was made applicable, and to which it is limited.

The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Supreme Court of Oregon to be another circumstance contributing to the coercive environment which makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule.

... [T]he judgment of the Oregon Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE MARSHALL, dissenting.

The respondent in this case was interrogated behind closed doors at police headquarters in connection with a burglary investigation. He had been named by the victim of the burglary as a suspect, and was told by the police that they believed he was involved. He was falsely informed that his fingerprints had been found at the scene, and in effect was advised that, by cooperating with the police, he could help himself. Not until after he had confessed was he given the warnings set forth in *Miranda v. Arizona* (1966).

The Court today holds that, for constitutional purposes, all this is irrelevant because respondent had not "*been taken into custody or otherwise deprived of his freedom of action in any significant way.*" [Per Curiam opinion] *I do not believe that such a determination is possible on the record before us. It is true that respondent was not formally placed under arrest, but surely formalities alone cannot control. At the very least, if respondent entertained an objectively reasonable belief that he was not free to leave during the questioning, then he was "deprived of his freedom of action in a significant way*

Plainly the respondent could have so believed, after being told by the police that they thought he was involved in a burglary and that his fingerprints had been found at the scene. Yet the majority is content to note that "there is no indication that ... respondent's freedom to depart was restricted in any way," [Per Curiam opinion], as if a silent record (and no state court findings) means that the State has sustained its burden ... of demonstrating that respondent received his constitutional due.

More fundamentally, however, I cannot agree with the Court's conclusion that, if respondent were not in custody, no warnings were required. I recognize that *Miranda* is limited to custodial interrogations. ... The rationale of *Miranda,* however, is not so easily cabined. *Miranda* requires warnings to "combat" a situation in which there are "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."

It is, of course, true, as the Court notes, that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it." [Per Curiam opinion]. But it does not follow that, because police "are not required to administer *Miranda* warnings to everyone whom they question," *ibid.,* that they need not administer warnings to anyone unless the factual setting of the *Miranda* cases is replicated. ...

In my view, even if respondent were not in custody, the coercive elements in the instant case were so pervasive as to require *Miranda*-type warnings. Respondent was interrogated in "privacy" and in "unfamiliar surroundings," factors on which *Miranda* places great stress. The investigation had focused on respondent. And respondent was subjected to some of the "deceptive stratagems," *Miranda v. Arizona* which called forth the *Miranda* decision. I therefore agree with the Oregon Supreme Court that to excuse the absence of warnings given these fact is "contrary to the rationale expressed in *Miranda*."

. ... Today's decision means, however, that the Fifth Amendment privilege does not provide full protection against mischiefs equivalent to, but different from, custodial interrogation. It is therefore important to note that the state courts remain free, in interpreting state constitutions, to guard against the evil clearly identified by this case.

I respectfully dissent.

Excerpted by Sobhi Sidani

Salinas v. Texas

570 U.S. 178 (2013)

> Vote: 5-4
> Decision: Affirmed
> Plurality: Alito, joined by Kennedy and Roberts
> Concurrence: Thomas, joined by Scalia
> Dissent: Breyer, joined by Ginsberg, Sotomayor, and Kagan

Mr. Justice Alito announced the judgment of the Court ...

Without being placed in custody or receiving Miranda warnings, petitioner voluntarily answered the questions of a police officer who was investigating a murder. But petitioner balked when the officer asked whether a ballistics test would show that the shell casings found at the crime scene would match petitioner's shotgun. Petitioner was subsequently charged with murder, and at trial prosecutors argued that his reaction to the officer's question suggested that he was guilty. Petitioner claims that this argument violated the Fifth Amendment, which guarantees that "no person ... shall be compelled in any criminal case to be a witness against himself."

Petitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question. It has long been settled that the privilege "generally is not self-executing" and that a witness who desires its protection "must claim it." *Minnesota v. Murphy* (1984). ... Because petitioner was required to assert the privilege in order to benefit from it, the judgment of the Texas Court of Criminal Appeals rejecting petitioner's Fifth Amendment claim is affirmed.

On the morning of December 18, 1992, two brothers were shot and killed in their Houston home. There were no witnesses to the murders, but a neighbor who heard gunshots saw someone run out of the house and speed away in a dark-colored car. Police recovered six shotgun shell casings at the scene. The investigation led police to petitioner, who had been a guest at a party the victims hosted the night before they were killed. Police visited petitioner at his home, where they saw a dark blue car in the driveway. He agreed to hand over his shotgun for ballistics testing and to accompany police to the station for questioning.

Petitioner's interview with the police lasted approximately one hour. All agree that the interview was noncustodial, and the parties litigated this case on the assumption that he was not read *Miranda* warnings. ... For most of the interview, petitioner answered the officer's questions. But when asked whether his shotgun "would match the shells recovered at the scene of the murder," ... petitioner declined to answer. Instead, petitioner "looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began to tighten up.". ... After a few moments of silence, the officer asked additional questions, which petitioner answered. ...

Following the interview, police arrested petitioner on outstanding traffic warrants. Prosecutors soon concluded that there was insufficient evidence to charge him with the murders, and he was released. A few days later, police obtained a statement from a man who said he had heard petitioner confess to the killings. On the strength of that additional evidence, prosecutors decided to charge petitioner. ... In 2007, police discovered petitioner living in the Houston area under an assumed name.

Petitioner did not testify at trial. Over his objection, prosecutors used his reaction to the officer's question during the 1993 interview as evidence of his guilt. The jury found petitioner guilty, and he received a 20-year sentence. On direct appeal to the Court of Appeals of Texas, petitioner argued that prosecutors' use of his silence as part of their case in chief violated the Fifth Amendment. The Court of Appeals rejected that argument, reasoning that petitioner's prearrest, pre-Miranda silence was not "compelled" within the meaning of the Fifth Amendment. ... The Texas Court of Criminal Appeals took up this case and affirmed on the same ground. ...

We granted certiorari ... to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief. ... But because petitioner did not invoke the privilege during his interview, we find it unnecessary to reach that question.

The privilege against self-incrimination "is an exception to the general principle that the Government has the right to everyone's testimony." *Garner v. United States*, (1976). To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who "desires the protection of the privilege ... must claim it" at the time he relies on it. ...

That requirement ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating, see *Hoffman v. United States,* (1951), or cure any potential self-incrimination through a grant of immunity, see *Kastigar v. United States*, (1972). The express invocation requirement also gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer. ...

We have previously recognized two exceptions to the requirement that witnesses invoke the privilege, but neither applies here. First, we held in *Griffin v. California*, (1965), that a criminal defendant need not take the stand and assert the privilege at his own trial. That exception reflects the fact that a criminal defendant has an "absolute right not to testify." *Turner v. United States*, (1970) (Black, J., dissenting). ... Since a defendant's reasons for remaining silent at trial are irrelevant to his constitutional right to do so, requiring that he expressly invoke the privilege would serve no purpose; neither a showing that his testimony would not be self-incriminating nor a grant of immunity could force him to speak. Because petitioner had no comparable unqualified right during his interview with police, his silence falls outside the *Griffin* exception.

Second, we have held that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary. Thus, in *Miranda*, we said that a suspect who is subjected to the "inherently compelling pressures" of an unwarned custodial interrogation need not invoke the privilege. ... Due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily forgone the privilege "unless he fails to claim it after being suitably warned." *Murphy*, supra [(1964)]. ...

... [W]here assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence ... *Leary v. United States* (1969). ... The principle that unites all of those cases is that a witness need not expressly invoke the privilege where some form of official compulsion denies him "a 'free choice to admit, to deny, or to refuse to answer.' ". ...

Petitioner cannot benefit from that principle because it is undisputed that his interview with police was voluntary. As petitioner himself acknowledges, he agreed to accompany the officers to the station and "was free to leave at any time during the interview.". ... That places petitioner's situation outside the scope of *Miranda* and other cases in which we have held that various forms of governmental coercion prevented defendants from voluntarily invoking the privilege. ... The critical question is whether, under the "circumstances" of this case, petitioner was deprived of the ability to voluntarily invoke the Fifth Amendment. He was not. We have before us no allegation that petitioner's failure to assert the privilege was involuntary, and it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment.

Petitioner urges us to adopt a third exception to the invocation requirement for cases in which a witness stands mute and thereby declines to give an answer that officials suspect would be incriminating. Our cases all but foreclose such an exception, which would needlessly burden the Government's interests in obtaining testimony and prosecuting criminal activity. We therefore decline petitioner's invitation to craft a new exception to the "general rule" that a witness must assert the privilege to subsequently benefit from it. ...

Our cases establish that a defendant normally does not invoke the privilege by remaining silent. In *Roberts v. United States* [(1984)] ... for example, we rejected the Fifth Amendment claim of a defendant who remained silent throughout a police investigation and received a harsher sentence for his failure to cooperate. In so ruling, we explained that "if believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate." . ...

We have also repeatedly held that the express invocation requirement applies even when an official has reason to suspect that the answer to his question would incriminate the witness. Thus, in *Murphy* we held that the defendant's self-incriminating answers to his probation officer were properly admitted at trial because he failed to invoke the privilege. ...

... [P]etitioner would have us hold that although neither a witness' silence nor official suspicions are enough to excuse the express invocation requirement, the invocation requirement does not apply where a witness is silent in the face of official suspicions. For the same reasons that neither of those factors is sufficient by itself to relieve a witness of the obligation to expressly invoke the privilege, we conclude that they do not do so together. A contrary result would do little to protect those genuinely relying on the Fifth Amendment privilege while placing a needless new burden on society's interest in the admission of evidence that is probative of a criminal defendant's guilt.

. ...

In any event, it is settled that forfeiture of the privilege against self-incrimination need not be knowing ... Statements against interest are regularly admitted into evidence at criminal trials ... and there is no good reason to approach a defendant's silence any differently.

. ...

We also reject petitioner's argument that an express invocation requirement will encourage police officers to " 'unfairly "trick" ' " suspects into cooperating. ... Petitioner worries that officers could unduly pressure suspects into talking by telling them that their silence could be used in a future prosecution. But as petitioner himself concedes, police officers "have done nothing wrong" when they "accurately state the law.". ... So long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation.

Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so, the judgment of the Texas Court of Criminal Appeals is affirmed.

It is so ordered.

Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join, dissenting.

In my view the Fifth Amendment here prohibits the prosecution from commenting on the petitioner's silence in response to police questioning. And I dissent from the Court's contrary conclusion.

. ... The plurality believes that the Amendment does not bar the evidence and comments because Salinas "did not expressly invoke the privilege against self-incrimination" when he fell silent during the questioning at the police station. ... But, in my view, that conclusion is inconsistent with this Court's case law and its underlying practical rationale.

The Fifth Amendment prohibits prosecutors from commenting on an individual's silence where that silence amounts to an effort to avoid becoming "a witness against himself." This Court has specified that "a rule of evidence" permitting "comment ... by counsel" in a criminal case upon a defendant's failure to testify "violates the Fifth Amendment." *Griffin*

v. California, (1965). ... And, since "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation," the "prosecution may not ... use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Miranda v. Arizona*, (1966). ...

Particularly in the context of police interrogation, a contrary rule would undermine the basic protection that the Fifth Amendment provides. ... To permit a prosecutor to comment on a defendant's constitutionally protected silence would put that defendant in an impossible predicament. He must either answer the question or remain silent. If he answers the question, he may well reveal, for example, prejudicial facts, disreputable associates, or suspicious circumstances even if he is innocent. ... If he remains silent, the prosecutor may well use that silence to suggest a consciousness of guilt. And if the defendant then takes the witness stand in order to explain either his speech or his silence, the prosecution may introduce, say for impeachment purposes, a prior conviction that the law would otherwise make inadmissible. Thus, where the Fifth Amendment is at issue, to allow comment on silence directly or indirectly can compel an individual to act as "a witness against himself" very much what the Fifth Amendment forbids. ... And that is similarly so whether the questioned individual, as part of his decision to remain silent, invokes the Fifth Amendment explicitly or implicitly, through words, through deeds, or through reference to surrounding circumstances.

It is consequently not surprising that this Court, more than half a century ago, explained that "no ritualistic formula is necessary in order to invoke the privilege." *Quinn v. United States*, (1955). Thus, a prosecutor may not comment on a defendant's failure to testify at trial even if neither the defendant nor anyone else ever mentions a Fifth Amendment right not to do so. Circumstances, not a defendant's statement, tie the defendant's silence to the right. ...

The cases in which this Court has insisted that a defendant expressly mention the Fifth Amendment by name in order to rely on its privilege to protect silence are cases where (1) the circumstances surrounding the silence (unlike the present case) did not give rise to an inference that the defendant intended, by his silence, to exercise his Fifth Amendment rights; and (2) the questioner greeted by the silence (again unlike the present case) had a special need to know whether the defendant sought to rely on the protections of the Fifth Amendment. ... These cases include *Roberts*, *Rogers*, *Sullivan*, *Vajtauer*, and *Jenkins*—all of which at least do involve the protection of silence—and also include cases emphasized by the plurality that are not even about silence—namely, *Murphy* and *Garner*.

In *Roberts* and *Rogers*, the individual refused to answer questions that government investigators (in *Roberts*) and a grand jury (in *Rogers*) asked, principally because the individual wanted to avoid incriminating other persons. ... But the Fifth Amendment does not protect someone from incriminating others; it protects against self-incrimination. In turn, neither the nature of the questions nor the circumstances of the refusal to answer them provided any basis to infer a tie between the silence and the Fifth Amendment, while knowledge of any such tie would have proved critical to the questioner's determination as to whether the defendant had any proper legal basis for claiming Fifth Amendment protection.

. ...

Perhaps most illustrative is *Jenkins*, a case upon which the plurality relies ... and upon which the Texas Court of Criminal Appeals relied almost exclusively. ... On cross-examination at his trial, Jenkins claimed that his killing was in self-defense after being attacked. ... The prosecutor then asked why he did not report the alleged attack, and in closing argument suggested that Jenkins' failure to do so cast doubt on his claim to have acted in self-defense. ... We explained that this unusual form of "prearrest silence" was not constitutionally protected from use at trial. ... How would anyone have known that

Jenkins, while failing to report an attack, was relying on the Fifth Amendment? And how would the government have had any way of determining whether his claim was valid? In *Jenkins*, as in *Roberts*, *Rogers*, *Sullivan*, and *Vajtauer*, no one had any reason to connect silence to the Fifth Amendment; and the government had no opportunity to contest any alleged connection. ...

. ...

We end where we began. "No ritualistic formula is necessary in order to invoke the privilege." *Quinn*. ... Much depends on the circumstances of the particular case, the most important circumstances being: (1) whether one can fairly infer that the individual being questioned is invoking the Amendment's protection; (2) if that is unclear, whether it is particularly important for the questioner to know whether the individual is doing so; and (3) even if it is, whether, in any event, there is a good reason for excusing the individual from referring to the Fifth Amendment, such as inherent penalization simply by answering.

Applying these principles to the present case, I would hold that Salinas need not have expressly invoked the Fifth Amendment. The context was that of a criminal investigation. Police told Salinas that and made clear that he was a suspect. His interrogation took place at the police station. Salinas was not represented by counsel. The relevant question—about whether the shotgun from Salinas' home would incriminate him—amounted to a switch in subject matter. And it was obvious that the new question sought to ferret out whether Salinas was guilty of murder. ... These circumstances give rise to a reasonable inference that Salinas' silence derived from an exercise of his Fifth Amendment rights. ...

I recognize that other cases may arise where facts and circumstances surrounding an individual's silence present a closer question. The critical question—whether those circumstances give rise to a fair inference that the silence rests on the Fifth Amendment—will not always prove easy to administer. But that consideration does not support the plurality's rule-based approach here, for the administrative problems accompanying the plurality's approach are even worse.

. ...

Far better, in my view, to pose the relevant question directly: Can one fairly infer from an individual's silence and surrounding circumstances an exercise of the Fifth Amendment's privilege? The need for simplicity, the constitutional importance of applying the Fifth Amendment to those who seek its protection, and this Court's case law all suggest that this is the right question to ask here. And the answer to that question in the circumstances of today's case is clearly: yes.

For these reasons, I believe that the Fifth Amendment prohibits a prosecutor from commenting on Salinas's silence. I respectfully dissent from the Court's contrary conclusion.

Excerpted by Sobhi Sidani

Exceptions and Admissibility

Harris v. New York

401 U.S. 222 (1971)

> Vote: 5-4
> Decision: Affirmed
> Majority: Burger, joined by White, Stewart, Harlan, and Blackmun
> Dissent: Black
> Dissent: Brennan, joined by Douglas and Marshall

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted the writ in this case to consider petitioner's claim that a statement made by him to police under circumstances rendering it inadmissible to establish the prosecution's case in chief under *Miranda v. Arizona* (1966), may not be used to impeach his credibility.

The State of New York charged petitioner in a two-count indictment with twice selling heroin to an undercover police officer. At a subsequent jury trial, the officer was the State's chief witness, and he testified as to details of the two sales. A second officer verified ... and a third offered testimony. ...

Petitioner took the stand in his own defense. He admitted knowing the undercover police officer, but denied a sale on January 4, 1966. He admitted making a sale of contents of a glassine bag to the officer on January 6, but claimed it was baking powder and part of a scheme to defraud the purchaser.

On cross-examination, petitioner was asked seriatim whether he had made specified statements to the police immediately following his arrest on January 7 — statements that partially contradicted petitioner's direct testimony at trial. In response to the cross-examination, petitioner testified that he could not remember virtually any of the questions or answers recited by the prosecutor. At the request of petitioner's counsel, the written statement from which the prosecutor had read questions and answers in his impeaching process was placed in the record for possible use on appeal; the statement was not shown to the jury.

The trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in passing on petitioner's credibility, and not as evidence of guilt. ... The jury then found petitioner guilty on the second count of the indictment. The New York Court of Appeals affirmed. ...

At trial, the prosecution made no effort in its case in chief to use the statements allegedly made by petitioner, conceding that they were inadmissible under *Miranda v. Arizona* (1966). The transcript of the interrogation used in the impeach-

ment, but not given to the jury, shows that no warning of a right to appointed counsel was given before questions were put to petitioner when he was taken into custody. Petitioner makes no claim that the statements made to the police were coerced or involuntary.

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding, and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes. ...

In *Walder v. United States* [(1954)], the Court permitted physical evidence, inadmissible in the case in chief, to be used for impeachment purposes.

"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. ... ". ...

It is true that Walder was impeached as to collateral matters included in his direct examination. ... We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*. Petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility. ...

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. ... Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. ...

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

It is conceded that the question and answer statement used to impeach petitioner's direct testimony was ... constitutionally inadmissible as part of the State's direct case against petitioner. I think that the Constitution also denied the State the use of the statement on cross-examination to impeach the credibility of petitioner's testimony given in his own defense. The decision in *Walder v. United States* (1954) ... supports my conclusion.

. ... Petitioner took the stand and flatly denied having sold anything to the officer on January 4. He countered the officer's testimony as to the January 6 sale with testimony that he had sold the officer two glassine bags containing what appeared

to be heroin, but that actually the bags contained only baking powder intended to deceive the officer in order to obtain $12. The statement contradicted petitioner's direct testimony as to the events of both days. ... [I]t is clear that the statement was used to impeach petitioner's direct testimony not on collateral matters, but on matters directly related to the crimes for which he was on trial.

Walder v. United States was not a case where tainted evidence was used to impeach an accused's direct testimony on matters directly related to the case against him. In *Walder*, the evidence was used to impeach the accused's testimony on matters collateral to the crime charged. ... The Court held that, on facts where "the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics," ... the exclusionary rule of *Weeks v. United States,* (1914), would not extend to bar the Government from rebutting this testimony with evidence, although tainted. ...

The Court was careful, however, to distinguish the situation of an accused whose testimony, as in the instant case, was a "denial of complicity in the crimes of which he was charged," that is, where illegally obtained evidence was used to impeach the accused's direct testimony on matters directly related to the case against him. ...

... [T]he evidence used for impeachment in *Walder* was related to the earlier ... prosecution, and had no direct bearing on "the elements of the case" being tried. ... The evidence tended solely to impeach the credibility of the defendant's direct testimony. ... But that evidence was completely unrelated to the indictment on trial, and did not in any way interfere with his freedom to deny all elements of that case against him. In contrast, here, the evidence ... was directly related to the case against petitioner.

While Walder did not identify the constitutional specifics that guarantee "a defendant the fullest opportunity to meet the accusation against him ... [and permit him to] be free to deny all the elements of the case against him," in my view, *Miranda v. Arizona,* (1966), identified the Fifth Amendment's privilege against self-incrimination as one of those specifics. ... It is fulfilled only when an accused is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will,". ... The choice of whether to testify in one's own defense must therefore be "unfettered," since that choice is an exercise of the constitutional privilege, *Griffin v. California,* (1965). *Griffin* held that comment by the prosecution upon the accused's failure to take the stand or a court instruction that such silence is evidence of guilt is impermissible because it "fetters" that choice. ... For precisely the same reason, the constitutional guarantee forbids the prosecution to use a tainted statement to impeach the accused who takes the stand: the prosecution's use of the tainted statement "cuts down on the privilege by making its assertion costly.". ...

The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. The "essential mainstay" of that system, *Miranda v. Arizona* ... is the privilege against self-incrimination, which, for that reason has occupied a central place in our jurisprudence since before the Nation's birth. ...

All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government ... must accord to the dignity and integrity of its citizens."

. ... The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that, although any statement they obtain in violation of Miranda cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution. I dissent.

Excerpted by Sobhi Sidani

Oregon v. Elstad

470 U.S. 298 (1985)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: O'Connor, joined by Blackmun, Powell, White, Burger, and Rehnquist
> Dissent: Brennan, joined by Marshall
> Dissent: Stevens

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether an initial failure of law enforcement officers to administer the warnings required by *Miranda v. Arizona*, (1966), without more, "taints" subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights. Respondent, Michael James Elstad, was convicted of burglary by an Oregon trial court. The Oregon Court of Appeals reversed, holding that respondent's signed confession, although voluntary, was rendered inadmissible by a prior remark made in response to questioning without benefit of *Miranda* warnings. We granted certiorari ... and we now reverse.

In December, 1981, the home of Mr. and Mrs. Gilbert Gross, in the town of Salem, Polk County, Ore., was burglarized. Missing were art objects and furnishings valued at $150,000. A witness to the burglary contacted the Polk County Sheriff's Office, implicating respondent Michael Elstad, an 18-year-old neighbor and friend of the Grosses' teenage son. Thereupon, Officers Burke and McAllister went to the home of respondent Elstad, with a warrant for his arrest. Elstad's mother answered the door. She led the officers to her son's room. ... The officers asked him to get dressed and to accompany them into the living room. Officer McAllister asked respondent's mother to step into the kitchen, where he explained that they had a warrant for her son's arrest for the burglary of a neighbor's residence. Officer Burke remained with Elstad in the living room. He later testified:

"I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point, I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.'"

. ...

Elstad was transported to the Sheriff's headquarters and, approximately one hour later ... McAllister then advised respondent for the first time of his *Miranda* rights, reading from a standard card. Respondent indicated he understood his rights, and ... gave a full statement, explaining that he had known that the Gross family was out of town, and had been paid to lead several acquaintances to the Gross residence and show them how to gain entry through a defective sliding glass door. The statement was typed, reviewed by respondent. ... Elstad added and initialed the sentence, "After leaving the house, Robby & I went back to van & Robby handed me a small bag of grass." . ...

Respondent was charged with first-degree burglary. He was represented at trial by retained counsel. Elstad waived his right to a jury, and his case was tried by a Circuit Court Judge. Respondent moved at once to suppress his oral statement and signed confession. He contended that the statement he made in response to questioning at his house "let the cat out of the bag," citing *United States v. Bayer*, (1947), and tainted the subsequent confession as "fruit of the poisonous tree," citing *Wong Sun v. United States*, (1963). The judge ruled that the statement, "I was there," had to be excluded because the defendant had not been advised of his *Miranda* rights. The written confession taken after Elstad's arrival at the Sheriff's office, however, was admitted in evidence. ...

. ... Elstad was found guilty of burglary in the first degree. He received a 5-year sentence, and was ordered to pay $18,000 in restitution.

Following his conviction, respondent appealed to the Oregon Court of Appeals. ... The State conceded that Elstad had been in custody when he made his statement, "I was there," and accordingly agreed that this statement was inadmissible ... [b]ut the State maintained that any conceivable "taint" had been dissipated prior to the respondent's written confession. ... The Court of Appeals reversed respondent's conviction, identifying the crucial constitutional inquiry as "whether there was a sufficient break in the stream of events between inadmissible statement and the written confession to insulate the latter statement from the effect of what went before.". ...

The Oregon court concluded: ". ... In determining whether it [coercive impact] has been dissipated, lapse of time, and change of place from the original surroundings are the most important considerations.". ... Because of the brief period separating the two incidents, the "cat was sufficiently out of the bag to exert a coercive impact on later admissions.". ...

The State of Oregon petitioned the Oregon Supreme Court for review, and review was declined. This Court granted certiorari to consider the question whether the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant.

The arguments advanced in favor of suppression of respondent's written confession rely heavily on metaphor. One metaphor ... would require that respondent's confession, regardless of its integrity, voluntariness, and probative value, be suppressed as the "tainted fruit of the poisonous tree" of the *Miranda* violation. A second metaphor questions whether a confession can be truly voluntary once the "cat is out of the bag." Taken out of context, each of these metaphors can be misleading. They should not be used to obscure fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment. The Oregon court assumed and respondent here contends that a failure to adminis-

ter *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as "fruit of the poisonous tree." We believe this view misconstrues the nature of the protections afforded by *Miranda* warnings, and therefore misreads the consequences of police failure to supply them.

. ... The Court in *Miranda* required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment. The Fifth Amendment, of course, is not concerned with nontestimonial evidence. Nor is it concerned with moral and psychological pressures to confess emanating from sources other than official coercion. ... Voluntary statements "remain a proper element in law enforcement." *Miranda v. Arizona*, [(1966)]. ... As the Court noted last Term in *New York v. Quarles* (1984):

"The *Miranda* Court, however, presumed that interrogation in certain custodial circumstances is inherently coercive, and ... that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights. The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution, but instead measures to insure that the right against compulsory self-incrimination protected.' . ... Requiring *Miranda* warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right."

Respondent's contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings, and must be excluded as "fruit of the poisonous tree," assumes the existence of a constitutional violation. This figure of speech is drawn from *Wong Sun v. United States*, (1963), in which the Court held that evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment must be excluded from evidence. The Wong Sun doctrine applies as well when the fruit of the Fourth Amendment violation is a confession. It is settled law that "a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" *Taylor v. Alabama* (1982). ...

But as we explained ... a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the "fruits" doctrine. The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits. ...

. ... Where a Fourth Amendment violation "taints" the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted in evidence. *Taylor v. Alabama* [(1982)]. ... Beyond this, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation.

The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. ... Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. ...

But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently voluntary statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination. ...

In *Michigan v. Tucker*, *supra*, the Court was asked ... to suppress the testimony of a witness for the prosecution whose identity was discovered as the result of a statement taken from the accused without benefit of full *Miranda* warnings. As in respondent's case, the breach of the *Miranda* procedures in *Tucker* involved no actual compulsion.. ... In deciding "how sweeping the judicially imposed consequences of a failure to administer Miranda warnings should be," ... the *Tucker* Court noted that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the witness' testimony. The unwarned confession must, of course, be suppressed, but the Court ruled that introduction of the third-party witness' testimony did not violate Tucker's Fifth Amendment rights.

We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive *Miranda* violation is neither a witness nor an article of evidence, but the accused's own voluntary testimony. ...

Because *Miranda* warnings may inhibit persons from giving information, this Court has determined that they need be administered only after the person is taken into "custody," or his freedom has otherwise been significantly restrained. *Miranda v. Arizona* [(1966)]. ... Unfortunately, the task of defining "custody" is a slippery one, and "policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." *Michigan v. Tucker* [(1974)]. ... It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

The Oregon court, however, believed that the unwarned remark compromised the voluntariness of respondent's later confession. It was the court's view that the prior answer, and not the unwarned questioning, impaired respondent's ability to give a valid waiver, and that only lapse of time and change of place could dissipate what it termed the "coercive impact" of the inadmissible statement. When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession. ... The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. ... Of the courts that have considered whether a properly warned confession must be suppressed ... the majority have explicitly or implicitly recognized that *Westover*'s requirement of a break in the stream of events is inapposite. In these circumstances, a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible [*Westover v. US* decided with *Miranda*]. ...

The Oregon court nevertheless identified a subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate. But endowing the psy-

chological effects of voluntary unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions. As the Court remarked in [*U.S. v*] *Bayer*: "[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."[(1947)]. ...

This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver. The Oregon court ... effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. ... This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being compelled to testify against himself. ... When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.

There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case. ...

We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Though belated, the reading of respondent's rights was undeniably complete. McAllister testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad's responses. There is no question that respondent knowingly and voluntarily waived his right to remain silent before he described his participation in the burglary. It is also beyond dispute that respondent's earlier remark was voluntary, within the meaning of the Fifth Amendment. Neither the environment nor the manner of either "interrogation" was coercive. The initial conversation took place at midday, in the living room area of respondent's own home, with his mother in the kitchen area, a few steps away. Although in retrospect the officers testified that respondent was then in custody, at the time he made his statement he had not been informed that he was under arrest. The arresting officers' testimony indicates that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect, but to notify his mother of the reason for his arrest. ...

The State has conceded the issue of custody, and thus we must assume that Burke breached *Miranda* procedures in failing to administer *Miranda* warnings before initiating the discussion in the living room. This breach may have been the result of confusion as to whether the brief exchange qualified as "custodial interrogation," or it may simply have reflected

Burke's reluctance to initiate an alarming police procedure before McAllister had spoken with respondent's mother. Whatever the reason for Burke's oversight, the incident had none of the earmarks of coercion. ... Nor did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent.

Respondent, however, has argued that he was unable to give a fully informed waiver of his rights because he was unaware that his prior statement could not be used against him. Respondent suggests that Officer McAllister, to cure this deficiency, should have added an additional warning to those given him at the Sheriff's office. Such a requirement is neither practicable nor constitutionally necessary. In many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained. ... The standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking. ...

This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. ...

When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. The Court has carefully adhered to this principle, permitting a narrow exception only where pressing public safety concerns demanded. ... The Court today in no way retreats from the bright-line rule of *Miranda*. We do not imply that good faith excuses a failure to administer *Miranda* warnings; nor do we condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him. A handful of courts have, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary.

The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver. We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.

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

It is so ordered.

Excerpted by Sobhi Sidani

Missouri v. Seibert

542 U.S. 600 (2004)

> Vote: 5-4
> Decision: Affirmed
> Plurality: Souter, joined by Stevens, Ginsburg, and Breyer
> Concurrence: Breyer
> Concurrence: Kennedy
> Dissent: O'Connor, joined by Rehnquist, Scalia, and Thomas

JUSTICE SOUTER announced the judgment of the Court and delivered an opinion, in which JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join.

This case tests a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda v. Arizona* (1966), the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time. The question here is the admissibility of the repeated statement. Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*'s constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible.

Respondent Patrice Seibert's 12-year-old son Jonathan had cerebral palsy, and when he died in his sleep, she feared charges of neglect. In her presence, two of her teenage sons and two of their friends devised a plan to conceal the facts surrounding Jonathan's death by incinerating his body ... [by] burning the family's mobile home, in which they planned to leave Donald Rector, a mentally ill teenager living with the family. ...

Five days later, the police awakened Seibert at 3 a.m. at a hospital. In arresting her, Officer Kevin Clinton followed instructions from ... Officer Richard Hanrahan that he refrain from giving *Miranda* warnings. After Seibert had been taken to the police station ... Hanrahan questioned her without *Miranda* warnings.

After Seibert finally admitted she knew Donald was meant to die in the fire ... Officer Hanrahan then turned on a tape recorder, gave Seibert the *Miranda* warnings, and obtained a signed waiver of rights from her. He resumed the questioning ... and confronted her with her prewarning statements. ...

After being charged with first-degree murder ... Seibert sought to exclude both her prewarning and postwarning statements. At the suppression hearing, Officer Hanrahan testified that he made a "conscious decision" to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question "until I get the answer that she's already provided once.". ...

The trial court suppressed the prewarning statement but admitted the responses given after the *Miranda* recitation. A jury convicted Seibert of second-degree murder. On appeal, the Missouri Court of Appeals affirmed, treating this case as indistinguishable from *Oregon v. Elstad* (1985). ...

The Supreme Court of Missouri reversed, holding that "[i]n the circumstances here, where the interrogation was nearly continuous ... the second statement, clearly the product of the invalid first statement, should have been suppressed." The court distinguished *Elstad* on the ground that warnings had not intentionally been withheld there, and reasoned that "Officer Hanrahan's intentional omission of a *Miranda* warning was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights. ... "

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment ... commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

. ...

Accordingly, "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause," *Chavez* v. *Martinez,* this Court in *Miranda* concluded that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility. ...

There are those, of course, who preferred the old way of doing things, giving no warnings and litigating the voluntariness of any statement in nearly every instance. In the aftermath of *Miranda*, Congress even passed a statute seeking to restore that old regime, 18 U. S. C. §3501, although the Act lay dormant for years until finally invoked and challenged in *Dickerson* v. *United States*. *Dickerson* reaffirmed *Miranda* and held that its constitutional character prevailed against the statute.

The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. Consistently with the officer's testimony, the Police Law Institute, for example, instructs that "officers may conduct a two-stage interrogation ... [a]t any point during the pre-*Miranda* interrogation. ... [O]fficers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any subsequent incriminating statements later in court. ... "

When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and question-first. *Miranda* addressed "interrogation practices ... likely ... to disable [an individual] from making a free

and rational choice" about speaking, and held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees. The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.

. ... "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*." The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could [the warnings] reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*. ...

. ... Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. ... What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran* v. *Burbine* By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

. ...

Missouri argues that a confession repeated at the end of an interrogation sequence envisioned in a question-first strategy is admissible on the authority of *Oregon* v. *Elstad* ... The Court, indeed, took care to mention that the officer's initial failure to warn was an "oversight" that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation'. ... In holding the second statement admissible and voluntary, *Elstad* rejected the "cat out of the bag" theory that any short, earlier admission, obtained in arguably innocent neglect of *Miranda*, determined the character of the later, warned confession, *Elstad*; on the facts of that case, the Court thought any causal connection between the first and second responses to the police was "speculative and attenuated."

At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. ... It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said

before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.

Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible.

The judgment of the Supreme Court of Missouri is affirmed.

It is so ordered.

Excerpted by Sloan Harmel

New York v. Harris

495 U.S. 14 (1990)

> Vote: 5-4
> Decision: reversed
> Majority: White, joined by Kennedy, O'Connor, Scalia, and Rehnquist
> Dissent: Marshall, joined by Brennan, Blackmun, and Stevens

Justice WHITE delivered the opinion of the Court.

On January 11, 1984, New York City police found the body of Ms. Thelma Staton murdered in her apartment. Various facts gave the officers probable cause to believe that the respondent in this case, Bernard Harris, had killed Ms. Staton ... three police officers went to Harris's apartment to take him into custody. They did not first obtain an arrest warrant.

When the police arrived, they knocked on the door, displaying their guns and badges. Harris let them enter. Once inside, the officers read Harris his *Miranda* rights. Harris acknowledged that he understood the warnings, and agreed to answer the officers' questions. At that point, he reportedly admitted that he had killed Ms. Staton.

Harris was arrested, taken to the station house, and again informed of his *Miranda* rights. He then signed a written inculpatory statement. The police subsequently read Harris the *Miranda* warnings a third time and videotaped an incriminating interview between Harris and a district attorney, even though Harris had indicated that he wanted to end the interrogation.

The trial court suppressed Harris' first and third statements; the State does not challenge those rulings. The sole issue in this case is whether Harris's second statement — the written statement made at the station house — should have been suppressed because the police, by entering Harris' home without a warrant and without his consent, violated *Payton v. New York*, (1980), which held that the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. The New York trial court concluded that the statement was admissible. Following a bench trial, Harris was convicted of second-degree murder. The Appellate Division affirmed. ...

A divided New York Court of Appeals reversed. ... That court first accepted the trial court's finding that Harris did not consent to the police officers' entry into his home, and that the warrantless arrest therefore violated *Payton* even though there was probable cause. Applying *Brown v. Illinois*, (1975), and its progeny, the court then determined that the station house statement must be deemed to be the inadmissible fruit of the illegal arrest because the connection between the statement and the arrest was not sufficiently attenuated. ... We granted certiorari to resolve the admissibility of the station house statement. ...

For present purposes, we accept the finding below that Harris did not consent to the police officers' entry into his home and the conclusion that the police had probable cause to arrest him. It is also evident, in light of *Payton*, that arresting Harris in his home without an arrest warrant violated the Fourth Amendment. But, as emphasized in earlier cases, "we have declined to adopt a "per se or but for' rule" that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest." *United States v. Ceccolini*, (1978). Rather, in this context, we have stated that "[t]he penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.". ...

In light of these principles, we decline to apply the exclusionary rule in this context because the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime. ...

Although it had long been settled that a warrantless arrest in a public place was permissible as long as the arresting officer had probable cause, see *United States v. Watson*, (1976), *Payton* nevertheless drew a line at the entrance to the home. ... Nothing in the reasoning of that case suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house. There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest. ... Nor is there any claim that the warrantless arrest required the police to release Harris, or that Harris could not be immediately rearrested if momentarily released. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings and allowed to talk. ...

Harris's statement taken at the police station was not the product of being in unlawful custody. Neither was it the fruit of having been arrested in the home rather than someplace else. ... [T]he police had a justification to question Harris prior to his arrest; therefore, his subsequent statement was not an exploitation of the illegal entry into Harris' home.

We do not hold, as the dissent suggests, that a statement taken by the police while a suspect is in custody is always admissible as long as the suspect is in legal custody. Statements taken during legal custody would of course be inadmissible for example, if, they were the product of coercion, if *Miranda* warnings were not given, or if there was a violation of the rule of *Edwards v. Arizona*, (1981). We do hold that the station-house statement in this case was admissible because Harris was in legal custody, as the dissent concedes, and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house, rather than someplace else.

To put the matter another way, suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris's in-house arrest illegal. The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated. We are not required by the Constitution to go further and suppress statements later made by Harris in order to deter police from violating *Payton*. ...

Even though we decline to suppress statements made outside the home following a *Payton* violation, the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found or statements taken inside the home. If we did suppress statements like Harris', moreover, the incremental deterrent value would be minimal. Given that the police have probable cause to arrest a suspect in Harris' position, they need not violate *Payton* in order to interrogate the suspect. ...

We hold that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*. The judgment of the court below is accordingly

Reversed.

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

Police officers entered Bernard Harris' home and arrested him there. They did not have an arrest warrant, he did not consent to their entry, and exigent circumstances did not exist. An arrest in such circumstances violates the Fourth Amendment. ... About an hour after his arrest, Harris made an incriminating statement, which the government subsequently used at his trial. The majority concedes that "[t]he fruits of that illegal entry" must be suppressed. ... The sole question before us is whether Harris' statement falls within that category.

The majority answers this question by adopting a broad and unprecedented principle, holding that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*.". ...

The majority's conclusion is wrong. Its reasoning amounts to nothing more than an analytical sleight-of-hand, resting on errors in logic, misreadings of our cases, and an apparent blindness to the incentives the Court's ruling creates for knowing and intentional constitutional violations by the police. I dissent.

In recent years, this Court has repeatedly stated that the principal purpose of the Fourth Amendment's exclusionary rule is to eliminate incentives for police officers to violate that Amendment. ... A police officer who violates the Constitution usually does so to obtain evidence that he could not secure lawfully. The best way to deter him is to provide that any evidence so obtained will not be admitted at trial. Deterrence of constitutional violations thus requires the suppression not only of evidence seized during an unconstitutional search but also of

"derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search."

Murray v. United States, (1988). ...

Because deterrence is a principal purpose of the exclusionary rule, our attenuation analysis must be driven by an understanding of how extensive exclusion must be to deter violations of the Fourth Amendment. We have long held that, where police have obtained a statement after violating the Fourth Amendment, the interest in deterrence does not disappear simply because the statement was voluntary, as required by the Fifth Amendment. ... Indeed, if the Fourth Amendment required exclusion only of statements taken in violation of the Fifth Amendment, the Fourth Amendment would serve no independent purpose. A regime that suppresses only some fruits of constitutional violations is a regime that barely begins to eliminate the incentives to violate the Constitution.

When faced with a statement obtained after an illegal arrest, then, a court will have occasion to engage in the attenuation inquiry only if it first determines that the statement is "voluntary," for involuntary statements are suppressible in any event. ... [W]e have identified several factors as relevant to the issue of attenuation: the length of time between the arrest and the statement, the presence of intervening circumstances, and the "purpose and flagrancy" of the violation. ... We have identified the last factor as "particularly" important. ... When a police officer intentionally violates what he knows to be a constitutional command, exclusion is essential to conform police behavior to the law. Such a "flagrant" violation is in marked contrast to a violation that is the product of a good-faith misunderstanding of the relevant constitutional requirements. This Court has suggested that excluding evidence that is the product of the latter variety of violation may result in deterrence of legitimate law enforcement efforts. ... Underlying this view is the theory that officers fear that if their judgment as to the constitutionality of their conduct turns out to be wrong, the consequences of their misjudgments may be too costly to justify the possible law enforcement benefits. Any doubt concerning the constitutionality of a course of action will therefore be resolved against that course of action. Whatever the truth of that theory, the concern that officers who act in good faith will be overdeterred is nonexistent when, based on a cynical calculus of the likely results of a suppression hearing, an officer intentionally decides to violate what he knows to be a constitutional command.

An application of the *Brown* factors to this case compels the conclusion that Harris' statement at the station house must be suppressed. About an hour elapsed between the illegal arrest and Harris' confession, without any intervening factor other than the warnings required by *Miranda v. Arizona,* (1966). This Court has held, however, that "*Miranda* warnings, alone and per se, ... cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.". ... Indeed, in *Brown*, we held that a statement made almost two hours after an illegal arrest, and after Miranda warnings had been given, was not sufficiently removed from the violation so as to dissipate the taint.

As to the flagrancy of the violation, petitioner does not dispute that the officers were aware that the Fourth Amendment prohibited them from arresting Harris in his home without a warrant. ... In short, the officers decided, apparently consistent with a "departmental policy," to violate Harris' Fourth Amendment rights so they could get evidence that they could not otherwise obtain. ...

Had the Court analyzed this case as our precedents dictate that it should, I could end my discussion here — the dispute would reduce to an application of the *Brown* factors to the constitutional wrong and the inculpatory statement that followed. But the majority chooses no such unremarkable battleground. Instead, the Court redrafts our cases in the service of conclusions they straightforwardly and explicitly reject. Specifically, the Court finds suppression unwarranted on the authority of its newly fashioned per se rule. In the majority's view, when police officers make a warrantless home arrest in violation of *Payton*, their physical exit from the suspect's home necessarily breaks the causal chain between the illegality and any subsequent statement by the suspect, such that the statement is admissible regardless of the *Brown* factors. ...

Perhaps the most alarming aspect of the Court's ruling is its practical consequences for the deterrence of Payton violations. Imagine a police officer who has probable cause to arrest a suspect but lacks a warrant. The officer knows if he were to break into the home to make the arrest without first securing a warrant, he would violate the Fourth Amendment and any evidence he finds in the house would be suppressed. Of course, if he does not enter the house, he will not be able to use any evidence inside the house either, for the simple reason that he will never see it. The officer also knows, though, that waiting for the suspect to leave his house before arresting him could entail a lot of waiting, and the time he would spend getting a warrant would be better spent arresting criminals. The officer could leave the scene to obtain a warrant, thus avoiding some of the delay, but that would entail giving the suspect an opportunity to flee.

More important, the officer knows that, if he breaks into the house without a warrant and drags the suspect outside, the suspect, shaken by the enormous invasion of privacy he has just undergone, may say something incriminating. Before today's decision, the government would only be able to use that evidence if the Court found that the taint of the arrest had been attenuated; after the decision, the evidence will be admissible regardless of whether it was the product of the unconstitutional arrest. ... The Court thus creates powerful incentives for police officers to violate the Fourth Amendment. In the context of our constitutional rights and the sanctity of our homes, we cannot afford to presume that officers will be entirely impervious to those incentives.

I dissent.

Excerpted by Sobhi Sidani

Investigatory Methods

Case List

Gathering Evidence from the Body

Rochin v. California (1952)
Winston v. Lee (1985)

Identification Methods

Hayes v. Florida (1985)
United States v. Dionisio (1973)
United States v. Wade (1967)
Kirby v. Illinois (1972)

Gathering Evidence from the Body

Rochin v. California

342 U.S. 165 (1952)

> Vote: 8-0
> Decision: Reversed
> Majority: Frankfurter, joined by Reed, Jackson, Burton, Vinson, and Clark
> Concurrence: Black
> Concurrence: Douglas
> Not participating: Minton

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Having "some information that (the petitioner here) was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed, the deputies spied two capsules. When asked "Whose stuff is this?", Rochin seized the capsules and put them in his mouth. A struggle ensued in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of possessing "a preparation of morphine" in violation of the California Health and Safety Code. ... The chief evidence against him was the two capsules. They were admitted over petitioner's objection. ...

On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officer. ...

"were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital." One of the three judges, while finding that "the record in this case reveals a shocking series of violations of constitutional rights", concurred only because he felt bound by decisions of his Supreme Court. ... The Supreme Court of California denied without opinion Rochin's petition for a hearing. ...

This Court granted certiorari because a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States.

In our federal system, the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. ... Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations ... in the original Constitution

These limitations, in the main, concern not restrictions upon the powers of the States to define crime, except in the restricted area where federal authority has pre-empted the field, but restrictions upon the manner in which the States may enforce their penal codes. Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far reaching and most frequent federal basis of challenging State criminal justice, "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." *Malinski v. New York*. [(1945)]. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', Snyder v. Commonwealth of Massachusetts [(1934)] ... Due process of law, "itself a historical product," *Jackman v. Rosenbaum Co.,* is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice. ...

. ... Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*. ...

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of or judicial process. ... The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions. ...

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. ... Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." *See* Mr. Chief Justice Hughes, speaking for a unanimous Court in *Brown v. Mississippi*. It

would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reasons for excluding coerced confessions. ...

In deciding this, case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. ...

On the facts of this case, the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be reversed.

Reversed.

Excerpted by Jacob Staab

Schmerber v. California

384 U.S. 757 (1966)

> Vote: 5-4
> Decision: Affirmed
> Majority: Brennan, joined by Clark, Harlan, Stewart, and White
> Concurrence: Harlan, joined by Stewart
> Dissent: Warren
> Dissent: Black, joined by Douglas,
> Dissent Douglas
> Dissent: Fortas

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor. ... At the direction of a police officer, a blood sample was then withdrawn from petitioner's body by a physician at the hospital.

The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication. ... Petitioner objected to receipt of this evidence ... on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the test. He contended that ... the withdrawal of

the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment ... his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction. In view of constitutional decisions since we last considered these issues in *Breithaupt v. Abram* [(1957)] ... we granted certiorari. We affirm.

THE DUE PROCESS CLAUSE CLAIM

Breithaupt was also a case in which police officers caused blood to be withdrawn from the driver of an automobile involved in an accident, and in which there was ample justification for the officer's conclusion that the driver was under the influence of alcohol. There, as here, the extraction was made by a physician in a simple, medically acceptable manner in a hospital environment.

There, however, the driver was unconscious at the time the blood was withdrawn, and hence had no opportunity to object to the procedure. We affirmed the conviction there resulting from the use of the test in evidence, holding that, under such circumstances, the withdrawal did not offend "that *sense of justice'* of which we spoke in *Rochin v. California*. *Breithaupt* thus requires the rejection of petitioner's due process argument, and nothing in the circumstances of this case or in supervening events persuades us that this aspect of *Breithaupt* should be overruled.

THE PRIVILEGE AGAINST SELF-INCRIMINATION CLAIM

We ... must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself ... and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion. ...

It could not be denied that, in requiring petitioner to submit to the withdrawal and chemical analysis of his blood, the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. ... The critical question, then, is whether petitioner was thus compelled "to be a witness against himself". ...

The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood ... is evidence of criminal guilt. Compelled submission fails on one view to respect the "inviolability of the human personality." Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused "by its own independent labors."

As the passage in *Miranda* implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest. ...

The leading case in this Court is *Holt v. United States.* There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument ... and went on to say:

"[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications ... but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. ...

In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion ... was involved either in the extraction or in the chemical analysis. ... Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

THE RIGHT TO COUNSEL CLAIM

This conclusion also answers petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. ...

THE SEARCH AND SEIZURE CLAIM

In *Breithaupt,* as here, it was also contended that the chemical analysis should be excluded from evidence as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. The Court did not decide whether the extraction of blood in that case was unlawful. ... The question is squarely presented therefore, whether the chemical analysis introduced in evidence in this case should have been excluded. ...

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. ...

... [I]f compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. ... It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. ...

Because we are dealing with intrusions into the human body, rather than with state interferences with property relationships or private papers — "houses, papers, and effects" — we write on a clean slate. ... We begin with the assumption that, once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol contest, the Fourth Amendment's proper function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In

other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

In this case ... these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him. ... The police officer who arrived at the scene ... smelled liquor on petitioner's breath, and testified that petitioner's eyes were "bloodshot, watery, sort of a glassy appearance." The officer saw petitioner again at the hospital, within two hours of the accident. There, he noticed similar symptoms of drunkenness. He thereupon informed petitioner

"that he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything that he told me would be used against him in evidence.". ...

... [T]he mere fact of a lawful arrest does not end our inquiry. ... The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. ...

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency. ... We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops. ... Given these special facts, we conclude that the attempt to secure evidence of blood alcohol content ... was ... appropriate. ...

Similarly, we are satisfied that the test chosen to measure petitioner's blood alcohol level was a reasonable one ... Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that, for most people, the procedure involves virtually no risk, trauma, or pain. ...

Finally, the record shows that the test was performed in a reasonable manner. ...

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. ...

Affirmed.

Excerpted by Jacob Staab

Winston v. Lee

470 U.S. 753 (1985)

> Vote: 9-0
> Decision: Affirmed
> Majority: Brennan, joined by Burger, White, Marshall, Powell, Stevens, and O'Connor
> Concurrence: Burger
> Concurrence: Blackmun
> Concurrence: Rehnquist (in judgement)

JUSTICE BRENNAN delivered the opinion of the Court.

Schmerber v. California (1966) held, *inter alia,* that a State may, over the suspect's protest, have a physician extract blood from a person suspected of drunken driving without violation of the suspect's right secured by the Fourth Amendment not to be subjected to unreasonable searches and seizures. However, *Schmerber* cautioned:

"That we today hold that the Constitution does not forbid the States[‘] minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."

In this case, the Commonwealth of Virginia seeks to compel the respondent ... to undergo a surgical procedure under a general anesthetic for removal of a bullet lodged in his chest. Petitioners allege that the bullet will provide evidence of respondent's guilt or innocence. We conclude that the procedure sought here is an example of the "more substantial intrusion" cautioned against in *Schmerber.* ...

... Ralph E. Watkinson was closing his shop for the night. ... [H]e observed someone armed with a gun coming toward him from across the street. Watkinson was also armed. ... Watkinson then fired at the other person, who returned his fire. ... The police arrived on the scene shortly thereafter, and Watkinson was taken by ambulance to the emergency room of the Medical College of Virginia (MCV) Hospital.

Approximately 20 minutes later, police officers responding to another call found respondent eight blocks from where the earlier shooting occurred. Respondent was suffering from a gunshot wound to his left chest area, and told the police that he had been shot when two individuals attempted to rob him. An ambulance took respondent to the MCV Hospital. Watkinson was still in the MCV emergency room and, when respondent entered that room, said "[t]hat's the man that shot me". ...

The Commonwealth shortly thereafter moved in state court for an order directing respondent to undergo surgery to remove an object thought to be a bullet lodged under his left collarbone. ... At the second hearing, the expert testified that, on reexamination of respondent, he discovered that the bullet was not "back inside close to the nerves and arteries," as he originally had thought. Instead, he now believed the bullet to be located "just beneath the skin." He testified that the surgery ... could be performed under local anesthesia, and would result in "no danger on the basis that there's no general anesthesia employed."

The state trial judge granted the motion to compel surgery. ...

On October 18, 1982, just before the surgery was scheduled, the surgeon ordered that X-rays be taken of respondent's chest. The X-rays revealed that the bullet was in fact lodged ... substantially deeper than had been thought when the state court granted the motion to compel surgery. The surgeon now believed that a general anesthetic would be desirable for medical reasons.

Respondent moved the state trial court for a rehearing based on the new evidence. After holding an evidentiary hearing, the state trial court denied the rehearing, and the Virginia Supreme Court affirmed. Respondent then returned to federal court. ... After an evidentiary hearing, the District Court enjoined the threatened surgery.

A divided panel of the Court of Appeals for the Fourth Circuit affirmed. We granted certiorari to consider whether a State may, consistently with the Fourth Amendment, compel a suspect to undergo surgery of this kind in a search for evidence of a crime.

The Fourth Amendment protects "expectations of privacy," *see Katz v. United States* –the individual's legitimate expectations that, in certain places and at certain times, he has "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States* (Brandeis, J., dissenting). Putting to one side the procedural protections of the warrant requirement, the Fourth Amendment generally protects the "security" of "persons, houses, papers, and effects" against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily "probable cause." Beyond this point, it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security. ...

A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime. ...

The authorities in *Schmerber* clearly had probable cause to believe that he had been driving while intoxicated and to believe that a blood test would provide evidence that was exceptionally probative in confirming this belief. Because the case fell within the exigent circumstances exception to the warrant requirement, no warrant was necessary. ...

Schmerber noted that

"[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State". ...

The intrusion perhaps implicated Schmerber's most personal and deep-rooted expectations of privacy, and the Court recognized that Fourth Amendment analysis thus required a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable. The Fourth Amendment neither forbids nor permits all such intrusions; rather, the Amendment's

"proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers. We believe that *Schmerber,* however, provides the appropriate framework of analysis for such cases.

Schmerber recognized that the ordinary requirements of the Fourth Amendment would be the threshold requirements for conducting this kind of surgical search and seizure. ...

Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. ... *Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity.

Weighed against these individual interests is the community's interest in fairly and accurately determining guilt. ... We noted in *Schmerber* that a blood test is "a highly effective means of determining the degree to which a person is under the influence of alcohol." Moreover, there was "a clear indication that in fact [desired] evidence [would] be found" if the blood test were undertaken.

Especially given the difficulty of proving drunkenness by other means, these considerations showed that results of the blood test were of vital importance if the State were to enforce its drunken driving laws. ...

Applying the *Schmerber* balancing test in this case, we believe that the Court of Appeals reached the correct result. ... Our inquiry therefore must focus on the extent of the intrusion on respondent's privacy interests and on the State's need for the evidence.

The threats to the health or safety of respondent posed by the surgery are the subject of sharp dispute between the parties. Before the new revelations of October 18, the District Court found that the procedure could be carried out "with virtually no risk to [respondent]." On rehearing, however, with new evidence before it, the District Court held that "the risks previously involved have increased in magnitude even as new risks are being added."

The Court of Appeals examined the medical evidence in the record and found that respondent would suffer some risks associated with the surgical procedure. ...

Both lower courts in this case believed that the proposed surgery, which for purely medical reasons required the use of a general anesthetic, would be an "extensive" intrusion on respondent's personal privacy and bodily integrity.

When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. ... In this case, however, the Court of Appeals noted that the Commonwealth proposes to take control of respondent's body. ...

The other part of the balance concerns the Commonwealth's need to intrude into respondent's body to retrieve the bullet. ... The Commonwealth has available substantial additional evidence that respondent was the individual who accosted Watkinson on the night of the robbery. ...

In weighing the various factors in this case, we therefore reach the same conclusion as the courts below. The operation sought will intrude substantially on respondent's protected interests. The medical risks of the operation, although apparently not extremely severe, are a subject of considerable dispute; the very uncertainty militates against finding the operation to be "reasonable." In addition, the intrusion on respondent's privacy interests entailed by the operation can only be characterized as severe. ...

The Fourth Amendment is a vital safeguard of the right of the citizen to be free from unreasonable governmental intrusions into any area in which he has a reasonable expectation of privacy. ... Applying these principles, we hold that the proposed search in this case would be "unreasonable" under the Fourth Amendment.

Affirmed.

Excerpted by Jacob Staab

Identification Methods

Hayes v. Florida

470 U.S. 811 (1985)

> Vote: 8-0
> Decision: Reversed
> Majority: White, joined by Burger, Rehnquist, Stevens, and O'Connor
> Concurrence: Brennan, joined by Marshall
> Concurrence: Blackmun
> Not Participating: Powell

JUSTICE WHITE delivered the opinion of the Court.

The issue before us in this case is whether the Fourth Amendment to the Constitution of the United States, applicable to the States by virtue of the Fourteenth Amendment, was properly applied by the District Court of Appeal of Florida ... to allow police to transport a suspect to the station house for fingerprinting, without his consent and without probable cause or prior judicial authorization.

A series of burglary-rapes occurred in Punta Gorda, Florida, in 1980. Police found latent fingerprints on the doorknob of the bedroom of one of the victims, fingerprints they believed belonged to the assailant. The police also found a herringbone pattern tennis shoe print near the victim's front porch. Although they had little specific information to tie petitioner Hayes to the crime ... the investigators came to consider petitioner a principal suspect. They decided to visit petitioner's home to obtain his fingerprints or, if he was uncooperative, to arrest him. They did not seek a warrant. ...

Arriving at petitioner's house, the officers spoke to petitioner on his front porch. When he expressed reluctance voluntarily to accompany them to the station for fingerprinting, one of the investigators explained that they would therefore arrest him. Petitioner, in the words of the investigator, then "blurted out" that he would rather go with the officers to the station than be arrested. While the officers were on the front porch, they also seized a pair of herringbone pattern tennis shoes in plain view.

Petitioner was then taken to the station house, where he was fingerprinted. When police determined that his prints matched those left at the scene of the crime, petitioner was placed under formal arrest. Before trial, petitioner moved to suppress the fingerprint evidence, claiming it was the fruit of an illegal detention. The trial court denied the motion and admitted the evidence without expressing a reason. Petitioner was convicted of the burglary and sexual battery committed at the scene where the latent fingerprints were found.

The District Court of Appeal of Florida ... affirmed the conviction. ... [A]lthough finding neither consent nor probable cause, the court held, analogizing to the stop-and-frisk rule of *Terry v. Ohio* (1968) that the officers could transport petitioner to the station house and take his fingerprints on the basis of their reasonable suspicion that he was involved in the crime.

The Florida Supreme Court denied review. ... We granted certiorari to review this application of *Terry* and we now reverse.

We agree with petitioner that *Davis v. Mississippi* (1969) requires reversal of the judgment below. In *Davis,* in the course of investigating a rape, police officers brought petitioner Davis to police headquarters on December 3, 1965. He was fingerprinted and briefly questioned before being released. He was later charged and convicted of the rape. An issue there was whether the fingerprints taken on December 3 were the inadmissible fruits of an illegal detention. Concededly, the police at that time were without probable cause for an arrest, there was no warrant, and Davis had not consented to being taken to the station house. The State nevertheless contended that the Fourth Amendment did not forbid an investigative detention for the purpose of fingerprinting, even in the absence of probable cause or a warrant. We rejected that submission, holding that Davis' detention for the purpose of fingerprinting was subject to the constraints of the Fourth Amendment and exceeded the permissible limits of those temporary seizures authorized by *Terry v. Ohio, supra.* This was so even though fingerprinting, because it involves neither repeated harassment nor any of the probing into private life and thoughts that often marks interrogation and search, represents a much less serious intrusion upon personal security than other types of searches and detentions. Nor was it a sufficient answer to the Fourth Amendment issue to recognize that fingerprinting is an inherently more reliable and effective crime-solving mechanism than other types of evidence such as lineups and confessions. The Court indicated that perhaps, under narrowly confined circumstances, a detention for fingerprinting on less than probable cause might comply with the Fourth Amendment, but found it unnecessary to decide that question. ...

Here, as in *Davis,* there was no probable cause to arrest, no consent to the journey to the police station, and no judicial authorization for such a detention for fingerprinting purposes. Unless later cases have undermined *Davis* or we now disavow that decision, the judgment below must be reversed.

None of our later cases have undercut the holding in *Davis* that transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment. Indeed, some 10 years later, in *Dunaway v. New York* (1979) we refused to extend *Terry v. Ohio, supra,* to authorize investigative interrogations at police stations on less than probable cause. ...

Nor are we inclined to forswear *Davis.* There is no doubt that, at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments. And our view continues to be that the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be. ...

None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment. ...

... [T]his Term, we concluded that, if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information. ...

We also do not abandon the suggestion in *Davis* and *Dunaway* [(1979)] that, under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting. We do not, of course, have such a case before us. ...

As we have said, absent probable cause and a warrant, *Davis v. Mississippi* requires the reversal of the judgment of the Florida District Court of Appeal.

It is so ordered.

Excerpted by Jacob Staab

United States v. Dionisio

410 U.S. 1 (1973)

> Vote: 7-3
> Decision: Reversed
> Majority: Stewart, joined by Burger, White, Blackmun, Powell, and Rehnquist
> Concur/Dissent: Brennan
> Dissent: Douglas
> Dissent: Marshall

MR. JUSTICE STEWART delivered the opinion of the Court.

A special grand jury was convened ... to investigate possible violations of federal criminal statutes. ... In the course of its investigation, the grand jury received in evidence certain voice recordings. ...

The grand jury subpoenaed approximately 20 persons, including the respondent Dionisio, seeking to obtain from them voice exemplars for comparison with the recorded conversations that had been received in evidence. ... Dionisio and other witnesses refused ... asserting that these disclosures would violate their rights under the Fourth and Fifth Amendments.

The Government then filed separate petitions in the United States District Court to compel Dionisio and the other witnesses to furnish the voice exemplars to the grand jury. The petitions stated that the exemplars were "essential and necessary" to the grand jury investigation. ...

Following a hearing, the District Judge rejected the witnesses' constitutional arguments and ordered them to comply with the grand jury's request. He reasoned that voice exemplars, like handwriting exemplars or fingerprints, were not

testimonial or communicative evidence. ... The District Judge also found that there would be no Fourth Amendment violation, because the grand jury subpoena did not itself violate the Fourth Amendment, and the order to produce the voice exemplars would involve no unreasonable search and seizure. ...

When Dionisio persisted in his refusal to respond to the grand jury's directive, the District Court adjudged him in civil contempt and ordered him committed to custody until he obeyed the court order, or until the expiration of 18 months.

The Court of Appeals for the Seventh Circuit reversed. It agreed with the District Court in rejecting the Fifth Amendment claims, but concluded that to compel the voice recordings would violate the Fourth Amendment. ...

In *Davis* [*v. Mississippi* (1969)], this Court held that it was error to admit the petitioner's fingerprints into evidence ... because they had been obtained during a police detention following a lawless wholesale roundup of the petitioner and more than 20 other youths. Equating the procedures followed by the grand jury in the present case to the fingerprint detentions in *Davis*, the Court of Appeals reasoned that

"[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis.*"

In view of a clear conflict between this decision and the one in the Court of Appeals for the Second Circuit, we granted ... certiorari. ...

The Court of Appeals correctly rejected the contention that the compelled production of the voice exemplars would violate the Fifth Amendment. It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by the privilege against compulsory self-incrimination. ...

The Court of Appeals held that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar, and that in this case the proposed "seizures" of the voice exemplars would be unreasonable because of the large number of witnesses summoned. ... We disagree.

The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. ... " Any Fourth Amendment violation in the present setting must rest on a lawless governmental intrusion upon the privacy of "persons," rather than on interference with "property relationships or private papers." *Schmerber v. California,* [1966]. ... In *Terry v. Ohio* [1968] the Court explained the protection afforded to "persons" in terms of the statement in *Katz v. United States* [1967] that "the Fourth Amendment protects people, not places," and concluded that

"wherever an individual may harbor a reasonable 'expectation of privacy,' ... The is entitled to be free from unreasonable governmental intrusion."

Terry v. Ohio.

As the Court made clear in *Schmerber, supra,* the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels — the "seizure" of the "person" necessary to bring him into contact with government agents, and the subsequent search for and seizure of the evidence. In *Schmerber,* we found the ... seizure of the blood sample from his body reasonable in light of the exigent circumstances. ...

And in *Terry,* we concluded that neither the initial seizure of the person, an investigatory "stop" by a policeman, nor the subsequent search, a "pat-down" of his outer clothing for weapons, constituted a violation of the Fourth and Fourteenth Amendments. The constitutionality of the compulsory production of exemplars from a grand jury witness necessarily turns on the same dual inquiry — whether either the initial compulsion of the person to appear before the grand jury or the subsequent directive to make a voice recording is an unreasonable "seizure" within the meaning of the Fourth Amendment.

It is clear that a subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome. ...

The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" in more than civic obligation. ...

This case is thus quite different from *Davis v. Mississippi, supra,* on which the Court of Appeals primarily relied. For, in *Davis,* it was the initial seizure — the lawless dragnet detention — that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints. ...

This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. The grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. The Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms "to be regarded as reasonable." *Hale v. Henkel*; *cf. Oklahoma Press Publishing Co. v. Walling* [1906]. ...

But we are here faced with no such constitutional infirmities in the subpoena to appear before the grand jury or in the order to make the voice recordings. ...

The Court of Appeals found critical significance in the fact that the grand jury had summoned approximately 20 witnesses to furnish voice exemplars. We think that fact is basically irrelevant. ...

... Dionisio argues that the grand jury's subsequent directive to make the voice recording was itself an infringement of his rights under the Fourth Amendment. We cannot accept that argument.

In *Katz v. United States, supra,* we said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his own home or office. ... " The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice. ...

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in *Schmerber*.

"The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."

Schmerber v. California. Similarly, a seizure of voice exemplars does not involve the "severe, though brief, intrusion upon cherished personal security," effected by the "pat-down" in Terry — "surely ... an annoying, frightening, and perhaps humiliating experience." *Terry v. Ohio*. ...

... [N]either the summons to appear before the grand jury nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment. ...

Since the Court of Appeals found an unreasonable search and seizure where none existed, and imposed a preliminary showing of reasonableness where none was required, its judgment is reversed and this case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Jacob Staab

United States v. Wade

388 U.S. 218 (1967)

> Vote: 5-4
> Decision: Reversed
> Majority: Brennan, joined by Clark (in full), joined in part Warren, Douglas, Fortas (all but Part I), Harlan, Stewart, and White (Parts I and III)
> Concurrence: Clark
> Concurrence/Dissent: Warren
> Concurrence/Dissent Black
> Concurrence/Dissent: Douglas
> Concurrence/Dissent: White, joined by Harlan, Stewart
> Concurrence/Dissent: Fortas, joined by Warren, Douglas

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to, and in the absence of, the accused's appointed counsel.

The ... bank ... was robbed on September 21, 1964. ... Wade was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later, an FBI agent, without notice to Wade's lawyer, arranged to have the two bank employees observe a lineup made up of Wade and five or six other prisoners. ... Both bank employees identified Wade. ...

At trial, the two employees, when asked on direct examination if the robber was in the courtroom, pointed to Wade. The prior lineup identification was then elicited from both employees on cross-examination ... Wade's counsel moved for a judgment of acquittal or, alternatively, to strike the bank officials' courtroom identifications on the ground that conduct of the lineup, without notice to and in the absence of his appointed counsel, violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and Wade was convicted. The Court of Appeals for the Fifth Circuit reversed the conviction ... holding that, though the lineup did not violate Wade's Fifth Amendment rights, "the lineup, held as it was, in the absence of counsel already chosen to represent appellant, was a violation of his Sixth Amendment rights. ... ". We granted certiorari. ... We reverse the judgment of the Court of Appeals and remand to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

. ...

The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the courtroom identifications should have been excluded because the lineup was conducted without notice to, and in the absence of, his counsel. ... [I]t is urged that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant — his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.

The Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in "matters of law," and eschewing any responsibility for "matters of fact.". ...

This background is reflected in the scope given by our decisions to the Sixth Amendment's guarantee to an accused of the assistance of counsel for his defense. When the Bill of Rights was adopted, there were no organized police forces as we know them today. ... In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well ... reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings ... The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."

As early as *Powell v. Alabama,* [(1932)], we recognized that the period from arraignment to trial was "perhaps the most critical period of the proceedings ... ", during which the accused "requires the guiding hand of counsel ... ", if the guarantee is not to prove an empty right. That principle has since been applied to require the assistance of counsel at the type of arraignment — for example, that provided by Alabama — where certain rights might be sacrificed or lost. ... The principle was also applied in *Massiah v. United States* [(1964)] where we held that incriminating statements of the defendant should have been excluded from evidence when it appeared that they were overheard by federal agents who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice turned informant. We said, quoting a concurring opinion in *Spano v. New York* [(1959)] that

"[a]nything less ... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"

In *Escobedo v. Illinois* [(1964)] ... holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's presence if the accused was to have a fair opportunity to present a defense at the trial. ...

Finally, in *Miranda v. Arizona* [(1966)] the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination. ...

Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. ... It is central to that principle that, in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. ...

In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial. ... It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different — for Sixth Amendment purposes — from various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages' being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages. ...

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might ... derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. ...

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an "identification parade" or "showup," as in the present case, or presentation of the suspect alone to the witness, as in *Stovall v. Denno,* [(1967)]. It is obvious that risks of suggestion attend either form of confrontation, and increase the dangers inhering in eyewitness identification. ...

What facts have been disclosed in specific cases about the conduct of pretrial confrontations for identification illustrate both the potential for substantial prejudice to the accused at that stage and the need for its revelation at trial. ...

The potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. ... In the present case, the testimony of the identifying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade "standing in the hall" within sight of an FBI agent. Five or six other prisoners later appeared in the hall. The vice-president testified that he saw a person in the hall in the custody of the agent who "resembled the person that we identified as the one that had entered the bank."

. ...

The few cases that have surfaced therefore reveal the existence of a process attended with hazards of serious unfairness to the criminal accused, and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the secrecy of the confrontation. We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather, we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification. ...

Insofar as the accused's conviction may rest on a courtroom identification, in fact, the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. ...

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice ... the post-indictment lineup was a critical stage of the prosecution. ... Thus, both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an "intelligent waiver.". ...

In our view, counsel can hardly impede legitimate law enforcement ... cannot help the guilty avoid conviction, but can only help assure that the right man has been brought to justice.

. ...

We come now to the question whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. ... Since counsel's presence at the lineup would equip him to attack not only the lineup identification, but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right. ...

On the record now before us, we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. ...

The judgment of the Court of Appeals is vacated, and the case is remanded to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Jacob Staab

Kirby v. Illinois

406 U.S. 682 (1972)

> Vote: 5-4
> Decision: Affirmed
> Plurality: Stewart, joined by Burger, Blackmun, and Rehnquist
> Concurrence: Burger
> Concurrence: Powell
> Dissent: Brennan, joined by Douglas and Marshall
> Dissent: White

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join.

In *United States v. Wade* and *Gilbert v. California*[, both (1967)], this Court held

"that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup."

Gilbert v. California. Those cases further held that no "in-court identifications" are admissible in evidence if their "source" is a lineup conducted in violation of this constitutional standard. "Only a *per se* exclusionary rule as to such testimony can be an effective sanction," the Court said. ... In the present case, we are asked to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony based upon a police station showup that took place before the defendant had been indicted or otherwise formally charged with any criminal offense.

... [A] man named Willie Shard reported to the Chicago police that the previous day two men had robbed him ... of a wallet containing ... traveler's checks and a Social Security card. ... [T]wo police officers stopped the petitioner and ... Ralph Bean. ... When asked for identification, the petitioner produced a wallet that contained three traveler's checks and

a Social Security card, all bearing the name of Willie Shard. ... When asked to explain his possession of Shard's property, the petitioner ... told the officers that he had won them in a crap game. The officers then arrested the petitioner and Bean and took them to a police station.

Only after arriving at the police station ... did the arresting officers learn of the Shard robbery. A police car ... picked up Shard and brought him to the police station. Immediately upon entering the room in the police station where the petitioner and Bean were seated at a table, Shard positively identified them as the men who had robbed him. ... No lawyer was present in the room, and neither the petitioner nor Bean had asked for legal assistance, or been advised of any right to the presence of counsel.

More than six weeks later, the petitioner and Bean were indicted for the robbery of Willie Shard. ... [A]t the trial, Shard testified as a witness for the prosecution. ... The jury found both defendants guilty, and the petitioner's conviction was affirmed on appeal. ... The Illinois appellate court held that the admission of Shard's testimony was not error ... holding that the *Wade-Gilbert per se* exclusionary rule is not applicable to pre-indictment confrontations.

We granted certiorari, limited to this question.

We note at the outset that the constitutional privilege against compulsory self-incrimination is in no way implicated here. The Court emphatically rejected the claimed applicability of that constitutional guarantee in *Wade*. ...

. ...

It follows that the doctrine of *Miranda v. Arizona* has no applicability whatever to the issue before us; for the *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. ...

The *Wade-Gilbert* exclusionary rule, by contrast, stems from ... the guarantee of the right to counsel contained in the Sixth and Fourteenth Amendments. ... [I]t is to the decisions construing that guarantee that we must look in determining the present controversy.

In a line of constitutional cases ... it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. ...

This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. ... [T]he point is that ... all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

. ...

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. ...

It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. ...

In this case, we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. ...

. ...

The judgment is affirmed.

Excerpted by Jacob Staab

Sixth Amendment

Case List

Right to Confront Witnesses

Pointer v. Texas (1965)
Illinois v. Allen (1970)
Estelle v. Williams (1976)

Right to Counsel

Powell v. Alabama (1932)
Betts v. Brady (1942)
Gideon v. Wainwright (1963)
Argersinger v. Hamlin (1972)

Effectiveness of Counsel

United States v. Cronic (1984)
Strickland v. Washington (1984)

Speedy and Public Trial

United States v. Marion (1971)
Barker v. Wingo (1972)

Juries and Fair Trials

Duncan v. Louisiana (1968)
Batson v. Kentucky (1986)
Georgia v. McCollum Et Al. (1992)
J.E.B. v. Alabama ex rel. T. B. (1994)
Foster v. Chatman (2016)
Sheppard v. Maxwell (1966)
Peña-Rodriguez v. Colorado (2017)

Right to Confront Witnesses

Pointer v. Texas

380 U.S. 400 (1965)

> Vote: 9-0
> Decision: Reversed and remanded
> Majority: Black, joined Warren, Douglas, Clark, Harlan, Brennan, White, and Goldberg
> Concurrence: Harlan
> Concurrence: Stewart
> Concurrence: Goldberg

MR. JUSTICE BLACK delivered the opinion of the Court.

The Sixth Amendment provides in part that:

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defence."

Two years ago, in *Gideon v. Wainwright*, [(1963)], we held that the Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel obligatory upon the States. The question we find necessary to decide in this case is whether the Amendment's guarantee of a defendant's right "to be confronted with the witnesses against him," which has been held to include the right to cross-examine those witnesses, is also made applicable to the States by the Fourteenth Amendment.

The petitioner Pointer and one Dillard were arrested in Texas and taken before a state judge for a preliminary hearing ... on a charge of having robbed Kenneth W. Phillips. ... At this hearing, an Assistant District Attorney conducted the prosecution and examined witnesses, but neither of the defendants, both of whom were laymen, had a lawyer. Phillips, as chief witness for the State, gave his version of the alleged robbery in detail, identifying petitioner as the man who had robbed him at gunpoint. Apparently Dillard tried to cross-examine Phillips, but Pointer did not, although Pointer was said to have tried to cross-examine some other witnesses at the hearing. Petitioner was subsequently indicted on a charge of having committed the robbery. Some time before the trial was held, Phillips moved to California. After putting in evidence to show that Phillips had moved and did not intend to return to Texas, the State at the trial offered the transcript of Phillips' testimony given at the preliminary hearing as evidence against petitioner. Petitioner's counsel immediately objected to introduction of the transcript, stating, "Your Honor, we will object to that, as it is a denial of the confrontment of the witnesses against the Defendant."

Similar objections were repeatedly made by petitioner's counsel, but were overruled by the trial judge, apparently in part because, as the judge viewed it, petitioner had been present at the preliminary hearing, and therefore had been "accorded

the opportunity of cross-examining the witnesses there against him." The Texas Court of Criminal Appeals ... affirmed petitioner's conviction, rejecting his contention that use of the transcript to convict him denied him rights guaranteed by the Sixth and Fourteenth Amendments. We granted certiorari to consider the important constitutional question the case involves.

. ... In *Gideon v. Wainwright*, in which this Court held that the Sixth Amendment's right to the assistance of counsel is obligatory upon the States, we did so on the ground that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment."

And last Term, in *Malloy v. Hogan*, [(1964)], in holding that the Fifth Amendment's guarantee against self-incrimination was made applicable to the States by the Fourteenth, we reiterated the holding of *Gideon* that the Sixth Amendment's right to counsel guarantee is "a fundamental right, essential to a fair trial,'" and "thus was made obligatory on the States by the Fourteenth Amendment." We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right, and is made obligatory on the States by the Fourteenth Amendment.

. ... The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. ...

. ... There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. ...

. ... We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-incrimination, is "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy v. Hogan*.

Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him. ... The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. ... Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment. Since we hold that the right of an accused to be confronted with the witnesses

against him must be determined by the same standards whether the right is denied in a federal or state proceeding, it follows that use of the transcript to convict petitioner denied him a constitutional right, and that his conviction must be reversed.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring in the result.

I agree that, in the circumstances the admission of the statement in question deprived the petitioner of a right of "confrontation" assured by the Fourteenth Amendment. I cannot subscribe, however, to the constitutional reasoning of the Court.

The Court holds that the right of confrontation guaranteed by the Sixth Amendment in federal criminal trials is carried into state criminal cases by the Fourteenth Amendment. This is another step in the onward march of the long-since discredited "incorporation" doctrine.

For me, this state judgment must be reversed because a right of confrontation is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, [(1937)], reflected in the Due Process Clause of the Fourteenth Amendment independently of the Sixth.

While either of these constitutional approaches brings one to the same end result in this particular case, there is a basic difference between the two in the kind of future constitutional development they portend. The concept of Fourteenth Amendment due process embodied in *Palko* and a host of other thoughtful past decisions now rapidly falling into discard, recognizes that our Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness "implicit in the concept of ordered liberty." The philosophy of "incorporation," on the other hand, subordinates all such state differences to the particular requirements of the Federal Bill of Rights and increasingly subjects state legal processes to enveloping federal judicial authority. ...

. ... The "incorporation" doctrines, whether full blown or selective, are both historically and constitutionally unsound and incompatible with the maintenance of our federal system on even course.

Excerpted by Alex Nobiletti and Sobhi Sidani

Illinois v. Allen

397 U.S. 337 (1970)

> Vote: 9-0
> Decision: Reversed
> Majority: Black, joined by Burger, Douglas, Harlan, Brennan, Stewart, White, and Marshall
> Concurrence: Brennan
> Concurrence: Douglas

MR. JUSTICE BLACK delivered the opinion of the Court.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him. ... " We have held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the States. *Pointer v. Texas*, (1965). One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. The question presented in this case is whether an accused can claim the benefit of this constitutional right to remain in the courtroom while, at the same time, he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial.

The issue arose in the following way. The respondent, Allen, was convicted by an Illinois jury of armed robbery, and was sentenced to serve 10 to 30 years in the Illinois State Penitentiary. The evidence against him showed that, on August 12, 1956, he entered a tavern in Illinois and, after ordering a drink, took $200 from the bartender at gunpoint. The Supreme Court of Illinois affirmed his conviction. ... Later, Allen filed a petition for a writ of habeas corpus in federal court, alleging that he had been wrongfully deprived by the Illinois trial judge of his constitutional right to remain present throughout his trial. Finding no constitutional violation, the District Court declined to issue the writ. The Court of Appeals reversed. ...

The facts surrounding Allen's expulsion from the courtroom are set out in the Court of Appeals' opinion sustaining Allen's contention:

"After his indictment and during the pretrial stage, the petitioner [Allen] refused court-appointed counsel and indicated to the trial court on several occasions that he wished to conduct his own defense. After considerable argument by the petitioner, the trial judge told him,"

"I'll let you be your own lawyer, but I'll ask Mr. Kelly [court-appointed counsel] [to] sit in and protect the record for you, insofar as possible."

"The trial began on September 9, 1957. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney as not going to act as his lawyer. He termi-

nated his remarks by saying, 'When I go out for lunchtime, you're [the judge] going to be a corpse here.' At that point, he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.' This warning had no effect on the petitioner. ...

"After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire examination then continued, and the jury was selected in the absence of the petitioner."

"After a noon recess, and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he 'behaved [himself] and [did] not interfere with the introduction of the case.' The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witnesses from the courtroom. The [petitioner] protested this effort on the part of his attorney, saying:"

"There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me."

"The trial judge thereupon ordered the petitioner removed from the courtroom."

After this second removal, Allen remained out of the courtroom during the presentation of the State's case in chief, except that he was brought in on several occasions for purposes of identification. ... After the prosecution's case had been presented, the trial judge reiterated his promise to Allen that he could return to the courtroom whenever he agreed to conduct himself properly. Allen gave some assurances of proper conduct, and was permitted to be present through the remainder of the trial, principally his defense, which was conducted by his appointed counsel.

The Court of Appeals went on to hold that the Supreme Court of Illinois was wrong in ruling that Allen had, by his conduct, relinquished his constitutional right to be present, declaring that:. ... "In light of the decision in *Hopt v. Utah*, (1884) and *Shields v. United States*, (1927), as well as the constitutional mandate of the sixth amendment, we are of the view that the defendant should not have been excluded from the courtroom during his trial despite his disruptive and disrespectful conduct. The proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged."

The Court of Appeals felt that the defendant's Sixth Amendment right to be present at his own trial was so "absolute" that, no matter how unruly or disruptive the defendant's conduct might be, he could never be held to have lost that right so long as he continued to insist upon it, as Allen clearly did. Therefore the Court of Appeals concluded that a trial judge could never expel a defendant from his own trial, and that the judge's ultimate remedy ... is to bind and gag him. We cannot agree that the Sixth Amendment, the cases upon which the Court of Appeals relied, or any other cases of this Court so handicap a trial judge in conducting a criminal trial. ...

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct

should not and cannot be tolerated. We believe trial judges ... must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Trying a defendant for a crime while he sits bound and gagged before the judge and jury would, to an extent, comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint. ...

. ... Allen was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner. Under these circumstances, we hold that Allen lost his right guaranteed by the Sixth and Fourteenth Amendments to be present throughout his trial.

. ...

We do not hold that removing this defendant from his own trial was the only way the Illinois judge could have constitutionally solved the problem he had. We do hold, however, that there is nothing whatever in this record to show that the judge did not act completely within his discretion. Deplorable as it is to remove a man from his own trial, even for a short time, we hold that the judge did not commit legal error in doing what he did.

The judgment of the Court of Appeals is

Reversed.

Excerpted by Alex Nobiletti

Estelle v. Williams

425 U.S. 501 (1976)

> Vote: 6-2
> Decision: Reversed and remanded
> Majority: Burger, joined by Stewart, White, Blackmun, Powell, and Rehnquist
> Concurrence: Powell, joined by Stewart
> Dissent: Brennan, joined by Marshall
> Not participating: Stevens

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether an accused who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws.

In November, 1970, respondent Williams was convicted in state court in Harris County, Tex., for assault with intent to commit murder with malice. The crime occurred during an altercation between respondent and his former landlord on the latter's property. The evidence showed that respondent returned to the apartment complex where he had formerly resided to visit a female tenant. While there, respondent and his former landlord became involved in a quarrel. Heated words were exchanged, and a fight ensued. Respondent struck the landlord with a knife in the neck, chest, and abdomen, severely wounding him.

Unable to post bond, respondent was held in custody while awaiting trial. When he learned that he was to go on trial, respondent asked an officer at the jail for his civilian clothes. This request was denied. As a result, respondent appeared at trial in clothes that were distinctly marked as prison issue. Neither respondent nor his counsel raised an objection to the prison attire at any time.

A jury returned a verdict of guilty on the charge of assault with intent to murder with malice. The Texas Court of Criminal Appeals affirmed the conviction. Williams then sought release in the United States District Court on a petition for a writ of habeas corpus. Although holding that requiring a defendant to stand trial in prison garb was inherently unfair, the District Court denied relief on the ground that the error was harmless.

The Court of Appeals reversed. ...

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. ...

. ...

The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.

The potential effects of presenting an accused before the jury in prison attire need not, however, be measured in the abstract. Courts have, with few exceptions, determined that a accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system. ... This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that ... an unacceptable risk is presented of impermissible factors coming into play.

That such factors cannot always be avoided is manifest in *Illinois v. Allen*, (1970), where we expressly recognized that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant ... ," yet the Court upheld the practice when necessary to control a contumacious defendant. ...

Unlike physical restraints, permitted under *Allen*, compelling an accused to wear jail clothing furthers no essential state policy. ... Indeed, the State of Texas asserts no interest whatever in maintaining this procedure.

Similarly troubling is the fact that compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment.

. ...

Consequently, the courts ... have recognized that the particular evil proscribed is compelling a defendant, against his will, to be tried in jail attire. The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury. This is apparently an accepted practice in Texas courts, including the court where respondent was tried.

Courts have therefore required an accused to object to being tried in jail garments, just as he must invoke or abandon other rights. ... .

. ...

The record is clear that no objection was made to the trial judge concerning the jail attire either before or at any time during the trial. This omission plainly did not result from any lack of appreciation of the issue, for respondent had raised the question with the jail attendant prior to trial. At trial, defense counsel expressly referred to respondent's attire during voir dire. The trial judge was thus informed that respondent's counsel was fully conscious of the situation.

Despite respondent's failure to raise the issue at trial, the Court of Appeals held:

"Waiver of the objection cannot be inferred merely from failure to object if trial in prison garb is customary in the jurisdiction."

The District Court had concluded that, at the time of respondent's trial, the majority of nonbailed defendants in Harris County were indeed tried in jail clothes. From this, the Court of Appeals concluded that the practice followed in respondent's case was customary.

However, that analysis ignores essential facts adduced at the evidentiary hearing. Notwithstanding the evidence as to the general practice in Harris County, there was no finding that nonbailed defendants were compelled to stand trial in prison garments if timely objection was made to the trial judge. On the contrary, the District Court concluded that the practice of the particular judge presiding in respondent's case was to permit any accused who so desired to change into civilian clothes. ...

Significantly, at the evidentiary hearing respondent's trial counsel did not intimate that he feared any adverse consequences attending an objection to the procedure. There is nothing to suggest that there would have been any prejudicial effect on defense counsel had he made objection, given the decisions on this point in that jurisdiction. ...

Nothing in this record, therefore, warrants a conclusion that respondent was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial. Nor can the trial judge be faulted for not asking the respondent or his counsel whether he was deliberately going to trial in jail clothes. ... Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.

Accordingly, although the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court ... is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

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

Reversed and remanded.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I dissent. The Court's statement that

"[t]he defendant's clothing is so likely to be a continuing influence throughout the trial that ... an unacceptable risk is presented of impermissible factors" affecting the jurors' judgment, thus presenting the possibility of all unjustified verdict of guilt, concedes that respondent's trial in identifiable prison garb constituted a denial of due process of law. The judgment setting aside respondent's conviction is nevertheless reversed on the ground that respondent was not compelled by the State to wear the prison garb. The Court does not ... rest the reversal on a finding that respondent ... consented to be tried in such attire, and thus had waived his due process right. Rather, for the first time, the Court confines due process protections by defining a right that materially affects the fairness and accuracy of the factfinding process in terms of state compulsion. ... The end result of this definitional approach is to impute the effect of waiver to the failure of respondent or his counsel to apprise the trial judge of respondent's objection to being tried in prison garb. This ... introduces into this Court's jurisprudence a novel and dangerously unfair test of surrender of basic constitutional rights to which I can-

not agree. The Court concedes that respondent was denied due process of law: there is a due process violation if the State denies an accused's objection to being tried in such garb, and, as will be developed, there is no relevant constitutional difference concerning that due process right if the accused has not objected to the practice.

. ...

Identifiable prison garb ... surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt. ... The prejudice may only be subtle, and jurors may not even be conscious of its deadly impact, but ... [j]urors ... may well see in an accused garbed in prison attire an obviously guilty person to be recommitted by them to the place where his clothes clearly show he belongs. ...

Trial in identifiable prison garb also entails additional dangers to the accuracy and objectiveness of the factfinding process. For example, an accused considering whether to testify in his own defense must weigh in his decision how jurors will react to his being paraded before them in such attire. ... And the problem will most likely confront the indigent accused who appears in prison garb only because he was too poor to make bail. ...

. ...

Even under the Court's standard of compelled appearance, the judgment of the Court of Appeals should be affirmed. The Court's holding relies on the per curiam statement ... that a defendant may not willingly proceed to trial in prison garb and later protest that fact. Yet ... the District Court in this case expressly found that respondent had *not* willingly gone to trial in identifiable prison garb, and that finding was affirmed by the Court of Appeals. ...

Since the Court does not hold that that finding of the two courts is clearly erroneous, the finding is conclusive on us for the purpose of deciding the merits, and compels affirmance of the Court of Appeals.

. ...

Excerpted by Alex Nobiletti

Right to Counsel

Powell v. Alabama

287 U.S. 45 (1932)

> Vote: 7-2
> Decision: Reversed and remanded
> Majority: Sutherland, joined by Brandeis, Cardoza, Hughes, Roberts, Stone, and Van Devanter
> Dissent: Butler, joined by McReynolds

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

. ...

The petitioners, hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls. ... The indictment was returned in a state court of first instance on March 31, and the record recites that, on the same day, the defendants were arraigned and entered pleas of not guilty. There is a further recital to the effect that, upon the arraignment, they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed. During the colloquy referred to, the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose of arraigning the defendants, and then, of course, anticipated that the members of the bar would continue to help the defendants if no counsel appeared. Upon the argument here, both sides accepted that as a correct statement of the facts concerning the matter.

. ... As each of the three cases was called for trial, each defendant ... entered a plea of not guilty. ... Each of the three trials was completed within a single day. ... The juries found defendants guilty and imposed the death penalty upon all. The trial court overruled motions for new trials and sentenced the defendants in accordance with the verdicts. The judgments were affirmed by the state supreme court. ...

. ...

The record shows that, on the day when the offense is said to have been committed, these defendants, together with a number of other negroes, were upon a freight train on its way through Alabama. On the same train were seven white boys and the two white girls. A fight took place between the negroes and the white boys in the course of which the white boys, with the exception of one named Gilley, were thrown off the train. ... The two girls testified that each of them was assaulted by six different negroes in turn. ...

Before the train reached Scottsboro, Alabama, a sheriff's posse seized the defendants and two other negroes. ... It is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile and excited public sentiment. ... [T]he record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as "the boys." They were ignorant and illiterate. ...

. ... It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial. ... The sole inquiry which we are permitted to make is whether the federal Constitution was contravened, and as to that, we confine ourselves ... to the inquiry [of] whether the defendants were in substance denied the right of counsel, and, if so, whether such denial infringes the due process clause of the Fourteenth Amendment.

First. The record shows that, immediately upon the return of the indictment, defendants were arraigned, and pleaded not guilty. Apparently they were not asked whether they had, or were able to, employ counsel, or wished to have counsel appointed, or whether they had friends or relatives who might assist in that regard if communicated with. That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that, very soon after conviction, able counsel appeared in their behalf.

. ...

It is hardly necessary to say that ... a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This will be amply demonstrated by a brief review of the record.

. ... When the first case was called, the court inquired whether the parties were ready for trial. The state's attorney replied that he was ready to proceed. No one answered for the defendants or appeared to represent or defend them. ...

. ...

And in this casual fashion, the matter of counsel in a capital case was disposed of. ...

It thus will be seen that, until the very morning of the trial, no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants." Whether they would represent the defendants thereafter if no counsel appeared in their behalf was a matter of speculation only. ...

. ...

. ... In any event, the circumstance lends emphasis to the conclusion that, during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Nor do we think the situation was helped by what occurred on the morning of the trial. At that time ... Mr. Roddy stated to the court that he did not appear as counsel, but that he would like to appear along with counsel that the court might appoint; that he had not been given an opportunity to prepare the case; that he was not familiar with the procedure in Alabama, but merely came down as a friend of the people who were interested. ... [T]he trials immediately proceeded. The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

. ... Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. ... Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. ...

. ...

Second. ... The question ... within our power to decide is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the federal Constitution.

. ...

. ... The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" *Hebert v. Louisiana* (1926), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment. ...

While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character.

It never has been doubted by this court, or any other, so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they ... constitute basic elements of the constitutional requirement of due process of law. ...

. ...

What, then, does a hearing include? Historically and in practice, in our own country, at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him.

Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

. ...

In the light of the facts outlined in the forepart of this opinion — the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and, above all, that they stood in deadly peril of their lives — we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. ... All that it is necessary now to decide, as we do decide, is that, in a capital case, where the defendant is unable to employ counsel and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

. ...

The judgments must be reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

Judgments reversed.

Excerpted by Sloan Harmel

Betts v. Brady

316 U.S. 455 (1942)

> Vote: 6-3
> Decision: Affirmed
> Majority: Roberts, joined by Byrnes, Frankfurter, Jackson, Reed, and Stone
> Dissent: Black, joined by Douglas and Murphy

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner was indicted for robbery in the Circuit Court of Carroll County, Maryland. Due to lack of funds, he was unable to employ counsel, and so informed the judge at his arraignment. He requested that counsel be appointed for him. The judge advised him that this would not be done, as it was not the practice in Carroll County to appoint counsel for indigent defendants, save in prosecutions for murder and rape.

Without waiving his asserted right to counsel, the petitioner pleaded not guilty and elected to be tried without a jury. At his request, witnesses were summoned in his behalf. He cross-examined the State's witnesses and examined his own. The latter gave testimony tending to establish an alibi. Although afforded the opportunity, he did not take the witness stand. The judge found him guilty, and imposed a sentence of eight years.

While serving his sentence, the petitioner filed with a judge of the Circuit Court for Washington County, Maryland, a petition for a writ of habeas corpus alleging that he had been deprived of the right to assistance of counsel guaranteed by the Fourteenth Amendment of the Federal Constitution. The writ issued, the cause was heard, his contention was rejected, and he was remanded to the custody of the prison warden.

Some months later, a petition for a writ of habeas corpus was presented ... the Court of Appeals of Maryland. ... [T]he evidence taken at the petitioner's trial was incorporated in the record, and the cause was argued. [The judge] ... denied the relief prayed and remanded the petitioner to the respondent's custody.

The petitioner applied to this court for certiorari directed to Judge Bond. The writ was issued on account of the importance of the jurisdictional questions involved and conflicting decisions upon the constitutional question presented. ...

. ...

Was the petitioner's conviction and sentence a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the court's refusal to appoint counsel at his request?

The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may ... operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth. Due process of law is secured against invasion by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which, in a given case, may be to ignore the qualifying factors therein disclosed.

The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be deduced from our former decisions is that, in every case, whatever the circumstances, one charged with

crime who is unable to obtain counsel must be furnished counsel by the State. Expressions in the opinions of this court lend color to the argument, but, as the petitioner admits, none of our decisions squarely adjudicates the question now presented.

. ...

... The question we are now to decide is whether due process of law demands that, in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant. Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness ... ? By the Sixth Amendment, the people ordained that, in all criminal prosecutions, the accused should "enjoy the right ... to have the assistance of counsel for his defence." We have construed the provision to require appointment of counsel in all cases where a defendant is unable to procure the services of an attorney, and where the right has not been intentionally and competently waived. Though ... the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment. Relevant data on the subject are afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date. These constitute the most authoritative sources for ascertaining the considered judgment of the citizens of the States upon the question.

The Constitutions of the thirteen original States, as they were at the time of federal union, exhibit great diversity in respect of the right to have counsel in criminal cases. ...

The substance of these provisions of colonial and early state constitutions is explained by the contemporary common law. Originally, in England, a prisoner was not permitted to be heard by counsel upon the general issue of not guilty on any indictment for treason or felony. The practice of English judges, however, was to permit counsel to advise with a defendant as to the conduct of his case and to represent him in collateral matters and as respects questions of law arising upon the trial. ...

In the light of this common law practice, it is evident that the constitutional provisions to the effect that a defendant should be "allowed" counsel or should have a right "to be heard by himself and his counsel," or that he might be heard by "either or both," at his election, were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the State to provide counsel for a defendant. At the least, such a construction by State courts and legislators cannot be said to lack reasonable basis.

The statutes in force in the thirteen original States at the time of the adoption of the Bill of Rights are also illuminating. It is of interest that the matter of appointment of counsel for defendants, if dealt with at all, was dealt with by statute, rather than by constitutional provision. The contemporary legislation exhibits great diversity of policy.

. ...

This material demonstrates that, in the great majority of the States, it has been the considered judgment of the people, their representatives, and their courts that appointment of counsel is not a fundamental right, essential to a fair trial ... [T]he matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that

the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.

The practice of the courts of Maryland gives point to the principle that the States should not be straight-jacketed in this respect by a construction of the Fourteenth Amendment. Judge Bond's opinion states, and counsel at the bar confirmed the fact, that, in Maryland, the usual practice is for the defendant to waive a trial by jury. This the petitioner did in the present case. Such trials, as Judge Bond remarks, are much more informal than jury trials, and it is obvious that the judge can much better control the course of the trial, and is in a better position to see impartial justice done, than when the formalities of a jury trial are involved.

In this case, there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. ... Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue ... It is quite clear that, in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. ...

To deduce from the due process clause a rule binding upon the States in this matter would be to impose upon them ... a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction.

. ...

... [T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and, while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

The judgment is *affirmed*.

Excerpted by Sloan Harmel

MR. JUSTICE BLACK, dissenting, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concur.

To hold that the petitioner had a constitutional right to counsel in this case does not require us to say that "no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." This case can be determined by a resolution of a narrower question: whether, in view of the nature of the offense and the circumstances of his trial and conviction, this petitioner was denied the procedural protection which is his right under the Federal Constitution. I think he was.

The petitioner, a farm hand, out of a job and on relief, was indicted in a Maryland state court on a charge of robbery. He was too poor to hire a lawyer. He so informed the court, and requested that counsel be appointed to defend him. His request was denied. Put to trial without a lawyer, he conducted his own defense, was found guilty, and was sentenced to eight years' imprisonment. The court below found that the petitioner had "at least an ordinary amount of intelligence." It is clear from his examination of witnesses that he was a man of little education.

If this case had come to us from a federal court, it is clear we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the Federal Government. I believe that the Fourteenth Amendment made the Sixth applicable to the states. ...

This Court has just declared that due process of law is denied if a trial is conducted in such manner that it is "shocking to the universal sense of justice" or "offensive to the common and fundamental ideas of fairness and right." On another occasion, this Court has recognized that whatever is "implicit in the concept of ordered liberty" and "essential to the substance of a hearing" is within the procedural protection afforded by the constitutional guaranty of due process. *Palko v. Connecticut [1937].*

The right to counsel in a criminal proceeding is "fundamental." *Powell v. Alabama*, [(1932)]. It is guarded from invasion by the Sixth Amendment, adopted to raise an effective barrier against arbitrary or unjust deprivation of liberty by the Federal Government. It is guarded from invasion by the Sixth Amendment, adopted to raise an effective barrier against arbitrary or unjust deprivation of liberty by the Federal Government. ...

A practice cannot be reconciled with "common and fundamental ideas of fairness and right," which subjects innocent men to increased dangers of conviction merely because of their poverty. ...

Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the "universal sense of justice" throughout this country. In 1854, for example, the Supreme Court of Indiana said:

> It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defence of the poor in such cases is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.

Webb v. Baird, 6 Ind. 13, 18. And most of the other States have shown their agreement by constitutional provisions, statutes, or established practice judicially approved, which assure that no man shall be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law.

Excerpted by Sloan Harmel

Gideon v. Wainwright

372 U.S. 335 (1963)

> Vote: 9-0
> Decision: Reversed and remanded
> Majority: Black, joined by Brennan, Clark, Douglas, Goldberg, Harlan, Stewart, Warren, and White
> Concurrence: Clark
> Concurrence: Harlan
> Concurrence: Douglas

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case."

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government.". ... Since 1942, when *Betts v. Brady* [(1942)], was decided by a divided Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari. Since Gideon was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in *Betts v. Brady* be reconsidered?"

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. ...

Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and, on review, this Court affirmed. ...

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances

in the *Betts* case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts v. Brady* holding, if left standing, would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration, we conclude that *Betts v. Brady* should be overruled.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." We have construed this to mean that, in federal courts, counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response, the Court stated that, while the Sixth Amendment laid down

"no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."

In order to decide whether the Sixth Amendment's guarantee of counsel is of this fundamental nature, the Court in *Betts* set out and considered

"[r]elevant data on the subject ... afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date."

On the basis of this historical data, the Court concluded that "appointment of counsel is not a fundamental right, essential to a fair trial.". ...

We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in *Powell v. Alabama* (1932), a case upholding the right of counsel, where the Court held that, the Fourteenth Amendment "embraced" those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" even though they had been "specifically dealt with in another part of the federal Constitution." In many cases other than *Powell* and *Betts*, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. ...

. ...

We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that "the right to the aid of counsel is of this fundamental character." *Powell v. Alabama* (1932). While the Court, at the close of its *Powell* opinion, did, by its language, as this Court frequently

does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

"We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

Grosjean v. American Press Co. (1936). And again, in 1938, this Court said:

"[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. ... The Sixth Amendment stands as a constant admonition that, if the constitutional safeguards it provides be lost, justice will not 'still be done.'"

Johnson v. Zerbst (1938). ... In light of these and many other prior decisions of this Court, it is not surprising that the *Betts* Court, when faced with the contention that "one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State," conceded that "[e]xpressions in the opinions of this court lend color to the argument. ... " The fact is that, in deciding as it did — that "appointment of counsel is not a fundamental right, essential to a fair trial" — the Court in *Betts v. Brady* made an abrupt break with its own well considered precedents. In returning to these old precedents ... we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents, but also reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama* (1932):

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down," and that it should now be overruled. We agree.

The judgment is reversed, and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

Excerpted by Sloan Harmel

Argersinger v. Hamlin

407 U.S. 25 (1972)

> Vote: 9-0
> Decision: Reversed
> Majority: Douglas, joined by Blackmun, Brennan, Burger, Marshall, Powell, Rehnquist, Stewart, and White
> Concurrence: Brennan, joined by Douglas and Stewart
> Concurrence: Burger
> Concurrence: Powell, joined by Rehnquist

MR. JUSTICE DOUGLAS delivered the opinion of the court.

Petitioner, an indigent, was charged in Florida with carrying a concealed weapon, an offense punishable by imprisonment up to six months, a $1,000 fine, or both. The trial was to a judge, and petitioner was unrepresented by counsel. He was sentenced to serve 90 days in jail, and brought this habeas corpus action in the Florida Supreme Court, alleging that, being deprived of his right to counsel, he was unable as an indigent layman properly to raise and present to the trial court good and sufficient defenses to the charge for which he stands convicted. The Florida Supreme Court, by a four-to-three decision, in ruling on the right to counsel, followed the line we marked out in *Duncan v. Louisiana* (1968) ... and held that the right to court-appointed counsel extends only to trials "for non-petty offenses punishable by more than six months imprisonment."

The case is here on a petition for certiorari, which we granted. We reverse.

The Sixth Amendment, which, in enumerated situations, has been made applicable to the States by reason of the Fourteenth Amendment provides specified standards for "all criminal prosecutions."

One is the requirement of a "public trial." *In re Oliver* [(1948)] held that the right to a "public trial" was applicable to a state proceeding even though only a 60-day sentence was involved.

Another guarantee is the right to be informed of the nature and cause of the accusation. Still another, the right of confrontation. And another, compulsory process for obtaining witnesses in one's favor. We have never limited these rights to felonies or to lesser but serious offenses.

In *Washington v. Texas* (1967), we said,

"We have held that due process requires that the accused have the assistance of counsel for his defense, that he be confronted with the witnesses against him, and that he have the right to a speedy and public trial."

. ...

The right to trial by jury, also guaranteed by the Sixth Amendment by reason of the Fourteenth, was limited by *Duncan v. Louisiana* (1968), to trials where the potential punishment was imprisonment for six months or more. But, as the various opinions in *Baldwin v. New York* (1970), make plain, the right to trial by jury has a different geneology, and is brigaded with a system of trial to a judge alone.

. ...

While there is historical support for limiting the "deep commitment" to trial by jury to "serious criminal cases," there is no such support for a similar limitation on the right to assistance of counsel:

"Originally, in England ... parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel. ... "

. ...

The Sixth Amendment thus extended the right to counsel beyond its common law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided.

We reject, therefore, the premise that, since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer.

The assistance of counsel is often a requisite to the very existence of a fair trial. The Court in *Powell v. Alabama* (1932) — a capital case — said:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small, and sometimes no, skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him [...]."

In *Gideon v. Wainwright* (1963) (overruling *Betts v. Brady* (1942)), we dealt with a felony trial. But we did not so limit the need of the accused for a lawyer. We said:

"[I]n our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. ... From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty. *Powell* and *Gideon* suggest that there are certain fundamental rights applicable to all such criminal prosecutions, even those, such as *In re Oliver* (1948), where the penalty is 60 days' imprisonment [.]

. ...

The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.

. ...

Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor, as well as in felony, cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

In addition, the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result. The Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 128 (1967), states:

'For example, until legislation last year increased the number of judges, the District of Columbia Court of General Sessions had four judges to process the preliminary stages of more than 1,500 felony cases, 7,500 serious misdemeanor cases, and 38,000 petty offenses and an equal number of traffic offenses per year. An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudiciation. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction ... "

. ...

There is evidence of the prejudice which results to misdemeanor defendants from this "assembly line justice." One study concluded that

"[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel."

American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970).

We must conclude, therefore, that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial. MR. JUSTICE POWELL suggests that these problems are raised even in situations where there is no prospect of imprisonment. We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here, petitioner was, in fact, sentenced to jail. And, as we said in *Baldwin v. New York* (1970),

"the prospect of imprisonment, for however short a time, will seldom be viewed by the accused as a trivial or 'petty' matter, and may well result in quite serious repercussions affecting his career and his reputation."

We hold, therefore, that, absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.

. ...

Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense, and therefore know when to name a lawyer to represent the accused before the trial starts.

The run of misdemeanors will not be affected by today's ruling. But, in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.

Reversed.

Excerpted by Sloan Harmel

Effectiveness of Counsel

United States v. Cronic

466 U.S. (1984)

> Vote: 9-0
> Decision: Reversed and remanded
> Majority: Stevens, joined by Blackmun, Brennan, Burger, White, O'Connor, Powell, and Rehnquist
> Concurrence: Marshall

JUSTICE STEVENS delivered the opinion of the Court.

Respondent and two associates were indicted on mail fraud charges involving the transfer of over $9,400,000 in checks ... in 1975. Shortly before the scheduled trial date, respondent's retained counsel withdrew. The court appointed a young lawyer with a real estate practice to represent respondent, but allowed him only 25 days for pretrial preparation, even though it had taken the Government over four and one-half years to investigate the case and it had reviewed thousands of documents during that investigation. The two codefendants agreed to testify for the Government; respondent was convicted on 11 of the 13 counts in the indictment and received a 25-year sentence.

The Court of Appeals reversed the conviction because it concluded that respondent did not "have the Assistance of Counsel for his defence" that is guaranteed by the Sixth Amendment to the Constitution. This conclusion was not supported by a determination that respondent's trial counsel had made any specified errors, that his actual performance had prejudiced the defense, or that he failed to exercise "the skill, judgment, and diligence of a reasonably competent defense attorney"; instead, the conclusion rested on the premise that no such showing is necessary "when circumstances hamper a given lawyer's preparation of a defendant's case." The question presented by the Government's petition for certiorari is whether the Court of Appeals has correctly interpreted the Sixth Amendment.

The indictment alleged a "check kiting" scheme. At the direction of respondent, his codefendant Cummings opened a bank account in the name of Skyproof Manufacturing, Inc. (Skyproof), at a bank in Tampa, Fla., and codefendant Merritt opened two accounts, one in his own name and one in the name of Skyproof, at banks in Norman, Okla. Knowing that there were insufficient funds in either account, the defendants allegedly drew a series of checks and wire transfers on the Tampa account aggregating $4,841,073.95, all of which were deposited in Skyproof's Norman bank account during the period between June 23, 1975, and October 16, 1975; during approximately the same period, they drew checks on Skyproof's Norman account for deposits in Tampa aggregating $4,600,881.39. The process of clearing the checks involved the use of the mails. By "kiting" insufficient funds checks between the banks in those two cities, defendants allegedly created false or inflated balances in the accounts. After outlining the overall scheme, Count I of the indictment alleged the mailing of two checks each for less than $1,000 early in May. Each of the additional 12 counts realleged the allegations in Count I except its reference to the two specific checks, and then added an allegation identifying other checks issued and mailed at later dates.

At trial, the Government proved that Skyproof's checks were issued and deposited at the times and places, and in the amounts, described in the indictment. Having made plea bargains with defendants Cummings and Merritt, who had actually handled the issuance and delivery of the relevant written instruments, the Government proved through their testimony that respondent had conceived and directed the entire scheme, and that he had deliberately concealed his connection with Skyproof because of prior financial and tax problems.

After the District Court ruled that a prior conviction could be used to impeach his testimony, respondent decided not to testify. Counsel put on no defense. By cross-examination of Government witnesses, however, he established that Skyproof was not merely a sham, but actually was an operating company with a significant cash flow, though its revenues were not sufficient to justify as large a "float" as the record disclosed. Cross-examination also established the absence of written evidence that respondent had any control over Skyproof, or personally participated in the withdrawals or deposits.

The 4-day jury trial ended ... and respondent was sentenced on August 28, 1980. His counsel perfected a timely appeal. ... Two months later, respondent filed a motion to substitute a new attorney in the Court of Appeals, and also filed a motion in the District Court seeking to vacate his conviction ... he also challenged the competence of his trial counsel. The District Court refused to entertain the motion while the appeal was pending. The Court of Appeals denied the motion to substitute the attorney designated by respondent, but did appoint still another attorney to handle the appeal. Later it allowed respondent's motion to supplement the record with material critical of trial counsel's performance.

The Court of Appeals reversed the conviction because it inferred that respondent's constitutional right to the effective assistance of counsel had been violated. That inference was based on its use of five criteria:

"'(1) [T]he time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.'"

Under the test employed by the Court of Appeals, reversal is required even if the lawyer's actual performance was flawless. By utilizing this inferential approach, the Court of Appeals erred.

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. ...

The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson* (1970). ...

. ...

Thus, in *McMann*, the Court indicated that the accused is entitled to "a reasonably competent attorney," whose advice is "within the range of competence demanded of attorneys in criminal cases." In *Cuyler v. Sullivan* (1980), we held that the Constitution guarantees an accused "adequate legal assistance." And in *Engle v. Isaac (*1982), the Court referred to the criminal defendant's constitutional guarantee of "a fair trial and a competent attorney."

. ... The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted — even if defense counsel may have made demonstrable errors — the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. ...

While the Court of Appeals purported to apply a standard of reasonable competence, it did not indicate that there had been an actual breakdown of the adversarial process during the trial of this case. Instead, it concluded that the circumstances surrounding the representation of respondent mandated an inference that counsel was unable to discharge his duties.

In our evaluation of that conclusion, we begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.

Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. ...

Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, 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 of the trial. *Powell v. Alabama* (1932), was such a case.

. ...

[In this case] the Court did not examine the actual performance of counsel at trial, but instead concluded that, under [the related] circumstances, the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair. ...

But every refusal to postpone a criminal trial will not give rise to such a presumption ...

Thus, only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial.

The Court of Appeals did not find that respondent was denied the presence of counsel at a critical stage of the prosecution. Nor did it find, based on the actual conduct of the trial, that there was a breakdown in the adversarial process that would justify a presumption that respondent's conviction was insufficiently reliable to satisfy the Constitution. The dispositive question in this case therefore is whether the circumstances surrounding respondent's representation — and in particular the five criteria identified by the Court of Appeals — justified such a presumption.

The five factors listed in the Court of Appeals' opinion are relevant to an evaluation of a lawyer's effectiveness in a particular case, but neither separately nor in combination do they provide a basis for concluding that competent counsel was not able to provide this respondent with the guiding hand that the Constitution guarantees.

Respondent places special stress on the disparity between the duration of the Government's investigation and the period the District Court allowed to newly appointed counsel for trial preparation. The lawyer was appointed to represent respondent on June 12, 1980, and on June 19, filed a written motion for a continuance of the trial that was then scheduled to begin on June 30. Although counsel contended that he needed at least 30 days for preparation, the District Court reset the trial for July 14 — thus allowing 25 additional days for preparation.

Neither the period of time that the Government spent investigating the case nor the number of documents that its agents reviewed during that investigation is necessarily relevant to the question whether a competent lawyer could prepare to defend the case in 25 days. The Government's task of finding and assembling admissible evidence that will carry its burden of proving guilt beyond a reasonable doubt is entirely different from the defendant's task in preparing to deny or rebut a criminal charge. Of course, in some cases, the rebuttal may be equally burdensome and time-consuming, but there is no necessary correlation between the two. In this case, the time devoted by the Government to the assembly, organization, and summarization of the thousands of written records evidencing the two streams of checks flowing between the banks in Florida and Oklahoma unquestionably simplified the work of defense counsel in identifying and understanding the basic character of the defendants' scheme. ...

The significance of counsel's preparation time is further reduced by the nature of the charges against respondent. Most of the Government's case consisted merely of establishing the transactions between the two banks. A competent attorney would have no reason to question the authenticity, accuracy, or relevance of this evidence — there could be no dispute that these transactions actually occurred. As respondent appears to recognize, the only bona fide jury issue open to competent defense counsel on these facts was whether respondent acted with intent to defraud. When there is no reason to dispute the underlying historical facts, the period of 25 days to consider the question whether those facts justify an inference of criminal intent is not so short that it even arguably justifies a presumption that no lawyer could provide the respondent with the effective assistance of counsel required by the Constitution.

That conclusion is not undermined by the fact that respondent's lawyer was young, that his principal practice was in real estate, or that this was his first jury trial. Every experienced criminal defense attorney once tried his first criminal case. Moreover, a lawyer's experience with real estate transactions might be more useful in preparing to try a criminal case involving financial transactions than would prior experience in handling, for example, armed robbery prosecutions. The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.

The three other criteria — the gravity of the charge, the complexity of the case, and the accessibility of witnesses — are all matters that may affect what a reasonably competent attorney could be expected to have done under the circumstances, but none identifies circumstances that, in themselves, make it unlikely that respondent received the effective assistance of counsel.

This case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel. The criteria used by the Court of Appeals do not demonstrate that counsel failed to func-

tion in any meaningful sense as the Government's adversary. Respondent can therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel. In this Court, respondent's present counsel argues that the record would support such an attack, but we leave that claim ... for the consideration of the Court of Appeals on remand.

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

It is so ordered.

Excerpted by Sloan Harmel

Strickland v. Washington

466 U.S. 668 (1984)

> Vote: 8-1
> Decision: Reversed
> Majority: O'Connor, joined by Blackmun, Burger, Powell, Rehnquist, Stevens, and White
> Concurrence/Dissent: Brennan
> Dissent: Marshall

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

During a 10-day period in September, 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders. ... The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short ... when he learned that, against his specific advice, respondent had also confessed to the first two murders. ... Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record, and that, at the time of his criminal spree, he was under extreme stress caused by his inability to support his family. He also stated, however, that he accepted responsibility for the crimes. ...

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. ... Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

. ...

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Counsel also argued that respondent had no history of criminal activity, and that respondent committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. ...

. ...

. ... With respect to each of the three convictions for capital murder, the trial judge concluded:

"A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances."

Washington v. State (1979). He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. ...

The trial court denied relief without an evidentiary hearing, finding that the record evidence conclusively showed that the ineffectiveness claim was meritless. ...

. ...

... [T]he trial court concluded that respondent had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding. ...

The Florida Supreme Court affirmed the denial of relief. ...

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. He advanced numerous grounds for relief, among them ineffective assistance of counsel based on the same errors. ...

[T]he District Court concluded that "there does not appear to be a likelihood, or even a significant possibility" that any errors of trial counsel had affected the outcome of the sentencing proceeding. The District Court went on to reject all of respondent's other grounds for relief, [and] accordingly denied the petition for a writ of habeas corpus.

On appeal, [t]he full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards. ...

. ...

The Court of Appeals thus laid down the tests to be applied. ... Summarily rejecting respondent's claims other than ineffectiveness of counsel, the court accordingly reversed the judgment of the District Court and remanded the case. ...

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. ... With the exception of *Cuyler v. Sullivan,* (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial. ...

In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another.

Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. ...

For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. ...

In a long line of cases ... this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. ...

. ...

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. ...

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson* (1970). ... Counsel ... can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," *Cuyler v. Sullivan* [(1980)]. ...

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in ... those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose — to ensure a fair trial — as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

The same principle applies to a capital sentencing proceeding such as that provided by Florida law. ...

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. ... When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. ... In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. ... No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel. ...

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. ...

. ...

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable

professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. ... At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance. ...

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. ... [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

. ...

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. ... Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan* [(1980)].

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. ... Even if a defendant shows that particular errors of counsel were unreasonable ... the defendant must show that they actually had an adverse effect on the defense.

. ...

... [T]he appropriate test for prejudice [is that] the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

. ...

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. ... [A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

. ...

Application of the governing principles is not difficult in this case. The facts as described above, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. ... Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. ... On these facts, there can be little question ... that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. ... Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.
...

. ...

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE MARSHALL, dissenting.

. ...

. ... For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. ... Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

. ...

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably" and must act like "a reasonably competent attorney," is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation. ...

. ...

The majority suggests that, "[f]or purposes of describing counsel's duties," a capital sentencing proceeding "need not be distinguished from an ordinary trial." I cannot agree.

The Court has repeatedly acknowledged that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.

. ...

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas* (1976). ... The importance to the process of counsel's efforts, combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings.

. ... In my view ... if the defendant [on death row] can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate.

Measured against the standards outlined above, respondent's contentions are substantial. Experienced members of the death penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections. ... Counsel's failure to investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the course of the trial gave him a feeling of "hopelessness" regarding the possibility of saving respondent's life.

That the aggravating circumstances implicated by respondent's criminal conduct were substantial, does not vitiate respondent's constitutional claim; judges and juries in cases involving behavior at least as egregious have shown mercy, particularly when afforded an opportunity to see other facets of the defendant's personality and life. Nor is respondent's contention defeated by the possibility that the material his counsel turned up might not have been sufficient to establish a statutory mitigating circumstance under Florida law; Florida sentencing judges and the Florida Supreme Court sometimes refuse to impose death sentences in cases

"in which, even though statutory mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment."

Barclay v. Florida (1983) (STEVENS, J., concurring in judgment) (emphasis in original).

If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding.

I respectfully dissent.

Excerpted by Sloan Harmel

Speedy and Public Trial

United States v. Marion

404 U.S. 307 (1971)

> Vote: 7-0
> Decision: Reversed
> Plurality: White, joined by Burger, Stewart, and Blackmun
> Concurrence: Douglas, joined by Brennan and Marshall

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal requires us to decide whether dismissal of a federal indictment was constitutionally required by reason of a period of three years between the occurrence of the alleged criminal acts and the filing of the indictment.

On April 21, 1970, the two appellees were indicted and charged in 19 counts with operating a business known as Allied Enterprises, Inc. ... the business was fraudulently conducted and involved misrepresentations, alterations of documents, and deliberate nonperformance of contracts. The period covered by the indictment was March 15, 1965, to February 6, 1967; the earliest specific act alleged occurred on September 3, 1965, the latest on January 19, 1966.

On May 5, 1970, appellees filed a motion to dismiss the indictment "for failure to commence prosecution of the alleged offenses charged therein within such time as to afford [them their] rights to due process of law and to a speedy trial. ... "

. ... Allied Enterprises had been subject to a Federal Trade Commission cease and desist order on February 6, 1967, and that a series of articles appeared in the Washington Post in October, 1967, reporting the ... practices employed by home improvement firms such as Allied. The articles also contained purported statements of the then United States Attorney for the District of Columbia ... predicting that indictments would soon be forthcoming ... the United States Attorney did not mention Allied specifically, that company was mentioned in the course of the newspaper stories. In the summer of 1968, at the request of the United States Attorney's office, Allied delivered certain of its records to that office, and, in an interview there, appellee Marion discussed his conduct as an officer of Allied Enterprises. The grand jury that indicted appellees was not impaneled until September, 1969, appellees were not informed of the grand jury's concern with them until March, 1970, and the indictment was finally handed down in April.

Appellees moved to dismiss because the indictment was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses." They argued that the indictment required memory of many specific acts and conversations occurring several years before, and they contended that the delay was due to the negligence or indifference of the United States Attorney in investigating the case and presenting it to a grand jury. ... The District Court judge dismissed the indictment for "lack of speedy prosecution" at the conclusion of the hearing. ...

The United States appealed directly to this Court pursuant. ... We now ... reverse the judgment of the District Court.

. ... Appellees ... claim that their rights to a speedy trial were violated by the period of approximately three years between the end of the criminal scheme charged and the return of the indictment; it is argued that this delay is so substantial and inherently prejudicial that the Sixth Amendment required the dismissal of the indictment. In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an "accused," an event that occurred in this case only when the appellees were indicted on April 21, 1970.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. ... " On its face, the protection of the Amendment is activated only when a criminal prosecution has begun, and extends only to those persons who have been "accused" in the course of that prosecution. ... The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him. "[T]he essential ingredient is orderly expedition, and not mere speed." *Smith v. United States*, (1959). ... The framers could hardly have selected less appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay. ...

Legislative effort to implement federal and State speedy trial provisions also plainly reveal the view that the guarantees are applicable only after a person has been accused of a crime. The Court has pointed out that ". ... [T]he mere failure to find an indictment will not operate to discharge the accused from the offense. ... " *United States v. Cadarr*, (1905).

Since it is "doubtless true that in some cases the power of the Government has been abused and charges have been kept hanging over the heads of citizens" the Court noted that many States. ... had passed statutes limiting the time within which such trial must occur after charge or indictment. Characteristically, these statutes to which the Court referred are triggered only when a citizen is charged or accused ... "[i]n no event ... [does] the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long before this.". ...

Appellees' position is, therefore, at odds with longstanding legislative and judicial constructions of the speedy trial provisions in both national and state constitutions.

It is apparent also that very little support for appellees' position emerges from a consideration of the purposes of the Sixth Amendment's speedy trial provision, a guarantee that this Court has termed

"an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, (1966). ...

Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. ... Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment. Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his

liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case.

The law has provided other mechanisms to guard against ... actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in *United States v. Ewell* [(1966)] ... "the applicable statute of limitations ... is ... the primary guarantee against bringing overly stale criminal charges." Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice. ... There is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function.

Since appellees rely only on potential prejudice and the passage of time between the alleged crime and the indictment ... we perhaps need go no further to dispose of this case, for the indictment was the first official act designating appellees as accused individuals, and that event occurred within the statute of limitations. Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. ...

However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases.

. ... The 38-month delay between the end of the scheme charged in the indictment and the date the defendants were indicted did not extend beyond the period of the applicable statute of limitations here. ... No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. ...

Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature.

Reversed.

Excerpted by Sobhi Sidani

Barker v. Wingo

407 U.S. 514 (1972)

> Vote: 9-0
> Decision: Affirmed
> Majority: Blackmun, Brennan, Burger, Blackmun, Douglas, Marshall, Powell, Rehnquist, and Stewart
> Concurrence: White, joined by Brennan

MR. JUSTICE POWELL delivered the opinion of the Court.

Although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution, this Court has dealt with that right on infrequent occasions. The Court's opinion in *Klopfer v. North Carolina* (1967), established that the right to a speedy trial is "fundamental," and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. As MR. JUSTICE BRENNAN pointed out in his concurring opinion in *Dickey* [*v. Florida* (1970)], in none of these cases have we attempted to set out the criteria by which the speedy trial right is to be judged. This case compels us to make such an attempt.

On July 20, 1958, in Christian County, Kentucky, an elderly couple was beaten to death by intruders wielding an iron tire tool. Two suspects, Silas Manning and Willie Barker, the petitioner, were arrested shortly thereafter. ... The Commonwealth had a stronger case against Manning, and it believed that Barker could not be convicted unless Manning testified against him. Manning was naturally unwilling to incriminate himself. Accordingly, on October 23, the day Silas Manning was brought to trial, the Commonwealth sought and obtained the first of what was to be a series of 16 continuances of Barker's trial. Barker made no objection. By first convicting Manning, the Commonwealth would remove possible problems of self-incrimination, and would be able to assure his testimony against Barker.

The Commonwealth encountered more than a few difficulties in its prosecution of Manning. ... Finally, after five trials, Manning was convicted. ...

The Christian County Circuit Court holds three terms each year — in February, June, and September. Barker's initial trial was to take place in the September term of 1958. The first continuance postponed it until the February, 1959, term. The second continuance was granted for one month only. Every term thereafter for as long as the Manning prosecutions were in process, the Commonwealth routinely moved to continue Barker's case to the next term. When the case was continued from the June, 1959, term until the following September, Barker, having spent 10 months in jail, obtained his release by posting a $5,000 bond. ... Barker made no objection, through his counsel, to the first 11 continuances.

When ... the Commonwealth moved for the twelfth time to continue the case until the following term, Barker's counsel filed a motion to dismiss the indictment. The motion to dismiss was denied two weeks later, and the Commonwealth's motion for a continuance was granted. The Commonwealth was granted further continuances in June, 1962, and September, 1962, to which Barker did not object.

In February, 1963, the first term of court following Manning's final conviction, the Commonwealth moved to set Barker's trial for March 19. But on the day scheduled for trial, it again moved for a continuance until the June term. ... To this continuance, Barker objected unsuccessfully.

... [T]he trial, which had been set for June 19, was continued again until the September term over Barker's objection. This time the court announced that the case would be dismissed for lack of prosecution if it were not tried during the next term. The final trial date was set for October 9, 1963. On that date, Barker again moved to dismiss the indictment, and this time specified that his right to a speedy trial had been violated. The motion was denied; the trial commenced with Manning as the chief prosecution witness; Barker was convicted and given a life sentence.

Barker appealed his conviction to the Kentucky Court of Appeals, relying in part on his speedy trial claim. The court affirmed. In February, 1970, Barker petitioned for habeas corpus in the United States District Court for the Western District of Kentucky. Although the District Court rejected the petition ... the court granted petitioner leave to appeal in forma pauperis and a certificate of probable cause to appeal. On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court. It ruled that Barker had waived his speedy trial claim for the entire period before February, 1963, the date on which the court believed he had first objected to the delay by filing a motion to dismiss. In this belief the court was mistaken, for the record reveals that the motion was filed in February, 1962. The Commonwealth so conceded at oral argument before this Court. The court held further that the remaining period after the date on which Barker first raised his claim and before his trial — which it thought was only eight months but which was actually 20 months — was not unduly long. ... We granted Barker's petition for certiorari.

The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. It must be of little comfort to the residents of Christian County, Kentucky, to know that Barker was at large on bail for over four years while accused of a viciousand brutal murder of which he was ultimately convicted. Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape. Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.

. ...

A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened. ... And it is the prosecution which carries the burden of proof. Thus ... deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. ... Thus, as we recognized in *Beavers v. Haubert*, [(1907)], any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:

"The right of a speedy trial is necessarily relative. It is consistent with delays, and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence, because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. ...

Perhaps because the speedy trial right is so slippery, two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right. The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it. ...

But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. ... We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. ...

The second suggested alternative would restrict consideration of the right to those case in which the accused has demanded a speedy trial. Most States have recognized what is loosely referred to as the "demand rule[.]". ... It is not clear, however, precisely what is meant by that term. ... The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. ... This essentially was the approach the Sixth Circuit took below.

Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst* (1938). Courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co. v. Kennedy* (1937). ... In *Carnley v. Cochran* (1962), we held:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver."

. ...

In excepting the right to speedy trial from the rule of waiver we have applied to other fundamental rights, courts that have applied the demand-waiver rule have relied on the assumption that delay usually works for the benefit of the accused. ... There are cases in which delay appreciably harms the defendant's ability to defend himself.

. ...

The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. ...

. ... Since, under the demand-waiver rule, no time runs until the demand is made, the government will have whatever time is otherwise reasonable to bring the defendant to trial after a demand has been made. ... The result in practice is likely to be either an automatic, pro forma demand made immediately after appointment of counsel or delays which, but for the demand-waiver rule, would not be tolerated. Such a result is not consistent with the interests of defendants, society, or the Constitution.

We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation ... allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule. ... It would also allow a court to weigh the frequency and force of the objections. ...

In ruling that a defendant has some responsibility to assert a speedy trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made. ... We have shown above that the right to a speedy trial is unique in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived. But the rule we announce today ... places the primary burden on the courts and the prosecutors to assure that cases are brought to trial. ...

. ... The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.

A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. ... [W]e identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. ...

Closely related to length of delay is the reason the government assigns to justify the delay. ... A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government. ... Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice,

which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. ... We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. ...

We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. ...

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors, and must be considered together with such other circumstances as may be relevant. ... But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

The difficulty of the task of balancing these factors is illustrated by this case, which we consider to be close. It is clear that the length of delay between arrest and trial — well over five years — was extraordinary. ... Perhaps some delay would have been permissible under ordinary circumstances so that Manning could be utilized as a witness in Barker's trial, but more than four years was too long a period. ...

Two counterbalancing factors, however, outweigh these deficiencies. The first is that prejudice was minimal. Of course, Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety. ... But there is no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay. ...

More important than the absence of serious prejudice is the fact that Barker did not want a speedy trial. Counsel was appointed for Barker immediately after his indictment, and represented him throughout the period. ... Despite the fact that counsel had notice of the motions for continuances, the record shows no action whatever taken between October 21, 1958, and February 12, 1962, that could be construed as the assertion of the speedy trial right. ... Instead, the record strongly suggests that, while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried. Counsel conceded as much at oral argument. ...

. ...

That Barker was gambling on Manning's acquittal is also suggested by his failure, following the pro forma motion to dismiss filed in February, 1962, to object to the Commonwealth's next two motions for continuances. Indeed, it was not until ... after Manning's convictions were final, that Barker, having lost his gamble, began to object to further continuances. At that time, the Commonwealth's excuse was the illness of the ex-sheriff, which Barker has conceded justified the further delay. We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant

was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.

The judgment of the Court of Appeals is

Affirmed.

Excerpted by Sloan Harmel

Juries and Fair Trials

Duncan v. Louisiana

391 U.S. 145 (1968)

> Vote: 7-2
> Opinion: White
> Decision: Reversed
> Majority: White, joined by Warren, Black, Douglas, Brennan, Fortas, Marshall
> Concurring: Black, Douglas, Fortas
> Dissent: Harlan and Stewart

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law simple battery is a misdemeanor, punishable by a maximum of two years' imprisonment and a $300 fine. Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution ... appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed ...

Appellant was 19 years of age when tried. While driving on Highway 23 in Plaquemines Parish on October 18, 1966, he saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. At trial the white boys and a white onlooker testified, as did appellant and his cousins. The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that just before getting in the car appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

...

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in

the opinions of this Court. The question has been asked whether a right is among those "'fundamental principles of' liberty and justice which lie at the base of all our civil and political institutions,'" *Powell v Alabama* (1932). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which-were they to be tried in a federal court-would come within the Sixth Amendment's guarantee ... Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused ...

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objective of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689 ...

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court ...

Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime ...

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power-a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States ...

We would not assert, however, that every criminal trial-or any particular trial-held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus, we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. However, the fact is that in most places more trials for serious crimes are to

juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely ...

Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision s' and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses, *Cheff v. Schnackenberg* (1966). But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia v. Clawans* (1937). In the case before us, the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for up to two years and a fine. The question, then, is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury.

We think not ... Of course, the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different -consequences to events which, when they lie near the line, actually differ very little.

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled b ... chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail." ... We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense." Consequently, appellant was entitled to a jury trial and it was error to deny it.

The judgment below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Excerpted by Kimberly Clairmont

Batson v. Kentucky

476 U.S. 79 (1986)

> Vote: 7-2
> Decision: Reversed and remanded
> Majority: Powell, joined by Brennan, White, Marshall, Blackmun, Stevens, and O'Connor Concurrence: Marshall
> Concurrence: White
> Concurrence: O'Connor
> Concurrence: Stevens, joined by Marshall
> Dissent: Burger, joined by Rehnquist
> Dissent: Rehnquist, joined by Burger

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain v. Alabama* ... (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury.

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted voir dire examination of the venire, excused certain jurors for cause, and permitted the parties to exercise peremptory challenges. The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire, and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. ... The Supreme Court of Kentucky affirmed. ... The court observed that it recently had reaffirmed its reliance on *Swain*, and had held that a defendant alleging lack of a fair cross-section must demonstrate systematic exclusion of a group of jurors from the venire. ... We granted certiorari ... and now reverse.

In *Swain v. Alabama* [(1965)], this Court recognized that a

"State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.". ...

This principle has been "consistently and repeatedly" reaffirmed ... in numerous decisions of this Court both preceding and following *Swain*. We reaffirm the principle today.

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder v. West Virginia,* (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. ... Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race.". ... But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race ... or on the false assumption that members of his race as a group are not qualified to serve as jurors. ...

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection, because it denies him the protection that a trial by jury is intended to secure. ...

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. ... As long ago as *Strauder* ... the Court recognized that, by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. ...

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. ... Discrimination within the judicial system is most pernicious because it is

"a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Strauder*. ...

In *Strauder*, the Court invalidated a state statute that provided that only white men could serve as jurors. ... We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications, and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." *Norris v. Alabama* [(1935)] Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors. While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. ...

Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. Although a prosecutor ordi-

narily is entitled to exercise permitted peremptory challenges ... the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. ...

The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court. Rather, the Court has been called upon repeatedly to review the application of those principles to particular facts. A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State. That question also was at the heart of the portion of *Swain v. Alabama* we reexamine today.

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. The record in *Swain* showed that the prosecutor had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, and the constitutional prohibition on exclusion of persons from jury service on account of race.

The Court went on to observe ... that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial," or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population.". ... Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. ... For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor,

"in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries.". ...

A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

Since the decision in *Swain*, we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." *Whitus v. Georgia* [(1967)]. ... In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp*. (1977). Circumstantial evidence of invidious intent may

include proof of disproportionate impact. ... We have observed that, under some circumstances, proof of discriminatory impact "may, for all practical purposes, demonstrate unconstitutionality because, in various circumstances, the discrimination is very difficult to explain on nonracial grounds.". ...

Moreover, since *Swain*, we have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. ... Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. ... The State cannot meet this burden on mere general assertions that its officials did not discriminate, or that they properly performed their official duties. ... Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v. Louisiana* [(1973)].

The showing necessary to establish a prima facie case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. ... The defendant initially must show that he is a member of a racial group capable of being singled out for different treatment. ... In combination with that evidence, a defendant may then make a prima facie case by proving that, in the particular jurisdiction, members of his race have not been summoned for jury service over an extended period of time. ... Proof of systematic exclusion from the venire raises an inference of purposeful discrimination, because the "result bespeaks discrimination." *Hernandez v. Texas* [(1952)]. ...

... [S]ince the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. These decisions are in accordance with the proposition, articulated in *Arlington Heights v. Metropolitan Housing Development Corp.*[(1977)], that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions.". For evidentiary requirements to dictate that "several must suffer discrimination" before one could object ... would be inconsistent with the promise of equal protection to all.

The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. ... These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group ... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia* [(1953)]. ... Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. ...

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. ... But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption — or his intuitive judgment — that they would be partial to the defendant because of their shared race. ... Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors ... so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." *Alexander v. Louisiana*. ...

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state and federal court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. ...

It is so ordered.

Excerpted by Sobhi Sidani

Georgia v. McCollum Et Al.

505 U.S. 42 (1992)

> Vote: 7-2
> Decision: Reversed and remanded
> Majority: Blackmun, joined by Kennedy, White, Souter, Stevens, and Rehnquist
> Concurrence: Rehnquist
> Concurrence: Thomas
> Dissent: O'Connor
> Dissent: Scalia

JUSTICE BLACKMUN delivered the opinion of the Court.

For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause. Last Term this Court held that racial discrimination in a civil litigant's exercise of peremptory challenges also violates the Equal Protection Clause. ... Today, we are asked to decide whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges.

On August 10, 1990, a grand jury ... returned a six-count indictment charging respondents with aggravated assault and simple battery. ... The indictment alleged that respondents beat and assaulted Jerry and Myra Collins. Respondents are white; the alleged victims are African-Americans. Shortly after the events, a leaflet was widely distributed in the local African-American community reporting the assault and urging community residents not to patronize respondents' business.

Before jury selection began, the prosecution moved to prohibit respondents from exercising peremptory challenges in ... a racially discriminatory manner. The State explained that it expected to show that the victims' race was a factor in the alleged assault. According to the State, counsel for respondents had indicated a clear intention to use peremptory strikes in a racially discriminatory manner. ... [T]he State contended that, if a statistically representative panel is assembled for jury selection, 18 of the potential 42 jurors would be African-American. With 20 peremptory challenges, respondents therefore would be able to remove all the African-American potential jurors. ... Relying on *Batson v. Kentucky,* (1986), the Sixth Amendment, and the Georgia Constitution, the State sought an order providing that, if it succeeded in making out a prima facie case of racial discrimination by respondents, the latter would be required to articulate a racially neutral explanation for peremptory challenges.

The trial judge denied the State's motion, holding that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." . ... The Supreme Court of Georgia ... affirmed the trial court's ruling. The court acknowledged that in *Edmonson v. Leesville Concrete Co.*, (1991), this Court had found that the exercise of a peremptory challenge in a racially discriminatory manner "would constitute an impermissible injury" to the excluded juror. ... The court noted, however, that *Edmonson* involved private civil litigants, not criminal defendants. "Bearing in mind the long history of jury trials as an essential element of the protection of human rights," the court "decline[d] to diminish the free exercise of peremptory strikes by a criminal defendant.". ...

We granted certiorari to resolve a question left open by our prior cases-whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges. ...

Over the last century, in an almost unbroken chain of decisions, this Court gradually has abolished race as a consideration for jury service. ...

In deciding whether the Constitution prohibits criminal defendants from exercising racially discriminatory peremptory challenges, we must answer four questions. First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.

The majority in *Powers* [*v. Ohio* (1991)] recognized that "*Batson* 'was designed "to serve multiple ends,'" only one of which was to protect individual defendants from discrimination in the selection of jurors.". ... As in *Powers* and *Edmonson*, the extension of *Batson* in this context is designed to remedy the harm done to the "dignity of persons" and to the "integrity of the courts." *Powers*. ...

As long ago as *Strauder* [*v. WV* (1880)], this Court recognized that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror. ... While "[a]n individual juror does not have a right to sit on any particular petit jury ... he or she does possess the right not to be excluded from one on account of race." *Powers*. ... Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same. ...

... One of the goals of our jury system is "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers*. ... Selection procedures that purposefully exclude African Americans from juries undermine that public confidence. ...

. ...

... [I]f a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice-our citizens' confidence in it. ...

. ... Racial discrimination ... violates the Constitution only when it is attributable to state action. ... Thus, the second question that must be answered is whether a criminal defendant's exercise of a peremptory challenge constitutes state action. ...

Until *Edmonson*, the cases decided by this Court that presented the problem of racially discriminatory peremptory challenges involved ... a prosecutor. ... In *Edmonson*, by contrast, the contested peremptory challenges were exercised by a private defendant in a civil action. ... [T]o determine whether state action was present in that setting, the ... Court in *Edmonson* used the analytical framework summarized in *Lugar v. Edmondson Oil Co*.

The first inquiry is "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority.". ... [P]eremptory challenges satisfy this first requirement, as they "are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury." *Edmonson*. ...

The second inquiry is whether the private party charged with the deprivation can be described as a state actor. ... In resolving that issue, the Court in *Edmonson* found it useful to apply three principles: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." ...

As to the first principle, the *Edmonson* Court found that the peremptory challenge system, as well as the jury system as a whole, "simply could not exist" without the "overt, significant participation of the government.". ... Georgia ... establishes the general criteria for service and the sources for creating a pool of qualified jurors representing a fair cross section of the community. ...

In light of these procedures, the defendant in a Georgia criminal case relies on "governmental assistance and benefits" that are equivalent to those found in the civil context in *Edmonson*. ...

In regard to the second principle, the Court in *Edmonson* found that peremptory challenges perform a traditional function of the government. ... These concerns are equally present in the context of a criminal trial. ... [T]he reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State.

. ...

Having held that a defendant's discriminatory exercise of a peremptory challenge is a violation of equal protection, we move to the question whether the State has standing to challenge. ... In *Powers* ... this Court held that a white criminal defendant has standing to raise the equal protection rights of black jurors wrongfully excluded from jury service. ...

In applying the first prong of its standing analysis, the Powers Court found that a criminal defendant suffered cognizable ... injury "because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." . ... Surely, a State suffers a similar injury when the fairness and integrity of its own judicial process is undermined.

In applying the second prong of its standing analysis, the *Powers* Court held that voir dire permits a defendant to "establish a relation, if not a bond of trust, with the jurors,". ... "Exclusion of a juror on the basis of race severs that relation in an invidious way." *Edmonson*. ... The State's relation to potential jurors in this case is closer than the relationships approved in *Powers* and *Edmonson*. As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors. ...

In applying the final prong of its standing analysis, the Powers Court recognized that ... the "barriers to a suit by an excluded juror are daunting.". ... Accordingly, we hold that the State has standing to assert the excluded jurors' rights.

The final question is whether the interests served by *Batson* must give way to the rights of a criminal defendant. ... This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial. ...

We do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice. Nonetheless, "if race stereotypes are the price for acceptance of a jury panel as fair," we reaffirm today that such a "price is too high to meet the standard of the Constitution.". ... It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race. ...

Lastly, a prohibition of the discriminatory exercise of peremptory challenges does not violate a defendant's Sixth Amendment right to a trial by an impartial jury. ...

We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges. The judgment of the Supreme Court of Georgia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Sobhi Sidani

J.E.B. v. Alabama ex rel. T. B.

511 U.S. 127 (1994)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: Blackmun, joined by Stevens, O'Connor, Souter, and Ginsberg
> Concurrence: O'Connor
> Concurrence: Kennedy
> Dissent: Rehnquist
> Dissent: Scalia, joined by Rehnquist and Thomas

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Batson v. Kentucky*, (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. The Court explained that although a defendant has "no right to a 'petit jury composed in whole or in part of persons of his own race,'" ... *Strauder v. West Virginia,*

(1880), the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria,". ... Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. ...

Although premised on equal protection principles that apply equally to gender discrimination, all our recent cases ... defining the scope of *Batson* involved alleged racial discrimination in the exercise of peremptory challenges. Today we are faced with the question whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.

On behalf of relator T. B., the mother of a minor child, respondent State of Alabama filed a complaint for paternity and child support against petitioner J. E. B. in the District Court of Jackson County, Alabama. On October 21, 1991, the matter was called for trial and jury selection began. The trial court assembled a panel of 36 potential jurors, 12 males and 24 females. After the court excused three jurors for cause, only 10 of the remaining 33 jurors were male. The State then used 9 of its 10 peremptory strikes to remove male jurors; petitioner used all but one of his strikes to remove female jurors. As a result, all the selected jurors were female.

Before the jury was empaneled, petitioner objected to the State's peremptory challenges on the ground that they were exercised against male jurors solely on the basis of gender, in violation of the Equal Protection Clause of the Fourteenth Amendment. Petitioner argued that the logic and reasoning of *Batson v. Kentucky*, which prohibits peremptory strikes solely on the basis of race, similarly forbids intentional discrimination on the basis of gender. The court rejected petitioner's claim. ... The jury found petitioner to be the father of the child, and the court entered an order directing him to pay child support. On post judgment motion, the court reaffirmed its ruling that Batson does not extend to gender based peremptory challenges. ...

We granted certiorari ... to resolve a question that has created a conflict of authority whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race. Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates ... the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.

. ... Gender-based peremptory strikes were hardly practicable during most of our country's existence, since, until the 20th century, women were completely excluded from jury service. So well entrenched was this exclusion of women that in 1880 this Court, while finding that the exclusion of African-American men from juries violated the Fourteenth Amendment, expressed no doubt that a State "may confine the selection [of jurors] to males." *Strauder v. West Virginia*. ... Many States continued to exclude women from jury service well into the present century. ... States that did permit women to serve on juries often erected other barriers, such as registration requirements and automatic exemptions, designed to deter women from exercising their right to jury service. ...

The prohibition of women on juries was derived from the English common law which, according to Blackstone, rightfully excluded women from juries under "the doctrine of propter defectum sexus, literally, the 'defect of sex.'" *United States v. De Gross*. ... Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere. ...

This Court in *Ballard v. United States*, (1946), first questioned the fundamental fairness of denying women the right to serve on juries. Relying on its supervisory powers over the federal courts, it held that women may not be excluded from the venire in federal trials in States where women were eligible for jury service under local law. In response to the argument that women have no superior or unique perspective, such that defendants are denied a fair trial by virtue of their exclusion from jury panels, the Court explained:

"It is said ... that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men-personality, background, economic status-and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act like a class. ... The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded."

Fifteen years later, however, the Court still was unwilling to translate its appreciation for the value of women's contribution to civic life into an enforceable right to equal treatment under state laws governing jury service. In *Hoyt v. Florida* [(1961)] ... the Court found it reasonable ... to exempt women from mandatory jury service by statute, allowing women to serve on juries only if they volunteered to serve. The Court justified the differential exemption policy on the ground that women, unlike men, occupied a unique position "as the center of home and family life.". ...

In 1975, the Court finally repudiated the reasoning of *Hoyt* and struck down, under the Sixth Amendment, an affirmative registration statute nearly identical to the one at issue in *Hoyt*. See *Taylor v. Louisiana*, (1975). ...

Taylor relied on Sixth Amendment principles, but the opinion's approach is consistent with the heightened equal protection scrutiny afforded gender-based classifications. Since *Reed v. Reed*, (1971), this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, see *Schlesinger v. Ballard* ... or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig v. Boren*, (1976). ...

Despite the heightened scrutiny afforded distinctions based on gender, respondent argues that gender discrimination in the selection of the petit jury should be permitted, though discrimination on the basis of race is not. Respondent suggests that "gender discrimination in this country ... has never reached the level of discrimination" against African-Americans, and therefore gender discrimination ... is tolerable in the courtroom. ...

While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, "overpower those differences.". ...

Certainly, with respect to jury service, African-Americans and women share a history of total exclusion. ...

We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history. It is necessary only to acknowledge that "our Nation has had

a long and unfortunate history of sex discrimination [*Frontiero v. Richardson* (1973)]. ... Under our equal protection jurisprudence, gender-based classifications require "an exceedingly persuasive justification" in order to survive constitutional scrutiny. ... Thus, the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial.

In making this assessment, we do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom. Instead, we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury.

. ...

... [R]espondent maintains that its decision to strike virtually all the males from the jury in this case "may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might ... be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child.". ... We shall not accept as a defense to gender-based peremptory challenges "the very stereotype the law condemns." *Powers v. Ohio*. ... Respondent's rationale ... is reminiscent of the arguments advanced to justify the total exclusion of women from juries. ... Respondent offers virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes. ...

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization. ...

Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. ...

Because ... stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers v. Ohio* [(1991)]. ... Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender. ...

In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures. ... All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce ... patterns of historical discrimination. ... Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by the law, an assertion of their inferiority." *Strauder v. West Virginia*. ...

Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. ...

... [T]his Court long has tolerated the discriminatory use of peremptory challenges, but this is not a reason to continue to do so. Many of "our people's traditions," ... such as de jure segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause. ...

The experience in the many jurisdictions that have barred gender-based challenges belies the claim that litigants and trial courts are incapable of complying with a rule barring strikes based on gender. ... As with race-based Batson claims, a party alleging gender discrimination must make a prima facie showing of ... intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. *Batson*. ... When an explanation is required, it need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual. ...

. ...

When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized. In view of these concerns, the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender. ...

The judgment of the Court of Civil Appeals of Alabama is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Sobhi Sidani

Justice Scalia, with whom The Chief Justice and with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors. The price to be paid for this display—a modest price, surely—is that most of the opinion is quite irrelevant to the case at hand. The hasty reader will be surprised to learn, for example, that this lawsuit involves a complaint about the use of peremptory challenges to exclude *men* from a petit jury. To be sure, petitioner, a man, used all but one of *his* peremptory strikes to remove *women* from the jury (he used his last challenge to strike the sole remaining male from the pool), but the validity of *his* strikes is not before us. Nonetheless, the Court treats itself to an extended discussion of the historic exclusion of women not only from jury service, but also from service at the bar (which is rather like jury service, in that it involves going to the courthouse a lot). All this, as I say, is irrelevant, since the case involves state action that allegedly discriminates against men. The parties do not contest that discrimination on the basis of sex is subject to what our cases call "heightened scrutiny,". ...

The Court also spends time establishing that the use of sex as a proxy for particular views or sympathies is unwise and perhaps irrational. The opinion stresses the lack of statistical evidence to support the widely held belief that, at least in certain types of cases, a juror's sex has some statistically significant predictive value as to how the juror will behave. This assertion seems to place the Court in opposition to its earlier Sixth Amendment "fair cross-section" cases. ... But times and trends do change, and unisex is unquestionably in fashion. Personally, I am less inclined to demand statistics, and

more inclined to credit the perceptions of experienced litigators who have had money on the line. But it does not matter. The Court's fervent defense of the proposition *iln'ya pasde différence entre les hommes et les femmes* (it stereotypes the opposite view as hateful "stereotyping") turns out to be, like its recounting of the history of sex discrimination against women, utterly irrelevant. Even if sex was a remarkably good predictor in certain cases, the Court would find its use in peremptories unconstitutional.

Of course the relationship of sex to partiality *would have been* relevant if the Court had demanded in this case what it ordinarily demands: that the complaining party have suffered some injury. Leaving aside for the moment the reality that the defendant himself had the opportunity to strike women from the jury, the defendant would have some cause to complain about the prosecutor's striking male jurors if male jurors tend to be more favorable toward defendants in paternity suits. But if men and women jurors are (as the Court thinks) fungible, then the only arguable injury from the prosecutor's "impermissible" use of male sex as the basis for his peremptories is injury to the stricken juror, not to the defendant. ... This case illustrates why making restitution to Paul when it is Peter who has been robbed is such a bad idea. Not only has petitioner, by implication of the Court's own reasoning, suffered no harm, but the scientific evidence presented at trial established petitioner's paternity with 99.92% accuracy. Insofar as petitioner is concerned, this is a case of harmless error if there ever was one; a retrial will do nothing but divert the State's judicial and prosecutorial resources, allowing either petitioner or some other malefactor to go free.

The core of the Court's reasoning is that peremptory challenges on the basis of any group characteristic subject to heightened scrutiny are inconsistent with the guarantee of the Equal Protection Clause. That conclusion can be reached only by focusing unrealistically upon individual exercises of the peremptory challenge, and ignoring the totality of the practice. Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection. ... That explains why peremptory challenges coexisted with the Equal Protection Clause for 120 years. ... The pattern here, however, displays not a systemic sex-based animus but each side's desire to get a jury favorably disposed to its case. That is why the Court's characterization of respondent's argument as "reminiscent of the arguments advanced to justify the total exclusion of women from juries," *ante,* at 138, is patently false. Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case.

Although the Court's legal reasoning in this case is largely obscured by anti-male-chauvinist oratory, to the extent such reasoning is discernible it invalidates much more than sexbased strikes. After identifying unequal treatment (by separating individual exercises of peremptory challenge from the process as a whole), the Court applies the "heightened scrutiny" mode of equal protection analysis used for sexbased discrimination, and concludes that the strikes fail heightened scrutiny because they do not substantially further an important government interest. The Court says that the only important government interest that could be served by peremptory strikes is "securing a fair and impartial jury. ... It refuses to accept respondent's argument that these strikes further that interest by eliminating a group (men) which may be partial to male defendants, because it will not accept any argument based on "`the very stereotype the law condemns.' " ... This analysis, entirely eliminating the only allowable argument, implies that sexbased strikes do not even rationally further a legitimate government interest, let alone pass heightened scrutiny. That places *all* peremptory strikes based on *any* group characteristic at risk, since they can all be denominated "stereotypes." Perhaps, however (though I do not see why it should be so), only the stereotyping of groups entitled to heightened or strict scrutiny constitutes "the

very stereotype the law condemns"—so that other stereotyping (*e. g.,* wide-eyed blondes and football players are dumb) remains OK. Or perhaps when the Court refers to "impermissible stereotypes," it means the adjective to be limiting rather than descriptive—so that we can expect to learn from the Court's peremptory/stereotyping jurisprudence in the future which stereotypes the Constitution frowns upon and which it does not.

. ...

And damage has been done, secondarily, to the entire justice system, which will bear the burden of the expanded quest for "reasoned peremptories" that the Court demands. The extension of *Batson* to sex, and almost certainly beyond, *Batson,* 476 U. S., at 124 (Burger, C. J., dissenting), will provide the basis for extensive collateral litigation, which especially the criminal defendant (who litigates full time and cost free) can be expected to pursue.

The irrationality of today's strike-by-strike approach to equal protection is evident from the consequences of extending it to its logical conclusion. If a fair and impartial trial is a prosecutor's only legitimate goal; if adversarial trial stratagems must be tested against that goal in abstraction from their role within the system as a whole; and if, so tested, sex-based stratagems do not survive heightened scrutiny—then the prosecutor presumably violates the Constitution when he selects a male or female police officer to testify because he believes one or the other sex might be more convincing in the context of the particular case, or because he believes one or the other might be more appealing to a predominantly male or female jury. A decision to stress one line of argument or present certain witnesses before a mostly female jury—for example, to stress that the defendant victimized women—becomes, under the Court's reasoning, intentional discrimination by a state actor on the basis of gender.

In order, it seems to me, not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions.

For these reasons, I dissent.

Excerpted by Rorie Solberg

Foster v. Chatman

578 U.S. 488 (2016)

> Vote: 7-1
> Decision: Reversed and remanded
> Majority: Roberts, joined by Kennedy, Ginsberg, Breyer, Sotomayor, and Kagan
> Concurrence: Alito (in judgment)
> Dissent: Thomas

Chief Justice Roberts delivered the opinion of the Court.

Petitioner Timothy Foster was convicted of capital murder and sentenced to death in a Georgia court. During jury selection at his trial, the State exercised peremptory strikes against all four black prospective jurors qualified to serve. Foster argued that the State's use of those strikes was racially motivated, in violation of our decision in *Batson v. Kentucky*, (1986). The trial court and the Georgia Supreme Court rejected Foster's *Batson* claim.

Foster then sought a writ of habeas corpus from the Superior Court of Butts County, Georgia, renewing his *Batson* objection. That court denied relief, and the Georgia Supreme Court declined to issue the Certificate of Probable Cause necessary under Georgia law for Foster to pursue an appeal. We granted certiorari and now reverse.

On the morning of August 28, 1986, police found Queen Madge White dead on the floor of her home in Rome, Georgia. White, a 79-year-old widow, had been beaten, sexually assaulted, and strangled to death. Her home had been burglarized. Timothy Foster subsequently confessed to killing White, and White's possessions were recovered from Foster's home and from Foster's two sisters. The State indicted Foster on charges of malice murder and burglary. He faced the death penalty. ...

District Attorney Stephen Lanier and Assistant District Attorney Douglas Pullen represented the State at trial. Jury selection proceeded in two phases: removals for cause and peremptory strikes. ... This first phase whittled the list down to 42 "qualified" prospective jurors. Five were black.

In the second phase, known as the "striking of the jury," both parties had the opportunity to exercise peremptory strikes against the array of qualified jurors. ... This second phase continued until 12 jurors had been accepted.

The morning the second phase began, Shirley Powell, one of the five qualified black prospective jurors, notified the court that she had just learned that one of her close friends was related to Foster. The court removed Powell for cause. That left four black prospective jurors: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett.

The striking of the jury then commenced. The State exercised nine of its ten allotted peremptory strikes, removing all four of the remaining black prospective jurors. Foster immediately lodged a *Batson* challenge. The trial court rejected the objection and empaneled the jury. The jury convicted Foster and sentenced him to death.

Following sentencing, Foster renewed his *Batson* claim in a motion for a new trial. After an evidentiary hearing, the trial court denied the motion. The Georgia Supreme Court affirmed. ...

Foster subsequently sought a writ of habeas corpus ... again pressing his *Batson* claim. While the state habeas proceeding was pending, Foster filed a series of requests under the Georgia Open Records Act ... seeking access to the State's file from his 1987 trial. In response, the State disclosed documents related to the jury selection at that trial. Over the State's objections, the state habeas court admitted those documents into evidence. They included the following:

(1) Four copies of the jury venire list. On each copy, the names of the black prospective jurors were highlighted in bright green. A legend in the upper right corner of the lists indicated that the green highlighting "represents Blacks.". ... The

letter "B" also appeared next to each black prospective juror's name. ... According to the testimony of Clayton Lundy, an investigator who assisted the prosecution during jury selection, these highlighted venire lists were circulated in the district attorney's office during jury selection. ...

(2) A draft of an affidavit that had been prepared by Lundy "at Lanier's request" for submission to the state trial court in response to Foster's motion for a new trial. ... The typed draft detailed Lundy's views on ten black prospective jurors, stating "[m]y evaluation of the jurors are a[s] follows." . ... "If it comes down to having to pick one of the black jurors, [this one] might be okay. This is solely my opinion. ... Upon picking of the jury after listening to all of the jurors we had to pick, if we had to pick a black juror I recommend that [this juror] be one of the jurors.". ...

(3) Three handwritten notes on black prospective jurors Eddie Hood, Louise Wilson, and Corrie Hinds. Annotations denoted those individuals as "B#1," "B#2," and "B#3," respectively. ... Lundy testified that these were examples of the type of "notes that the team—the State would take down during voir dire to help select the jury in Mr. Foster's case.". ...

(4) A typed list of the qualified jurors remaining after voir dire ... included "Ns" next to ten jurors' names ... [s]uch an "N" appeared alongside the names of all five qualified black prospective jurors. ... Lundy testified that he was unsure who had prepared or marked the two lists.

(5) A handwritten document titled "definite NO's," listing six names. The first five were those of the five qualified black prospective jurors. ... The State concedes that either Lanier or Pullen compiled the list, which Lundy testified was "used for preparation in jury selection.". ...

(6) A handwritten document titled "Church of Christ." A notation on the document read: "NO. No Black Church.". ...

(7) The questionnaires that had been completed by several of the black prospective jurors. On each one, the juror's response indicating his or her race had been circled. ...

The Georgia Supreme Court denied Foster the "Certificate of Probable Cause" necessary under state law for him to pursue an appeal, determining that his claim had no "arguable merit.". ...

... [T]he State introduced short affadavits from Lanier and Pullen. ...

The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana* (2008). ... Our decision in *Batson v. Kentucky* [(1986)] ... provides a three-step process for determining when a strike is discriminatory:

"First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder*. ...

Both parties agree that Foster has demonstrated a prima facie case, and that the prosecutors have offered race-neutral reasons for their strikes. We therefore address only *Batson*'s third step. That step turns on factual determinations, and, "in the absence of exceptional circumstances," we defer to state court factual findings unless we conclude that they are clearly erroneous. *Synder*. ...

Before reviewing the factual record in this case, a brief word is in order regarding the contents of the prosecution's file that Foster obtained through his Georgia Open Records Act requests. Pursuant to those requests, Foster received a "certif[ied] ... true and correct copy of 103 pages of the State's case file" from his 1987 trial. ... The State argues that "because [Foster] did not call either of the prosecutors to the stand" to testify in his state habeas proceedings, "he can only speculate as to the meaning of various markings and writings" on those pages, "the author of many of them, and whether the two prosecutors at trial (District Attorney Lanier and Assistant District Attorney Pullen) even saw many of them.". ... For these reasons, the State argues, "none of the specific pieces of new evidence [found in the file] shows an intent to discriminate.". ... For his part, Foster argues that "[t]here is no question that the prosecutors used the lists and notes, which came from the prosecution's file and were certified as such," and therefore the "source of the lists and notes, their timing, and their purpose is hardly 'unknown' or based on 'conjecture.' ". ...

The State concedes that the prosecutors themselves authored some documents ... and Lundy's testimony strongly suggests that the prosecutors viewed others. ... There are, however, genuine questions that remain about the provenance of other documents. Nothing in the record, for example, identifies the author of the notes that listed three black prospective jurors as "B#1," "B#2," and "B#3." Such notes, then, are not necessarily attributable directly to the prosecutors themselves. The state habeas court was cognizant of those limitations, but nevertheless admitted the file into evidence, reserving "a determination as to what weight the Court is going to put on any of [them]" in light of the objections urged by the State. ...

We agree with that approach. Despite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. ... At a minimum, we are comfortable that all documents in the file were authored by someone in the district attorney's office. Any uncertainties concerning the documents are pertinent only as potential limits on their probative value.

Foster centers his *Batson* claim on the strikes of two black prospective jurors, Marilyn Garrett and Eddie Hood. We turn first to Marilyn Garrett. According to Lanier, on the morning that the State was to use its strikes he had not yet made up his mind to remove Garrett. Rather, he decided to strike her only after learning that he would not need to use a strike on another black prospective juror, Shirley Powell, who was excused for cause that morning.

Ultimately, Lanier did strike Garrett. In justifying that strike to the trial court, he articulated a laundry list of reasons. Specifically, Lanier objected to Garrett because she: (1) worked with disadvantaged youth in her job as a teacher's aide; (2) kept looking at the ground during voir dire; (3) gave short and curt answers during voir dire; (4) appeared nervous; (5) was too young; (6) misrepresented her familiarity with the location of the crime; (7) failed to disclose that her cousin had been arrested on a drug charge; (8) was divorced; (9) had two children and two jobs; (10) was asked few questions by the defense; and (11) did not ask to be excused from jury service. ...

The trial court accepted Lanier's justifications, concluding that "[i]n the totality of circumstances," there was "no discriminatory intent, and that there existed reasonably clear, specific, and legitimate reasons" for the strike. ... On their face, Lanier's justifications for the strike seem reasonable enough. Our independent examination of the record, however, reveals that much of the reasoning provided by Lanier has no grounding in fact.

Lanier's misrepresentations to the trial court began with an elaborate explanation of how he ultimately came to strike Garrett:. ... The four negative challenges were allocated for Hardge, Hood, Turner and Powell. ... But on the morning of jury selection, Juror Powell was excused for cause with no objections by [d]efense counsel. She was replaced by Juror Cadle [who] was acceptable to the State. This left the State with an additional strike it had not anticipated or allocated. Consequently, the State had to choose between [white] Juror Blackmon or Juror Garrett, the only two questionable jurors the State had left on the list.". ...

Lanier concluded that "the chances of [Blackmon] returning a death sentence were greater when all these factors were considered than Juror Garrett. Consequently, Juror Garrett was excused.". ...

Moreover, several of Lanier's reasons for why he chose Garrett over Blackmon are similarly contradicted by the record. Lanier told the court, for example, that he struck Garrett because "the defense did not ask her questions about" pertinent trial issues such as her thoughts on "insanity" or "alcohol," or "much questions on publicity.". ... But the trial transcripts reveal that the defense asked her several questions on all three topics. ...

Still other explanations given by the prosecution, while not explicitly contradicted by the record, are difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror. Lanier told the trial court that he struck Garrett because she was divorced ... he declined to strike three out of the four prospective white jurors who were also divorced. ... Additionally, Lanier claimed that he struck Garrett because she was too young, and the "State was looking for older jurors that would not easily identify with the defendant.". ... Yet Garrett was 34, and the State declined to strike eight white prospective jurors under the age of 36. ... Two of those white jurors served on the jury; one of those two was only 21 years old. ...

In sum, in evaluating the strike of Garrett, we are not faced with a single isolated misrepresentation.

. ...

[The Court goes through a similar analysis of the strike of Hood.]

The prosecution's file fortifies our conclusion that any reliance on ... religion was pretextual. The file contains a handwritten document titled "Church of Christ." The document notes that the church "doesn't take a stand on Death Penalty," and that the issue is "left for each individual member.". ... The document then states: "NO. NO Black Church.". ... The State tries to downplay the significance of this document by emphasizing that the document's author is unknown. That uncertainty is pertinent. But we think the document is nonetheless entitled to significant weight, especially given that it is consistent with our serious doubts about the prosecution's account of the strike.

Many of the State's secondary justifications similarly come undone when subjected to scrutiny. ...

Many of the State's secondary justifications similarly come undone when subjected to scrutiny. ...

As we explained in *Miller-El v. Dretke*, "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination." (2005). ... But that is not all. There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file. Considering all of the circumstantial evidence that "bears upon the issue of racial animosity," we are left with the firm conviction that the strikes ... were "motivated in substantial part by discriminatory intent." *Snyder*. ...

Throughout all stages of this litigation, the State has strenuously objected that "race [was] not a factor" in its jury selection strategy. ... The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a "color-blind" manner. ... The sheer number of references to race in that file is arresting. The State, however, claims that things are not quite as bad as they seem. The focus on black prospective jurors, it contends, does not indicate any attempt to exclude them from the jury. It instead reflects an effort to ensure that the State was "thoughtful and non-discriminatory in consideration of black prospective jurors to develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding [its] selections were pretextual.". ...

In addition, the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury. The State argues that it "was actively seeking a black juror.". ... But this claim is not credible. An "N" appeared next to each of the black prospective jurors' names on the jury venire list. ... An "N" was also noted next to the name of each black prospective juror on the list of the 42 qualified prospective jurors; each of those names also appeared on the "definite NO's" list". ... And a draft affidavit from the prosecution's investigator stated his view that "[i]f it comes down to having to pick one of the black jurors, Garrett, might be okay.". ... Such references are inconsistent with attempts to "actively seek" a black juror.

The State's new argument today does not dissuade us from the conclusion that its prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows.

The order of the Georgia Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Sobhi Sidani

Sheppard v. Maxwell

384 U.S. 333 (1966)

> Vote: 8-1
> Decision: Reversed and remanded
> Majority: Clark, joined by Warren, Douglas, Harlan, Brennan, Stewart, White, and Fortas
> Dissent: Black

MR. JUSTICE CLARK delivered the opinion of the Court.

This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution. The United States District Court held that he was not afforded a fair trial, and granted the writ subject to the State's right to put Sheppard to trial again. ... The Court of Appeals for the Sixth Circuit reversed by a divided vote. ... We granted certiorari ... concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment.

Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death. ... Sheppard pieced together ... the following story: he and his wife had entertained neighborhood friends, the Aherns, on the previous evening at their home. After dinner ... Sheppard became drowsy and dozed off to sleep on a couch. Later, Marilyn partially awoke him saying that she was going to bed. The next thing he remembered, was hearing his wife cry out in the early morning hours. He hurried upstairs and, in the dim light from the hall, saw a "form" standing next to his wife's bed. As he struggled with the "form," he was struck on the back of the neck and rendered unconscious. On regaining his senses, he found himself on the floor next to his wife's bed. He rose, looked at her, took her pulse and "felt that she was gone." He then went to his son's room and found him unmolested. Hearing a noise, he hurried downstairs. He saw a "form" running out the door and pursued it to the lake shore. He grappled with it on the beach, and again lost consciousness. Upon his recovery, he was lying face down with the lower portion of his body in the water. He returned to his home, checked the pulse on his wife's neck, and "determined or thought that she was gone." He then went downstairs and called a neighbor, Mayor Houk of Bay Village. The Mayor and his wife came over at once ... Sheppard then related the above-outlined events ... the Mayor called the local police, Dr. Richard Sheppard, petitioner's brother, and the Aherns. The local police were the first to arrive. They, in turn, notified the Coroner and Cleveland police. ...

From the outset, officials focused suspicion on Sheppard. ... Dr. Gerber, the Coroner, is reported ... to have told his men, "Well, it is evident the doctor did this, so let's go get the confession out of him." He proceeded to interrogate and examine Sheppard while ... under sedation in his hospital room. ... Later that, afternoon Chief Eaton and two Cleveland police officers interrogated Sheppard at some length, confronting him with evidence, and demanding explanations. Asked by Officer Shotke to take a lie detector test, Sheppard said he would if it were reliable. Shotke replied that it was "infallible," and "you might as well tell us all about it now." At the end of the interrogation, Shotke told Sheppard: "I think you killed your wife.". ...

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon — later the chief prosecutor of Sheppard — sharply criticized the refusal of the Sheppard family to permit his immediate questioning. ... [O]ne story described a visit by Coroner Gerber and four police officers to the hospital on July 8. When Sheppard insisted that his lawyer be present, the Coroner wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel, and the subpoena was torn up. The officers questioned him for several hours.

On July 9, Sheppard, at the request of the Coroner, reenacted the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner. The home was locked, so that Sheppard was obliged to wait outside until the Coroner arrived. Sheppard's performance was reported in detail by the news media, along with photographs. The newspapers also played up Sheppard's refusal to take a lie detector test and "the protective ring" thrown up by his family. Front-page newspaper headlines announced on the same day that "Doctor Balks At Lie Test; Retells Story." A column opposite that story contained an "exclusive" interview with Sheppard headlined: "Loved My Wife, She Loved Me,' Sheppard Tells News Reporter." The next day, another headline story disclosed that Sheppard had "again late yesterday refused to take a lie detector test," and quoted an Assistant County Attorney as saying that, "at the end of a nine-hour questioning of Dr. Sheppard, I felt he was now ruling [a test] out completely." But subsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with "truth serum."

On the 20th, the "editorial artillery" opened fire with a front-page charge that somebody is "getting away with murder." The editorial attributed the ineptness of the investigation to

"friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected. ... "

. ... July 21 a ... page-one editorial was headed: "Why No Inquest? Do It Now, Dr. Gerber." The Coroner called an inquest the same day, and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest, but were not permitted to participate.

When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes. At the end of the hearing, the Coroner announced that he "could" order Sheppard held for the grand jury, but did not do so. Throughout this period, the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. ...

A front-page editorial on July 30 asked: "Why Isn't Sam Sheppard in Jail?" It was later titled "Quit Stalling — Bring Him In." After calling Sheppard "the most unusual murder suspect ever seen around these parts," the article said that, "[e]xcept for some superficial questioning during Coroner Sam Gerber's inquest, he has been scot-free of any official

grilling. ... " It asserted that he was "surrounded by an iron curtain of protection [and] concealment." That night, at 10 o'clock, Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall, where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned — having been denied a temporary delay to secure the presence of counsel — and bound over to the grand jury. ...

With this background, the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge, Judge Blythin, was a candidate to succeed himself. Twenty-five days before the case was set, 75 veniremen were called as prospective jurors. All three Cleveland newspapers published the names and addresses of the veniremen. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors.

[S]eats were ... assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family, and the other to Marilyn's. ... Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. ... All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. ... The jurors themselves were constantly exposed to the news media. Every juror except one testified at voir dire to reading about the case in the Cleveland papers or to having heard broadcasts about it. ...

[I]n a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer. ... Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. The judge also overruled the motion for continuance based on the same ground. ... Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

. ... When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: "Would that have any effect upon your judgment?" Both replied, "No." This was accepted by the judge as sufficient. ...

. ... On December 9 ... Sheppard ... testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: "Bare-faced Liar,' Kerr Says of Sam." Captain Kerr never appeared as a witness at the trial.

. ... After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel ... the jurors were permitted to use the phones in the bailiffs' rooms. ... The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that this ground alone warranted a new trial, but the motion was overruled, and no evidence was taken on the question.

. ... A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. ... The press does not simply publish information about trials, but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. ... And where there was "no threat or menace to the integrity of the trial," *Craig v. Harney* ... we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

But the Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. California*. ... And the Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida*, (1940). ...

Among ... "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall v. United States* (1959), we set aside a federal conviction where the jurors were exposed, "through news accounts," to information that was not admitted at trial. ... Likewise, in *Irvin v. Dowd* (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction. ...

It is clear that the totality of circumstances in this case also warrants such an approach. ... Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered ... the Sheppard jurors were subjected to newspaper, radio, and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. ...

At intervals during the trial, the judge simply repeated his "suggestions" and "requests" that the jurors not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. ... The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy. ...

... [T]hree months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships. While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held.

In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." *Estes v. Texas*. ... The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits and to confer privately with client and co-counsel. It is designed to protect the witness

and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media, the judge lost his ability to supervise that environment.

The movement of the reporters ... caused frequent confusion and disruption of the trial. ... The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation. ...

There can be no question about the nature of the publicity which surrounded Sheppard's trial. ... As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. ... Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about the case ... we can assume that some of this material reached members of the jury.

The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings, the judge announced that neither he nor anyone else could restrict prejudicial news accounts. ... Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.

The carnival atmosphere at trial could easily have been avoided, since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes*, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. ...

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion ... the judge was aware of his responsibility in this respect. ... The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" dis-

seminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. ... The fact that many of the prejudicial news items can be traced to the prosecution as well as the defense aggravates the judge's failure to take any action. ...

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. ...

From the cases coming here, we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. ... Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised. ... If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. ... Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable, and worthy of disciplinary measures.

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

Excerpted by Sobhi Sidani

Peña-Rodriguez v. Colorado

580 U.S. ___ (2017)

> Vote: 5-3
> Decision: Reversed and remanded
> Majority: Kennedy, joined by Ginsburg, Breyer, Sotomayor, and Kagan
> Dissent: Thomas
> Dissent: Alito, joined by Roberts and Thomas

Justice Kennedy delivered the opinion of the Court.

The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

. ... The right to a jury trial in criminal cases was part of the Constitution as first drawn, and it was restated in the Sixth Amendment. Art. III, §2, cl. 3; Amdt. 6. By operation of the Fourteenth Amendment, it is applicable to the States.

Like all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense. A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. This principle, itself centuries old, is often referred to as the no-impeachment rule. The instant case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that an-other juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.

State prosecutors in Colorado brought criminal charges against petitioner, Miguel Angel Peña-Rodriguez, based on the following allegations. In 2007, in the bathroom of a Colorado horse-racing facility, a man sexually assaulted two teenage sisters. ... The State charged petitioner with harassment, unlawful sexual contact, and attempted sexual assault on a child. Before the jury was empaneled, members of the venire were repeatedly asked whether they believed that they could be fair and impartial in the case. ... None of the empaneled jurors expressed any reservations based on racial or any other bias. And none asked to speak with the trial judge. After a 3-day trial, the jury found petitioner guilty of unlawful sexual contact and harassment, but it failed to reach a verdict on the attempted sexual assault charge. ...

Following the discharge of the jury, petitioner's counsel entered the jury room to discuss the trial with the jurors. As the room was emptying, two jurors remained to speak with counsel in private. They stated that, during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Petitioner's counsel reported this to the court and, with the court's supervision, obtained sworn affidavits from the two jurors. The affidavits by the two jurors described a number of biased statements made by another juror, identified as Juror H. C. According to the two jurors, H. C. told the other jurors that he "believed the defendant was guilty because, in [H. C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." [App.] 110. The jurors reported that H. C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, " 'I think he did it because he's Mexican and Mexican men take whatever they want.' *Id.,* at 109. According to the jurors, H. C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.,* at 110. Finally, the jurors recounted that Juror H. C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was " 'an illegal.' " *Ibid.* (In fact, the witness testified during trial that he was a legal resident of the United States.)

After reviewing the affidavits, the trial court acknowledged H. C.'s apparent bias. But the court denied petitioner's motion for a new trial, noting that "[t]he actual deliberations that occur among the jurors are protected from. ... Like its federal counterpart, Colorado's Rule 606(b) generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict.. ... The verdict deemed final, petitioner was sentenced to two years' probation and was required to register as a sex offender. ... The Colorado Supreme Court affirmed by a vote of 4 to 3. ... The prevailing opinion relied on two decisions of this Court rejecting constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias. ... This Court granted certiorari to decide whether there is a constitutional exception to the no-impeachment rule for instances of racial bias. ...

Juror H. C.'s bias was based on petitioner's Hispanic identity, which the Court in prior cases has referred to as ethnicity, and that may be an instructive term here. ... Yet we have also used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons. ... This opinion refers to the nature of the bias as racial in keeping with the primary terminology employed by the parties and used in our precedents.

At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. The Mansfield rule ... prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations. American courts adopted the Mansfield rule. ... The common-law development of the no-impeachment rule reached a milestone in 1975, when Congress adopted. ... broad no-impeachment rule ... with exceptions only where the jury had considered prejudicial extraneous evidence or was subject to other outside influence. ...

The current version of [the law] states as follows:

"(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

"(2) Exceptions. A juror may testify about whether:

"(A) extraneous prejudicial information was improperly brought to the jury's attention;

"(B) an outside influence was improperly brought to bear on any juror; or

"(C) a mistake was made in entering the verdict on the verdict form."

This version of the no-impeachment rule has substantial merit. It promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts. ...

In addressing the scope of the common-law no-impeachment rule before Rule 606(b)'s adoption, the *Reid* and *McDonald* Courts noted the possibility of an exception to the rule in the "gravest and most important cases.". ... Yet since the enactment of Rule 606(b), the Court has addressed the precise question whether the Constitution mandates an exception to it in just two instances.

In its first case, *Tanner [v. US* (1987)] ... the Court rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial ... the Court's reasoning were the "long-recognized and very substantial concerns" supporting "the protection of jury deliberations from intrusive inquiry.". ... The *Tanner* Court echoed ... concern that, if attorneys could use juror testimony to attack verdicts, jurors would be "harassed and beset by the defeated party," thus destroying "all frankness and freedom of discussion and conference.". ... The Court was concerned, moreover, that attempts to impeach a verdict would "disrupt the finality of the process" and undermine both "jurors' willingness to return an unpopular verdict" and "the community's trust in a system that relies on the decisions of laypeople.". ...

In *Warger [v. Shauers* (2014)] ... [t]he Court again rejected the argument that, in the circumstances there, the jury trial right required an exception to the no-impeachment rule. ...

In *Warger*, however, the Court did reiterate that the no-impeachment rule may admit exceptions. ... [T]he Court warned of "juror bias so extreme that, almost by definition, the jury trial right has been abridged."

The recognition in *Warger* that there may be extreme cases where the jury trial right requires an exception to the no-impeachment rule must be interpreted in context as a guarded, cautious statement. ... Today, however, the Court faces the question that *Reid*, *McDonald*, and *Warger* left open ... whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.

It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. ...

. ... In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial. ... Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. Beginning in 1880, the Court interpreted the Fourteenth Amendment to prohibit the exclusion of jurors on the basis of race. *Strauder v. West Virginia*. ... The Court has repeatedly struck down laws and practices that systematically exclude racial minorities from juries. ... To guard against discrimination in jury selection, the Court has ruled that no litigant may exclude a prospective juror on the basis of race. ... The unmistakable principle underlying these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell* [(1979)]. ... Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers v. Ohio* (1991). ...

This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system. The two lines of precedent, however, need not conflict.

Racial bias of the kind alleged in this case differs ... from ... *McDonald* ... *Tanner*, or ... *Warger*. The behavior in those cases is troubling and unacceptable, but ... neither history nor common experience show that the jury system is rife with mischief of these or similar kinds. ...

The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy. ...

. ... All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. ... These limits seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord.

That is what happened here. In this case the alleged statements by a juror were egregious and unmistakable in their reliance on racial bias. Not only did juror H. C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis. ... With the understanding that they were under no obligation to speak out, the jurors approached petitioner's counsel, within a short time after the verdict, to relay their concerns about H. C.'s statements. ... Pursuant to local court rules, petitioner's counsel then sought and received permission from the court to contact the two jurors and obtain affidavits

limited to recounting the exact statements made by H. C. that exhibited racial bias. While the trial court concluded that Colorado's Rule 606(b) did not permit it even to consider the resulting affidavits, the Court's holding today removes that bar. When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.

. ... This case does not ask, and the Court need not address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. ... The Court also does not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted. ...

The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.

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

It is so ordered.

Excerpted by Sobhi Sidani

Eighth Amendment

Case List

Cruel and Unusual Punishment

Solem v. Helm (1983)
Furman v. Georgia (1972)
Gregg v. Georgia (1976)
Donald P. Roper, Superintendent, Potosi Correctional Center v. Christopher Simmons (2005)
Kansas v. Marsh (2006)
Baze v. Rees (2008)
Kennedy v. Louisiana (2008)
Atkins v. Virginia (2002)
Glossip v. Gross (2015)
City of Grants Pass v. Johnson (2024)

Cruel and Unusual Punishment

Solem v. Helm

463 U.S. 277 (1983)

> Vote: 5-4
> Decision: Affirmed
> Majority: Powell, joined by Brennan, Blackmun, Marshall, and Stevens
> Dissent: Burger, joined by O'Connor, Rehnquist, and White

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

By 1975, the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969, Helm was convicted of third-degree burglary. In 1972, he was convicted of obtaining money under false pretenses. In 1973, he was convicted of grand larceny. And in 1975, he was convicted of third-offense driving while intoxicated. The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979, Helm was charged with uttering a "no account" check for $100. ...

Ordinarily, the maximum punishment for uttering a "no account" check would have been five years' imprisonment in the state penitentiary and a $5,000 fine. ... As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.". ... The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a $25,000 fine. ... Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles.". ... The Governor is authorized to pardon prisoners, or to commute their sentences ... but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment. ... The court explained:

"'I think you certainly earned this sentence, and certainly proven that you're an habitual criminal, and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes. ... '"

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. ...

... Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments ... [i]t ... denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. ... It concluded ... that Helm's sentence was "grossly disproportionate to the nature of the offense.". ...

We granted certiorari to consider the Eighth Amendment question presented by this case. ... We now affirm.

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence. In 1215, three chapters of Magna Carta were devoted to the rule that "amercements" may not be excessive. ... These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. ... When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. ... The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment. ...

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality. ... Thus our Bill of Rights was designed in part to ensure that these rights were preserved. Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection — including the right to be free from excessive punishments.

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century. In the leading case of *Weems v. United States* (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense," ... and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard ... and determined that the sentence before it was "cruel in its excess of imprisonment," ... well as in its shackles and restrictions. ...

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright* ... and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of impris-

onment were not. There is also no historical support for such an exception. The common law principle incorporated into the Eighth Amendment clearly applied to prison terms. ... And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. ...

When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment. ... It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*. ... As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Rummel v. Estelle*. ... We agree, therefore, that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare.". ... This does not mean, however, that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional. As the Court noted in *Robinson v. California* ... a single day in prison may be unconstitutional in some circumstances.

When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized. First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. ... In *Coker*, the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. ... Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. ...

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus, in *Enmund*, the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. ... The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. ...

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. ...

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense, this assumption is justified, and courts traditionally have made these judgments — just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. ...

There are other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than

stealing a hundred dollars — a point recognized in statutes distinguishing petty theft from grand theft. ... Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus, a court is justified in viewing assault with intent to murder as more serious than simple assault. ... A court, of course, is entitled to look at a defendant's motive in committing a crime. Thus, a murder may be viewed as more serious when committed pursuant to a contract. ... This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree. ... The Sixth Amendment offers two good examples. A State is constitutionally required to provide an accused with a speedy trial, *Klopfer v. North Carolina*,(1967), but the delay that is permissible must be determined on a case-by-case basis. "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case. ... " *Barker v. Wingo*. ...

The right to a jury trial is another example. *Baldwin v. New York* (1970), in particular, illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. There the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized.". ... In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. ...

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The $100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft. It is easy to see why such a crime is viewed by society as among the less serious offenses. Helm, of course, was not charged simply with uttering a "no account" check, but also with being a habitual offender. And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor. All were nonviolent, and none was a crime against a person. ...

Helm's present sentence is life imprisonment without possibility of parole. ... Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. ... Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder ... and was authorized to impose a life sentence for treason ... first-degree manslaughter ... first-degree arson ... and kidnaping. ... No other crime was punishable so severely on the first offense. ... Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check — even when the bad-check writer had already committed six minor felonies. Moreover, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. ... In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," ... and we have no reason to doubt this finding. ... At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. ... We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada. It appears that Helm was treated more severely than he would have been in any other State.

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. ...

As a matter of law, parole and commutation are different concepts. ... The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. ... Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. ...

In South Dakota, commutation is more difficult to obtain than parole. ... In fact, no life sentence has been commuted in over eight years ... while parole — where authorized — has been granted regularly during that period. ... Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole. Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*. ... The possibility of commutation is nothing more than a hope for "an ad hoc exercise of clemency.". ... Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. The judgment of the Court of Appeals is accordingly

Affirmed.

Excerpted by Sobhi Sidani

Furman v. Georgia

408 U.S. 238 (1972)

> Vote: 5-4
> Decision: Reversed
> Majority: Per Curiam
> Concurrence: Douglas
> Concurrence: Brennan
> Concurrence: Stewart
> Concurrence: White
> Concurrence: Marshall
> Dissent: Burger, joined by Blackmun, Powell, and Rehnquist
> Dissent: Blackmun
> Dissent: Powell, joined by Burger, Blackmun, and Rehnquist
> Dissent: Rehnquist, joined by Burger, Blackmun, and Powell

Per Curiam

... Certiorari was granted limited to the following question:

"Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.

MR. JUSTICE STEWART, concurring.

The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide ...

The opinions of other Justices today have set out in admirable and thorough detail the origins and judicial history of the Eighth Amendment's guarantee against the infliction of cruel and unusual punishments, and the origin and judicial history of capital punishment. There is thus no need for me to review the historical materials here, and what I have to say can, therefore, be briefly stated. Legislatures — state and federal — have sometimes specified that the penalty of

death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct ... [Fo]r example ... [t]he Rhode Island Legislature has ordained the death penalty for a life term prisoner who commits murder. ...

If we were reviewing death sentences imposed under these or similar laws, we would be faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. We would need to decide whether a legislature — state or federal — could constitutionally determine that certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, the automatic penalty of death will provide maximum deterrence.

On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment ... When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.

The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. In a word, neither State has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses. As MR. JUSTICE WHITE so tellingly puts it, the "legislative will is not frustrated if the penalty is never imposed."

Instead, the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. *Robinson v. California,* [(1962)]. In the first place, it is clear that these sentences are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. *Weems v. United States,* [(1910)]. In the second place, it is equally clear that these sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race ... But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

For these reasons I concur in the judgments of the Court.

Excerpted by Rorie Solberg

Gregg v. Georgia

428 U.S. 153 (1976)

Vote: 7-2
Decision: Affirmed
Plurality: Steward, joined by Stevens and Powell
Concurrence: Burger
Concurrence: Rehnquist
Concurrence: White, joined by Burger and Rehnquist
Concurrence: Blackmun
Dissent: Marshall
Dissent: Brennan

Judgment of the Court ... announced by MR. JUSTICE STEWART.

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.

The petitioner, Troy Gregg, was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial was in two stages, a guilt stage and a sentencing stage. The evidence at the guilt trial established that, on November 21, 1973, the petitioner and a traveling companion, Floyd Allen, while hitchhiking north in Florida were picked up by Fred Simmons and Bob Moore. ...

A short time later, the four men interrupted their journey for a rest stop along the highway. The next morning the bodies of Simmons and Moore were discovered in a ditch nearby.

... P]etitioner and Allen, while in Simmons' car, were arrested in Asheville, N.C. In the search incident to the arrest a .25-caliber pistol, later shown to be that used to kill Simmons and Moore, was found in the petitioner's pocket. ... Allen recounted the events ... was as follows: After Simmons and Moore left the car, the petitioner stated that he intended to rob them ... the petitioner fired three shots and the two men fell near a ditch. The petitioner, at close range, then fired a shot into the head of each. He robbed them of valuables and drove away with Allen. ... Although Allen did not testify, a police detective recounted the substance of Allen's statements. ...

The trial judge submitted the murder charges to the jury on both felony murder and nonfelony murder theories. ... The jury found the petitioner guilty of two counts of armed robbery and two counts of murder.

At the penalty stage, which took place before the same jury, neither the prosecutor nor the petitioner's lawyer offered any additional evidence. ... The trial judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count. The judge further charged the jury that, in determining what sentence was appropriate, the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.

Finally, the judge instructed the jury that it "would not be authorized to consider [imposing] the penalty of death" unless it first found beyond a reasonable doubt one of these aggravating circumstances;

"One — That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies. ... "

"Two — That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment."

"Three — The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they involved the depravity of [the] mind of the defendant.". ...

Finding the first and second of these circumstances, the jury returned verdicts of death on each count.

The Supreme Court of Georgia affirmed the convictions and the imposition of the death sentences for murder. After reviewing the trial transcript and the record, including the evidence, and comparing the evidence and sentence in similar cases in accordance with the requirements of Georgia law, the court concluded that, considering the nature of the crime and the defendant, the sentences of death had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases. The death sentences imposed for armed robbery, however, were vacated on the grounds that the death penalty had rarely been imposed in Georgia for that offense, and that the jury improperly considered the murders as aggravating circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murders. ...

We granted the petitioner's application for a writ of certiorari limited to his challenge to the imposition of the death sentences in this case as "cruel and unusual" punishment in violation of the Eighth and the Fourteenth Amendments. ...

Before considering the issues presented, it is necessary to understand the Georgia statutory scheme for the imposition of the death penalty. The Georgia statute, as amended after our decision in *Furman v. Georgia* (1972), retains the death penalty for six categories of crime: murder, kidnaping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking. ... The capital defendant's guilt or innocence is determined in the traditional manner, either by a trial judge or a jury, in the first stage of a bifurcated trial. ...

After a verdict, finding, or plea of guilty to a capital crime, a presentence hearing is conducted before whoever made the determination of guilt. ... At the hearing: "[T]he judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, ... only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge [or jury] shall also hear argument by the defendant or his counsel and the prosecuting attorney ... regarding the punishment to be imposed." § 27-2503 (Supp. 1975). ...

In the assessment of the appropriate sentence to be imposed, the judge is also required to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. ... " § 27-2534.1(b) (Supp. 1975). The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute.

. ... The sentence of death may be imposed only if the jury (or judge) finds one of the statutory aggravating circumstances and then elects to impose that sentence. § 23102 (Supp. 1975). If the verdict is death, the jury or judge must specify the aggravating circumstance(s) found. ... In jury cases, the trial judge is bound by the jury's recommended sentence §§ 23102, 27-2514 (Supp. 1975). ...

In addition to the conventional appellate process available in all criminal cases, provision is made for special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death in the particular case. ...

We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. ... [W]e will consider the sentence of death imposed under the Georgia statutes at issue in this case.

The Court, on a number of occasions, has both assumed and asserted the constitutionality of capital punishment. ... But until *Furman v. Georgia* (1972), the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution. Although this issue was presented and addressed in *Furman*, it was not resolved by the Court. ... We now hold that the punishment of death does not invariably violate the Constitution.

The history of the prohibition of "cruel and unusual" punishment already has been reviewed at length. ... In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. ... But the Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States,* (1910). ...

[T]he Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles* [(1958)]. ... Thus, an assessment of contemporary values ... requires ... that we look to objective indicia that reflect the public attitude toward a given sanction. But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop v. Dulles*. ... [T]he punishment not be "excessive." ... "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. *Furman v. Georgia* ... (BURGER, C.J., dissenting). ... Second, the punishment must not be grossly out of proportion to the severity of the crime. *Trop v. Dulles*. ...

. ... [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people. This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Furman v. Georgia* ... (BURGER, C.J., dissenting). ...

We now consider specifically whether the sentence of death for the crime of murder is a per se violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question. ...

It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. ... The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases. ...

And the Fourteenth Amendment, adopted over three-quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of "life, liberty, or property" without due process of law. ...

Rejecting the contention that death by electrocution was "cruel and unusual," the Court in *In re Kemmler* [(1890)] ... reiterated: "[T]he punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.". ...

Four years ago, the petitioners in *Furman* and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. ... This view was accepted by two Justices. Three other Justices were unwilling to so far; focusing on the procedures by which convicted defendants were selected for the death penalty, rather than on the actual punishment inflicted ... they joined in the conclusion that the statutes before the Court were constitutionally invalid.

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. ... [I]t is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction. ... The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. ...

The jury also is a significant and reliable objective index of contemporary values, because it is so directly involved ... the actions of juries in many States since *Furman* are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974, at least 254 persons had been sentenced to death since *Furman,* and, by the end of March, 1976, more than 460 persons were subject to death sentences.

As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. ... The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders. ... "Retribution is no longer the dominant objective of the criminal law," *Williams v. New York* (1949), but neither is it a forbidden objective, nor one inconsistent with our respect for the dignity of men. ... Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death. Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The result simply have been inconclusive. ...

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. ... The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures. ...

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification, and thus is not unconstitutionally severe.

Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed. There is no question that death, as a punishment, is unique in its severity and irrevocability. ... When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. ... But we are concerned here only with the imposition of capital punishment for the crime of murder, and, when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

We now consider whether Georgia may impose the death penalty on the petitioner in this case. ...

. ... Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. ... *Furman* mandates that, where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

[A] bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.

But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. ... Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. ... When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations. ... In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition, these concerns are best met by a system that provides for a bifurcated proceeding. ... We do not intend to suggest that only the above-described procedures would be permissible under *Furman*, or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*. ...

We now turn to consideration of the constitutionality of Georgia's capital sentencing procedures. In the wake of *Furman*, Georgia amended its capital punishment statute ... to narrow the class of murderers subject to capital punishment by specifying statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. ... In addition, the jury's attention is focused on the characteristics of the person who committed the crime. ...

. ... Georgia's new sentencing procedures require, as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover ... the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face, these procedures seem to satisfy the concerns of *Furman*. ...

The petitioner contends, however, that the changes in the Georgia sentencing procedures are only cosmetic, that the arbitrariness and capriciousness condemned by *Furman* continue to exist in Georgia — both in traditional practices that still remain and in the new sentencing procedures adopted in response to *Furman*.

. ... The provision for appellate review in the Georgia capital sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. ... The new Georgia sentencing procedures ... focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way, the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

For the reasons expressed in this opinion, we hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution. Accordingly, the judgment of the Georgia Supreme Court is affirmed.

It is so ordered.

Excerpted by Sobhi Sidani

Donald P. Roper, Superintendent, Potosi Correctional Center v. Christopher Simmons

543 U.S. 551 (2005)

> Vote: 5-4
> Decision: Affirmed
> Majority: Kennedy, joined by Stevens, Ginsberg, Breyer, and Souter
> Concurrence: Stevens, joined by Ginsberg
> Dissent: O'Connor
> Dissent: Stevens, joined by Rehnquist and Thomas

Justice Kennedy delivered the opinion of the Court.

This case requires us to address ... whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime. In *Stanford v. Kentucky*, (1989), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question.

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. ... Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could "get away with it" because they were minors. ...

[A]fter receiving information of Simmons' involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. ... Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

The State charged Simmons with burglary, kidnaping, stealing, and murder in the first degree. As Simmons was 17 at the time of the crime, he was outside the criminal jurisdiction of Missouri's juvenile court system. ... He was tried as an

adult. At trial the State introduced Simmons' confession and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the penalty phase.

The State sought the death penalty. As aggravating factors, the State submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman. ... In mitigation Simmons' attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to the responsibility Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough.". ... In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." The jury recommended the death penalty ... the trial judge imposed the death penalty.

Simmons obtained new counsel, who moved in the trial court to set aside the conviction and sentence ... [t]he trial court ... denied the motion ... the Missouri Supreme Court affirmed. ... The federal courts denied Simmons' petition for a writ of habeas corpus. ...

After these proceedings in Simmons' case had run their course, this Court held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person. *Atkins v. Virginia* (2002). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed. The Missouri Supreme Court agreed ... "a national consensus has developed against the execution of juvenile offenders. ... " On this reasoning it set aside Simmons' death sentence and resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor.". ...

We granted certiorari ... and now affirm.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia* (1972). ... As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. ... By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. ...

[I]n *Stanford v. Kentucky* (1989), the Court ... referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under

18. The Court noted that 22 of the 37 death penalty States permitted the death penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year-old offenders. These numbers, in the Court's view, indicated there was no national consensus "sufficient to label a particular punishment cruel and unusual.". ...

The same day the Court decided *Stanford*, it held that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded. *Penry v. Lynaugh* (1989). ... Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. The Court noted objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded. ... [T]he Court determined that executing mentally retarded offenders "has become truly unusual, and it is fair to say that a national consensus has developed against it.". ...

Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*. The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. ... By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. ... Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so. ...

There is, to be sure, at least one difference between the evidence of consensus in *Atkins* and in this case. Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. Sixteen States that permitted the execution of the mentally retarded at the time of *Penry* had prohibited the practice by the time we heard *Atkins*. By contrast ... [f]ive States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years ... we still consider the change from *Stanford* to this case to be significant.

. ... The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation. ... Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.

The slower pace of abolition of the juvenile death penalty over the past 15 years, moreover, may have a simple explanation. When we heard *Penry*, only two death penalty States had already prohibited the execution of the mentally retarded. When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under

18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier than the impropriety of executing the mentally retarded. ...

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal.". ...

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First ... "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*. ... The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*. ... The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. ...

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18 ... however, a line must be drawn. ... The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest. ...

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments.". ... It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. ... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. ...

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment of the Missouri Supreme Court ... is affirmed.

It is so ordered.

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary ... ha[s] neither FORCE nor WILL but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961). But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define and

point out their duty in every particular case that comes before them." *Id.,* at 471. Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years–not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," *ante*, at 6 (internal quotation marks omitted), of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Ante*, at 9 (internal quotation marks omitted). The Court thus proclaims itself sole arbiter of our Nation's moral standards–and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent. ...

Excerpted by Sobhi Sidani

Kansas v. Marsh

548 U.S. 163 (2006)

> Vote: 5-4
> Decision: Reversed and remanded
> Majority: Thomas, joined by Roberts, Scalia, Kennedy, and Alito
> Concurrence: Scalia
> Dissent: Stevens
> Dissent: Souter, joined by Stevens, Ginsberg, and Breyer

Justice Thomas delivered the opinion of the Court.

Kansas law provides that if a unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances, the death penalty shall be imposed. ... We must decide whether this statute, which requires the imposition of the death penalty when the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise, violates the Constitution. We hold that it does not.

Respondent Michael Lee Marsh II broke into the home of Marry Ane Pusch and lay in wait for her to return. When Marry Ane entered her home with her 19-month-old daughter, M. P., Marsh repeatedly shot Marry Ane, stabbed her, and slashed her throat. The home was set on fire with the toddler inside, and M. P. burned to death.

The jury convicted Marsh of the capital murder of M. P., the first-degree premeditated murder of Marry Ane, aggravated arson, and aggravated burglary. The jury found beyond a reasonable doubt the existence of three aggravating circumstances, and that those circumstances were not outweighed by any mitigating circumstances. On the basis of those findings, the jury sentenced Marsh to death for the capital murder of M. P. ...

On direct appeal, Marsh challenged §21–4624(e), which reads: "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances ... is not outweighed by any mitigating circumstances ... the defendant shall be sentenced to death. ... " Focusing on the phrase "shall be sentenced to death," Marsh argued that §21–4624(e) establishes an unconstitutional presumption in favor of death because it directs imposition of the death penalty when aggravating and mitigating circumstances are in equipoise.

The Kansas Supreme Court agreed, and held that the Kansas death penalty statute ... is facially unconstitutional. ... The court concluded that the statute's weighing equation violated the Eighth and Fourteenth Amendments of the United States Constitution because, "[i]n the event of equipoise ... the death penalty would be required.". ... The Kansas Supreme Court affirmed Marsh's conviction and sentence for aggravated burglary and premeditated murder of Marry Ane, and reversed and remanded for new trial Marsh's convictions for capital murder of M. P. and aggravated arson. We granted certiorari ... and now reverse the Kansas Supreme Court's judgment that Kansas' capital sentencing statute ... is facially unconstitutional. ...

Having considered the parties' arguments, we conclude that we have jurisdiction in this case and that the constitutional issue is properly before the Court.

This case is controlled by *Walton v. Arizona* (1990), overruled on other grounds, *Ring v. Arizona* (2002). In that case, a jury had convicted Walton of a capital offense. At sentencing, the trial judge found the existence of two aggravating circumstances and that the mitigating circumstances did not call for leniency, and sentenced Walton to death. ... The Arizona Supreme Court affirmed, and this Court granted certiorari to resolve the conflict between the Arizona Supreme Court's decision in *State v. Walton,* (1989), and the Ninth Circuit's decision in *Adamson v. Ricketts* (1988). ... Consistent with the Ninth Circuit's conclusion in *Adamson*, Walton argued to this Court that the Arizona capital sentencing system created an unconstitutional presumption in favor of death because it "tells an Arizona sentencing judge who finds even a single aggravating factor, that death must be imposed, unless—as the Arizona Supreme Court put it in Petitioner's case—there are 'outweighing mitigating factors.' ". ...

Rejecting Walton's argument ... [t]his Court noted that, as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation, and that a state statute that permits a jury to consider any mitigating evidence comports with that requirement. ... The Court also pointedly observed that while the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence. ... So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death. ... Indeed, *Walton* suggested that the only capital sentencing systems that would be impermissibly mandatory were those that would "automatically impose death upon conviction for certain types of murder."

Contrary to Marsh's contentions and the Kansas Supreme Court's conclusions ... the question presented in the instant case was squarely before this Court in *Walton*. Though, as Marsh notes, the *Walton* Court did not employ the term

"equipoise,". ... [T]he dissent in *Walton* reinforces what is evident from the opinion and the judgment of the Court—that the equipoise issue was before the Court, and that the Court resolved the issue in favor of the State. ... [A]lthough *Walton* did not discuss the equipoise issue explicitly, that issue was resolved by its holding. ...

Our conclusion that *Walton* controls here is reinforced by the fact that the Arizona and Kansas statutes are comparable in important respects. Similar to the express language of the Kansas statute, the Arizona statute at issue in *Walton* has been consistently construed to mean that the death penalty will be imposed upon a finding that aggravating circumstances are not outweighed by mitigating circumstances. ... Like the Kansas statute, the Arizona statute places the burden of proving the existence of aggravating circumstances on the State, and both statutes require the defendant to proffer mitigating evidence.

The statutes are distinct in one respect. The Arizona statute ... tasks the defendant with the burden of proving sufficient mitigating circumstances to overcome the aggravating circumstances. ... In contrast, the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators. ... This distinction operates in favor of Kansas capital defendants. Otherwise the statutes function in substantially the same manner and are sufficiently analogous for our purposes. Thus, *Walton* is not distinguishable from the instant case.

Accordingly, the reasoning of *Walton* requires approval of the Kansas death penalty statute. At bottom, in *Walton*, the Court held that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances. A fortiori, Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise.

Even if, as Marsh contends, *Walton* does not directly control, the general principles set forth in our death penalty jurisprudence would lead us to conclude that the Kansas capital sentencing system is constitutionally permissible. Together, our decisions in *Furman v. Georgia*, (1972) and *Gregg v. Georgia*, (1976) establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. ... So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. ...

The use of mitigation evidence is a product of the requirement of individualized sentencing. ... In *Lockett v. Ohio*, (1978), a plurality of this Court held that "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original.) The Court has held that the sentencer must have full access to this "'highly relevant'" information. Id., at 603 (alteration omitted) (quoting Williams v. New York, 337 U. S. 241, 247 (1949)). Thus, in *Lockett*, the Court struck down the Ohio death penalty statute as unconstitutional because, by limiting a jury's consideration of mitigation to three factors specified in the statute, it prevented sentencers in capital cases from giving independent weight to mitigating evidence militating in favor of a sentence other than death. ...

In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. ... [T]his Court has held that the States enjoy " 'a constitutionally permissible range of discretion in imposing the death penalty.' " *Blystone [v. PA* (1990)]. ...

The Kansas death penalty statute satisfies the constitutional mandates of *Furman* and its progeny because it rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. It does not interfere, in a constitutionally significant way, with a jury's ability to give independent weight to evidence offered in mitigation.

Kansas' procedure narrows the universe of death-eligible defendants consistent with Eighth Amendment requirements. Under Kansas law, imposition of the death penalty is an option only after a defendant is convicted of capital murder. ... Once convicted of capital murder, a defendant becomes eligible for the death penalty only if the State seeks a separate sentencing hearing ... and proves beyond a reasonable doubt the existence of one or more statutorily enumerated aggravating circumstances. ... .

. ...

Contrary to Marsh's argument, §21–4624(e) does not create a general presumption in favor of the death penalty in the State of Kansas. Rather, the Kansas capital sentencing system is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction. ... [T]he State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence. Absent the State's ability to meet that burden, the default is life imprisonment. ... This system does not create a presumption that death is the appropriate sentence for capital murder.

Nor is there any force behind Marsh's contention that an equipoise determination reflects juror confusion or inability to decide between life and death. ... The Kansas jury instructions clearly inform the jury that a determination that the evidence is in equipoise is a decision for—not a presumption in favor of—death. Kansas jurors, presumed to follow their instructions, are made aware that: a determination that mitigators outweigh aggravators is a decision that a life sentence is appropriate; a determination that aggravators outweigh mitigators or a determination that mitigators do not outweigh aggravators—including a finding that aggravators and mitigators are in balance—is a decision that death is the appropriate sentence. ...

Justice Souter argues (hereinafter the dissent) that the advent of DNA testing has resulted in the "exoneratio[n]" of "innocent" persons "in numbers never imagined before the development of DNA tests.". ...

But the availability of DNA testing, and the questions it might raise about the accuracy of guilt-phase determinations in capital cases, is simply irrelevant to the question before the Court today, namely, the constitutionality of Kansas' capital sentencing system. Accordingly, the accuracy of the dissent's factual claim that DNA testing has established the "innocence" of numerous convicted persons under death sentences—and the incendiary debate it invokes—is beyond the scope of this opinion. ...

We hold that the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional. Accordingly, we reverse the judgment of the Kansas Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Excerpted by Sobhi Sidani

Baze v. Rees

553 U.S. 35 (2008)

> Vote: 7-2
> Decision: Affirmed
> Plurality: Roberts, joined by Kennedy, and Alito
> Concurrence: Alito
> Concurrence: Stevens (in judgment)
> Concurrence: Scalia (in judgment), joined by Thomas
> Concurrence: Thomas (in judgment), joined by Scalia
> Concurrence: Breyer (in judgment)
> Dissent: Ginsberg, joined by Souter

Chief Justice Roberts announced the judgment of the Court. ...

Like 35 other States and the Federal Government, Kentucky has chosen to impose capital punishment for certain crimes. ... Kentucky has altered its method of execution over time to a more humane means of carrying out the sentence. That progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty.

Petitioners in this case ... contend that the lethal injection protocol is unconstitutional under the Eighth Amendment's ban on "cruel and unusual punishments," because of the risk that the protocol's terms might not be properly followed, resulting in significant pain. ...

The trial court held extensive hearings and entered detailed Findings of Fact and Conclusions of Law. It recognized that "[t]here are no methods of legal execution that are satisfactory to those who oppose the death penalty on moral, religious, or societal grounds," but concluded that Kentucky's procedure "complies with the constitutional requirements against cruel and unusual punishment." . ... The State Supreme Court affirmed. We too agree that petitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment. The judgment below is affirmed.

. ... A total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States. It is also the method used by the Federal Government.

Of these 36 States, at least 30 (including Kentucky) use the same combination of three drugs in their lethal injection protocols. ... The first drug, sodium thiopental (also known as Pentathol) ... induces a deep, comalike unconsciousness when given in the amounts used for lethal injection. ... The second drug, pancuronium bromide (also known as Pavulon) ... inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration. ... Potassium chloride, the third drug, interferes with ... the heart, inducing cardiac arrest. ...

Kentucky replaced electrocution with lethal injection in 1998. ... Prisoners sentenced before 1998 have the option of electing either electrocution or lethal injection, but lethal injection is the default if—as is the case with petitioners—the prisoner refuses to make a choice at least 20 days before the scheduled execution. ... Kentucky's protocol called for the injection of 2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. In 2004, as a result of this litigation, the department chose to increase the amount of sodium thiopental from 2 grams to 3 grams. ... The protocol reserves responsibility for inserting the IV catheters to qualified personnel having at least one year of professional experience. ... Kentucky uses a certified phlebotomist and an emergency medical technician (EMT) to perform the venipunctures necessary for the catheters. ...

Kentucky's execution facilities consist of the execution chamber, a control room separated by a one-way window, and a witness room. The warden and deputy warden remain in the execution chamber with the prisoner, who is strapped to a gurney. The execution team administers the drugs remotely from the control room through five feet of tubing. If ... determined ... through visual inspection, the prisoner is not unconscious within 60 seconds following the delivery of the sodium thiopental ... a new 3-gram dose of thiopental is administered. ... In addition to assuring that the first dose of thiopental is successfully administered, the warden and deputy warden also watch for any problems with the IV catheters and tubing. A physician is present to assist in any effort to revive the prisoner in the event of a last-minute stay of execution. ... An electrocardiogram (EKG) verifies the death of the prisoner. Only one Kentucky prisoner, Eddie Lee Harper, has been executed since the Commonwealth adopted lethal injection. There were no reported problems at Harper's execution.

Petitioners Ralph Baze and Thomas C. Bowling were each convicted of two counts of capital murder and sentenced to death. The Kentucky Supreme Court upheld their convictions and sentences on direct appeal. ...

Baze and Bowling sued three state officials ... seeking to have Kentucky's lethal injection protocol declared unconstitutional. After a 7-day bench trial ... the court upheld the protocol, finding there to be minimal risk of various claims of improper administration of the protocol. On appeal, the Kentucky Supreme Court stated that a method of execution violates the Eighth Amendment when it "creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death.". ... Applying that standard, the court affirmed.

We granted certiorari to determine whether Kentucky's lethal injection protocol satisfies the Eighth Amendment. We hold that it does.

. ... We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. ... It necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions. Petitioners do not claim that it does. Rather, they contend that the Eighth Amendment prohibits procedures that create an "unnecessary risk" of pain. ... Petitioners envision that the quantum of risk necessary to make out an Eighth Amendment claim will vary according to the severity of the pain and the availability of alternatives. ... Kentucky responds that this "unnecessary risk" standard is tantamount to a requirement that States adopt the " 'least risk' " alternative in carrying out an execution, a standard the Commonwealth contends will cast recurring constitutional doubt on any procedure adopted by the States. Instead, Kentucky urges the Court to approve the " 'substantial risk' " test. ...

This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment. In *Wilkerson v. Utah* (1879) ... [w]e noted there the difficulty of "defin[ing] with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.". ... [T]he *Wilkerson* Court simply noted that "it is safe to affirm that punishments of torture ... and all others in the same line of unnecessary cruelty, are forbidden" by the Eighth Amendment ... each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain. ... " to the death sentence through torture and the like.

We carried these principles further in *In re Kemmler* (1890). There ... we observed that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.". ...

Petitioners ... concede that "if performed properly," an execution carried out under Kentucky's procedures would be "humane and constitutional.". ... That is because ... proper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride. ...

Instead, petitioners claim that there is a significant risk ... that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered. Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. ... We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Farmer v. Brennan*, (1994). Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual. ... [A]n isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm."

Much of petitioners' case rests on the contention that they have identified a significant risk of harm that can be eliminated by adopting alternative procedures, such as a one-drug protocol ... and additional monitoring by trained personnel ... a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly

or marginally safer alternative. Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining "best practices" for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach ... would embroil the courts in ongoing scientific controversies ... and would substantially intrude ... state legislatures in implementing their execution procedures. ... Accordingly, we reject petitioners' proposed "unnecessary risk" standard. ...

Instead, the proffered alternatives must effectively address a "substantial risk of serious harm.". ... To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.

... [I]t is difficult to regard a practice as "objectively intolerable" when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution. The Federal Government uses lethal injection as well. ... This broad consensus goes not just to the method of execution, but also to the specific three-drug combination used by Kentucky. Thirty States, as well as the Federal Government, use a series of sodium thiopental, pancuronium bromide, and potassium chloride, in varying amounts. ...

In order to meet their "heavy burden" of showing that Kentucky's procedure is "cruelly inhumane," *Gregg*, petitioners point to numerous aspects of the protocol that they contend create opportunities for error. ... [P]etitioners have not shown that the risk of an inadequate dose of the first drug is substantial. And we reject the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified.

. ...

[T]he presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems. ... In light of these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation. Nor does Kentucky's failure to adopt petitioners' proposed alternatives demonstrate that the Commonwealth's execution procedure is cruel and unusual. ...

In any event, the Commonwealth's continued use of the three-drug protocol cannot be viewed as posing an "objectively intolerable risk" when no other State has adopted the one-drug method and petitioners proffered no study showing that it is an equally effective manner of imposing a death sentence. ... [T]he comparative efficacy of a one-drug method of execution is not so well established that Kentucky's failure to adopt it constitutes a violation of the Eighth Amendment.

. ...

A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

. ... Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. Petitioners agree that, if administered as intended, that procedure will result in a painless death. The risks ... cannot

remotely be characterized as "objectively intolerable." Kentucky's decision to adhere to its protocol ... cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment. ... The judgment ... that Kentucky's procedure is consistent with the Eighth Amendment is, accordingly, affirmed.

It is so ordered.

Excerpted by Sobhi Sidani

Kennedy v. Louisiana

554 U.S. 407 (2008)

> Vote: 5-4
> Decision: Reversed and Remanded
> Majority: Kennedy, joined by Stevens, Souter, Ginsberg, and Breyer
> Dissent: Alito, joined by Roberts, Thomas, and Scalia

Justice Kennedy delivered the opinion of the Court.

. ... Patrick Kennedy, the petitioner here, seeks to set aside his death sentence under the Eighth Amendment. He was charged by the respondent, the State of Louisiana, with the aggravated rape of his then-8-year-old stepdaughter. After a jury trial petitioner was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12 years of age. ... This case presents the question whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. We hold the Eighth Amendment prohibits the death penalty for this offense. The Louisiana statute is unconstitutional.

Petitioner's crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death. ... [O]n March 2, 1998, petitioner called 911 to report that his stepdaughter, referred to here as L. H., had been raped. ... Two neighborhood boys, petitioner told the operator, had dragged L. H. from the garage to the yard, pushed her down, and raped her. ...

When police arrived ... they found L. H. on her bed ... bleeding profusely from the vaginal area. Petitioner told police he had carried her from the yard to the bathtub and then to the bed. Consistent with this explanation, police found a thin line of blood drops in the garage on the way to the house and then up the stairs. Once in the bedroom, petitioner had used a basin of water and a cloth to wipe blood from the victim. This later prevented medical personnel from collecting a reliable DNA sample.

L. H. was transported to the Children's Hospital. An expert in pediatric forensic medicine testified that L. H.'s injuries were the most severe he had seen from a sexual assault in his four years of practice. ...

Eight days after the crime, and despite L. H.'s insistence that petitioner was not the offender, petitioner was arrested for the rape. The State's investigation had drawn the accuracy of petitioner and L. H.'s story into question. ...

Police ... found that petitioner made two telephone calls on the morning of the rape. Sometime before 6:15 a.m., petitioner called his employer and left a message that he was unavailable to work that day. Petitioner called back between 6:30 and 7:30 a.m. to ask a colleague how to get blood out of a white carpet because his daughter had " 'just become a young lady.' ". ... At 7:37 a.m., petitioner called B & B Carpet Cleaning and requested urgent assistance in removing bloodstains from a carpet. Petitioner did not call 911 until about an hour and a half later. ...

About a month after petitioner's arrest L. H. was removed from the custody of her mother, who had maintained until that point that petitioner was not involved in the rape. On June 22, 1998, L. H. was returned home and told her mother for the first time that petitioner had raped her. And on December 16, 1999, about 21 months after the rape, L. H. recorded her accusation in a videotaped interview with the Child Advocacy Center.

The State charged petitioner with aggravated rape of a child under La. Stat. Ann. §14:42 ... and sought the death penalty. ...

The jury having found petitioner guilty of aggravated rape, the penalty phase ensued. ...

The jury unanimously determined that petitioner should be sentenced to death. The Supreme Court of Louisiana affirmed. ...

The court ... noting that, while *Coker* bars the use of the death penalty as punishment for the rape of an adult woman, it left open the question which, if any, other nonhomicide crimes can be punished by death consistent with the Eighth Amendment. Because " 'children are a class that need special protection,' ". ...

... [T]he Supreme Court of Louisiana rejected the petitioner's argument that the death penalty for the rape of a child under 12 years is disproportionate and upheld the constitutionality of the statute. ...

We granted certiorari. ...

The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins* [v. *VA* (2002)]. ... The Court explained in *Atkins* ... and *Roper* [v. *Simmons* (2005)] ... that the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." *Weems v. United States* (1910). Whether this requirement has been fulfilled is determined ... by the norms that "currently prevail." *Atkins*. ... The Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles* (1958). ...

As we shall discuss, punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. ... It is the last of these, retribution, that most often can contradict the law's own ends. ... When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.

For these reasons we have explained that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " *Roper*. ... Though the death penalty is not invariably unconstitutional ... the Court insists upon confining the instances in which the punishment can be imposed.

Applying this principle, we held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime ... further ... the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim. ...

Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments. ...

The existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in *Roper*, *Atkins*, *Coker*, and *Enmund*, and we follow the approach of those cases here. ...

In 1925, 18 States, the District of Columbia, and the Federal Government had statutes that authorized the death penalty for the rape of a child or an adult. ... In 1972, *Furman* invalidated most of the state statutes authorizing the death penalty for the crime of rape; and in *Furman's* aftermath only six States reenacted their capital rape provisions. Three States ... did so with respect to all rape offenses. Three States ... did so with respect only to child rape. ... All six statutes were later invalidated under state or federal law. ...

Louisiana reintroduced the death penalty for rape of a child in 1995. ... Under the current statute, any ... intercourse with a child under the age of 13 constitutes aggravated rape and is punishable by death ... [m]istake of age is not a defense. ... Five States have since followed Louisiana's lead. ... Four of these States' statutes are more narrow than Louisiana's. ...

By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse. ...

Respondent would include Florida among those States that permit the death penalty for child rape. The state statute does authorize, by its terms, the death penalty for "sexual battery upon ... a person less than 12 years of age." ... however, the Supreme Court of Florida held the death penalty for child sexual assault to be unconstitutional. ... It acknowledged ... that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment,". ...

The statistics in *Enmund* [*v. Florida* (1982)] bear a ... similarity to the instant case. There eight jurisdictions had authorized imposition of the death penalty solely for participation in a robbery during which an accomplice committed mur-

der ... and six defendants between 1954 and 1982 had been sentenced to death for felony murder where the defendant did not personally commit the homicidal assault. ... These facts, the Court concluded, "weigh[ed] on the side of rejecting capital punishment for the crime.". ...

The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty. As mentioned above, only six of those jurisdictions authorize the death penalty for rape of a child. ...

At least one difference between this case and our Eighth Amendment proportionality precedents must be addressed. Respondent and its *amici* suggest that some States have an "erroneous understanding of this Court's Eighth Amendment jurisprudence." Brief for Missouri Governor Matt Blunt et al. as *Amici Curiae* 10. They submit that the general propositions set out in *Coker,* contrasting murder and rape, have been interpreted in too expansive a way, leading some state legislatures to conclude that *Coker* applies to child rape when in fact its reasoning does not, or ought not, apply to that specific crime.

This argument seems logical at first, but in the end it is unsound. In *Coker,* a four-Member plurality of the Court, plus Justice Brennan and Justice Marshall in concurrence, held that a sentence of death for the rape of a 16-year-old woman, who was a minor under Georgia law, see Ga. Code Ann. §74–104 (1973), yet was characterized by the Court as an adult, was disproportionate and excessive under the Eighth Amendment.

The plurality noted that only one State had a valid statute authorizing the death penalty for adult rape and that "in the vast majority of cases, at least 9 out of 10, juries ha[d] not imposed the death sentence." *Coker.* ...

Coker's holding was narrower than some of its language read in isolation. The *Coker* plurality framed the question as whether, "with respect to rape of an adult woman," the death penalty is disproportionate punishment. ... Respondent cites no reliable data to indicate that state legislatures have read *Coker* to bar capital punishment for child rape and, for this reason, have been deterred from passing applicable death penalty legislation. ... We conclude on the basis of this review that there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional. ...

There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society. ... [N]o individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963. ...

We turn ... to the resolution of the question before us, which is informed by our precedents and our own understanding of the Constitution and the rights it secures.

It must be acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death. ... The attack was not just on her but on her childhood. For this reason, we should be most reluctant to rely upon the language of the plurality in *Coker*. ... We cannot dismiss the years of long anguish that must be endured by the victim of child rape. It does not follow, though, that capital punishment is a propor-

tionate penalty for the crime. The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish "be exercised within the limits of civilized standards." *Trop*. ... It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment. ...

Our concern here is limited to crimes against individual persons. We do not address ... offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken. ...

The same distinction between homicide and other serious violent offenses against the individual informed the Court's analysis in *Enmund* ... where the Court held that the death penalty for the crime of vicarious felony murder is disproportionate to the offense. The Court repeated there the fundamental, moral distinction between a "murderer" and a "robber," noting that while "robbery is a serious crime deserving serious punishment," it is not like death in its "severity and irrevocability."

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but ... they cannot be compared to murder in their "severity and irrevocability.". ...

There are ... serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a "special risk of wrongful execution" in some child rape cases. *Atkins*. ... This undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment. Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement. ... [C]hild rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed. ... In addition, by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim. Assuming the offender behaves in a rational way ... the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime. ...

Each of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape. Taken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense. These considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the rape of a child. ...

The judgment of the Supreme Court of Louisiana upholding the capital sentence is reversed. This case is remanded for further proceedings not inconsistent with this opinion

It is so ordered.

Excerpted by Sobhi Sidani

Atkins v. Virginia

536 U.S. 304 (2002)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: Stevens, joined by Ginsberg, Souter, Breyer, O'Connor, and Kennedy
> Dissent: Rehnquist, joined by Scalia and Thomas
> Dissent: Scalia, joined by Rehnquist and Thomas

JUSTICE STEVENS delivered the opinion of the Court.

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes ... however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. [T]he American public ... have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

Petitioner, Daryl Renard Atkins, was convicted of abduction, armed robbery, and capital murder, and sentenced to death. ... Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

. ... At the penalty phase of the trial, the State introduced victim impact evidence and proved two aggravating circumstances: future dangerousness and "vileness of the offense." To prove future dangerousness, the State relied on Atkins' prior felony convictions as well as the testimony of four victims of earlier robberies and assaults. To prove the second aggravator, the prosecution relied upon the trial record, including pictures of the deceased's body and the autopsy report.

In the penalty phase, the defense relied on one witness ... who had evaluated Atkins before trial and concluded that he was "mildly mentally retarded.". ... [B]ased on interviews with people who knew Atkins, a review of school and court records, and ... that Atkins had a full scale IQ of 59. The jury sentenced Atkins to death, but the Virginia Supreme Court ordered a second sentencing hearing. ... The State presented an expert rebuttal witness ... who expressed the opinion that Atkins was not mentally retarded, but rather was of "average intelligence, at least," and diagnosable as having antisocial personality disorder. ... The jury again sentenced Atkins to death. The Supreme Court of Virginia affirmed. ...

Atkins did not argue ... that his sentence was disproportionate ... but he did contend "that he is mentally retarded and thus cannot be sentenced to death.". ... The court was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score.". ...

Because of the gravity of the concerns ... and in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years, we granted certiorari to revisit the issue that we first addressed in the *Penry* [*v. Lynaugh* (1989)] case. ...

The Eighth Amendment succinctly prohibits "excessive" sanctions ... n *Weems* v. *United States* (1910), we held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. We explained "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense.". ...

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. ...

Proportionality review under those evolving standards should be informed by " 'objective factors to the maximum possible extent,' " see *Harmelin [v. Michigan* (1991)] ... We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry* Relying in part on such legislative evidence, we have held that death is an impermissibly excessive punishment for the rape of an adult woman, *Coker* v. *Georgia,* (1977), or for a defendant who neither took life, attempted to take life, nor intended to take life, *Enmund* v. *Florida* (1982). ...

We also acknowledged in *Coker* that the objective evidence, though of great importance, did not "wholly determine" the controversy, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."

. ...

Thus, in cases involving a consensus, our own judgment is "brought to bear," *Coker*, by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.

Guided by our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.

. ... In [1986] Georgia ... led ... the enactment of the first state statute prohibiting such executions. In 1988, when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a "sentence of death shall not be carried out upon a person who is mentally retarded." In 1989, Maryland enacted a similar prohibition. It was in that year that we decided *Penry*, and concluded that those two state enactments, "even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.". ...

Much has changed since then. Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue. In 1990, Kentucky and Tennessee enacted

statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998. There appear to have been no similar enactments during the next two years, but in 2000 and 2001 six more States–South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina–joined the procession. The Texas Legislature unanimously adopted a similar bill, and bills have passed at least one house in other States, including Virginia and Nevada.

It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of reinstating ... executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. ... Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. ... Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States. [E]ven among those States that ... have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*. ... The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.

. ...

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial ... however ... they have diminished capacities to understand and process information. ... There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan. ... Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

In light of these deficiencies, our death penalty jurisprudence provides two reasons ... that the mentally retarded should be categorically excluded from execution. First, there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders. *Gregg v. Georgia* ... identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund [v. Florida* 1982]. ...

With respect to retribution –the interest in seeing that the offender gets his "just deserts"–the severity of the appropriate punishment necessarily depends on the culpability of the offender. ... If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

With respect to deterrence ... "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,'" *Enmund*. ... Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. ... Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable ... that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. ... Thus, executing the mentally retarded will not measurably further the goal of deterrence. ...

As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. ... Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

. ... Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive. ...

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

It is so ordered.

Justice Scalia, with whom the Chief Justice and Justice Thomas join, dissenting.

Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.

I begin with a brief restatement of facts that are abridged by the Court but important to understanding this case. After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw $200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.

. ... A psychologist testified that petitioner was mildly mentally retarded with an IQ of 59, that he was a "slow learne[r]," who showed a "lack of success in pretty much every domain of his life," and that he had an "impaired" capacity to appreciate the criminality of his conduct and to conform his conduct to the law. Petitioner's family members offered additional evidence in support of his mental retardation claim (*e.g.,* that petitioner is a "follower,"). The State contested the

evidence of retardation and presented testimony of a psychologist who found "absolutely no evidence other than the IQ score ... indicating that [petitioner] was in the least bit mentally retarded" and concluded that petitioner was "of average intelligence, at least." [257 Va. 160, 179, 510 S. E. 2d 445, 457 (1999)]

The jury also heard testimony about petitioner's 16 prior felony convictions for robbery, attempted robbery, abduction, use of a firearm, and maiming.

Under our Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if it falls within one of two categories: "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford* v. *Wainwright* (1986), and modes of punishment that are inconsistent with modern "standards of decency," as evinced by objective indicia, the most important of which is "legislation enacted by the country's legislatures," *Penry* v. *Lynaugh* (1989).

The Court makes no pretense that execution of the mildly mentally retarded would have been considered "cruel and unusual" in 1791. Only the *severely* or *profoundly* mentally retarded, commonly known as "idiots," enjoyed any special status under the law at that time. They, like lunatics, suffered a "deficiency in will" rendering them unable to tell right from wrong. 4 W. Blackstone, Commentaries on the Laws of England 24 (1769). ...

The Court is left to argue, therefore, that execution of the mildly retarded is inconsistent with the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles,* (1958). ...

The Court pays lipservice to these precedents as it miraculously extracts a "national consensus" forbidding execution of the mentally retarded ... from the fact that 18 States–less than *half* (47%) of the 38 States that permit capital punishment (for whom the issue exists)–have very recently enacted legislation barring execution of the mentally retarded ...

But let us accept, for the sake of argument, the Court's faulty count. That bare number of States alone–*18*–should be enough to convince any reasonable person that no "national consensus" exists. How is it possible that agreement among 47% of the death penalty jurisdictions amounts to "consensus"? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual on "evolving standards" grounds ...

The Court attempts to bolster its embarrassingly feeble evidence of "consensus" with the following: "It is not so much the number of these States that is significant, but the *consistency* of the direction of change." (emphasis added). But in what *other* direction *could we possibly* see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change (except precipitate undoing of what had just been done) was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus. That is to say, to be accurate the Court's "*consistency*-of-the-direction-of-change" point should be recast into the following unimpressive observation: "No State has yet undone its exemption of the mentally retarded, one for as long as 14 whole years."

. ...

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. ...

Beyond the empty talk of a "national consensus," the Court gives us a brief glimpse of what really underlies today's decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor even* by the current moral sentiments of the American people. ...

Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence. None of those requirements existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus. ...

Excerpted by Sobhi Sidani

Glossip v. Gross

576 U.S. 863 (2015)

> Vote: 5-4
> Decision: Affirmed
> Majority: Alito, joined by Roberts, Scalia, Kennedy, and Thomas
> Concurrence: Scalia, joined by Thomas
> Concurrence: Thomas, joined by Scalia
> Dissent: Breyer, joined by Ginsberg
> Dissent: Sotomayor, joined by Ginsberg, Breyer and Kagan

Justice Alito delivered the opinion of the Court.

Prisoners sentenced to death in the State of Oklahoma filed an action in federal court ... contending that the method of execution ... creates an unacceptable risk of severe pain. They argue that midazolam, the first drug employed in the State's current three-drug protocol, fails to render a person insensate to pain. ... District Court denied four prisoners' application ... finding that they had failed to prove that midazolam is ineffective ... Court of Appeals ... affirmed. ...

For two independent reasons, we also affirm. First, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims. ... Second, the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.

The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights. ...

While methods of execution have changed over the years, "[t]his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." [*Baze v Rees* (2008)]. ... In *Wilkerson v. Utah*(1879), the Court upheld a sentence fo death by firing squad. In *In re Kemmler* [(1890)] ... the Court

rejected a challenge to the use of the electric chair ... holding even when presented with a case in which a State's initial attempt to execute a prisoner by electrocution was unsuccessful. ... Most recently, in *Baze* ... seven Justices agreed that the three-drug protocol ... does not violate the Eighth Amendment.

Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional ... [a]nd because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. ... Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.

Baze cleared any legal obstacle to use of the most common three-drug protocol. ... But a practical obstacle soon emerged ... [t]he sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug protocol, was persuaded to cease production of the drug. ... That effort proved successful, and in January 2011, the company announced that it would exit the sodium thiopental market entirely. ... States ... replaced sodium thiopental with pentobarbital, another barbiturate. ...

Before long, however, pentobarbital also became unavailable. Anti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions. ...

Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs. ...

The Lockett execution caused Oklahoma to implement new safety precautions as part of its lethal injection protocol. ... The investigation ... recommended several changes ... and Oklahoma adopted a new protocol. ... That protocol allows the Oklahoma Department of Corrections to choose among four different drug combinations. The option that Oklahoma plans to use to execute petitioners calls for the administration of 500 milligrams of midazolam followed by a paralytic agent and potassium chloride. The paralytic agent may be pancuronium bromide, vecuronium bromide, or rocuronium bromide, three drugs that, all agree, are functionally equivalent for purposes of this case. The protocol also includes procedural safeguards to help ensure that an inmate remains insensate to any pain. ... Those safeguards include: (1) the insertion of both a primary and backup IV catheter, (2) procedures to confirm the viability of the IV site, (3) the option to postpone an execution if viable IV sites cannot be established within an hour, (4) a mandatory pause between administration of the first and second drugs, (5) numerous procedures for monitoring the offender's consciousness, including the use of an electrocardiograph and direct observation, and (6) detailed provisions with respect to the training and preparation of the execution team. ...

In November 2014 ... Richard Glossip, Benjamin Cole, John Grant, and Warner—filed a motion for a preliminary injunction. All four men had been convicted of murder and sentenced to death by Oklahoma juries. ... The Oklahoma Court of Criminal Appeals affirmed the murder conviction and death sentence of each offender. Each of the men then unsuccessfully sought both state postconviction and federal habeas corpus relief. Having exhausted the avenues for challenging their convictions and sentences, they moved for a preliminary injunction against Oklahoma's lethal injection protocol.

. ...

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Resources Defense Council, Inc.*, (2008). The parties agree that this case turns on whether petitioners are able to establish a likelihood of success on the merits.

The Eighth Amendment ... prohibits the infliction of "cruel and unusual punishments." The controlling opinion in *Baze* outlined what a prisoner must establish to succeed on an Eighth Amendment method-of-execution claim. ... *Baze* first concluded that prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is " 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.' ". ... To prevail on such a claim, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm'. ... The controlling opinion also stated that prisoners "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." ... prisoners must identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.". ...

The preliminary injunction posture of the present case thus requires petitioners to establish a likelihood that they can establish both that Oklahoma's lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives.

The challenge in *Baze* failed both because the Kentucky inmates did not show that the risks they identified were substantial and imminent ... and because they did not establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk. ... Petitioners' arguments here fail for similar reasons. First, petitioners have not proved that any risk posed by midazolam is substantial when compared to known and available alternative methods of execution. Second, they have failed to establish that the District Court committed clear error when it found that the use of midazolam will not result in severe pain and suffering. We address each reason in turn.

Our first ground for affirmance is based on petitioners' failure to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution. In their amended complaint, petitioners proffered that the State could use sodium thiopental as part of a single-drug protocol. They have since suggested that it might also be constitutional for Oklahoma to use pentobarbital. ... [T]he record shows that Oklahoma has been unable to procure those drugs despite a good-faith effort to do so. Petitioners ... have not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain. ... Instead, they argue that they need not identify a known and available method of execution that presents less risk. But this argument is inconsistent with the controlling opinion in *Baze*. ...

. ...

We also affirm for a second reason: The District Court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution.

. ... When a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the burden of showing that the method creates an unacceptable risk of pain. Here, petitioners' own experts effectively conceded that they lacked evidence to prove their case beyond dispute. ...

Based on the evidence that the parties presented to the District Court, we must affirm. ...

Petitioners' remaining arguments about midazolam all lack merit. ...

... [P]etitioners argue that there is no consensus among the States regarding midazolam's efficacy because only four States ... have used midazolam as part of an execution. Petitioners rely on the plurality's statement in *Baze* that "it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated,". ... But while the near-universal use of the particular protocol at issue in *Baze* supported our conclusion that this protocol did not violate the Eighth Amendment, we did not say that the converse was true. ... That argument ... would hamper the adoption of ... more humane methods and ... prevent States from adapting to changes in the availability of suitable drugs.

... [P]etitioners argue that difficulties with Oklahoma's execution of Lockett ... establish that midazolam is sure or very likely to cause serious pain. We are not persuaded ... 12 other executions have been conducted using the three-drug protocol at issue here, and those appear to have been conducted without any significant problems. ... Moreover, Lockett was administered only 100 milligrams of midazolam, and Oklahoma's investigation into that execution concluded that the difficulties were due primarily to the execution team's inability to obtain an IV access site. ...

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit is affirmed.

It is so ordered.

Excerpted by Sobhi Sidani

Note: Glossip had another hearing before the U.S. Supreme Court on October 9, 2024. On February 25, 2025, the Court, in a 5-3 opinion, determined they had jurisdiction to hear this appeal and ruled that under precedent (*Napue v. Illinois,* 1959) when prosecutors knowingly use false testimony they violate the Constitution. See https://www.scotusblog.com/2025/02/supreme-court-grants-richard-glossip-new-trial-in-capital-case/, last accessed on March 3, 2025. At the time of writing, Glossip remained in prison.

City of Grants Pass v. Johnson

603 U.S. ___ (2024)

> Vote: 6-3
> Decision: Reversed and remanded
> Majority: Gorsuch, joined by Roberts, Kavanaugh, Barrett, Alito, and Thomas
> Dissent: Sotomayor, joined by Kagan and Jackson

Justice Gorsuch delivered the opinion of the Court.

Many cities across the American West face a homelessness crisis. ... Like many local governments, the city of Grants Pass, Oregon, has pursued a multifaceted approach. Recently, it adopted various policies aimed at "protecting the rights, dignity[,] and private property of the homeless.". ... It appointed a "homeless community liaison" officer charged with ensuring the homeless receive information about "assistance programs and other resources" available to them through the city and its local shelter. ... And it adopted certain restrictions against encampments on public property. ... The Ninth Circuit, however, held that the Eighth Amendment's Cruel and Unusual Punishments Clause barred that last measure. With support from States and cities across the country, Grants Pass urged this Court to review the Ninth Circuit's decision. We take up that task now.

. ... As the number of homeless individuals has grown, the number of homeless encampments across the country has increased as well, "in numbers not seen in almost a century.". ... As the number and size of these encampments have grown, so have the challenges they can pose for the homeless and others. We are told, for example, that the "exponential increase in ... encampments in recent years has resulted in an increase in crimes both against the homeless and by the homeless." Brief for California State Sheriffs' Associations. ... Some city officials indicate that encampments facilitate the distribution of drugs like heroin and fentanyl, which have claimed the lives of so many Americans in recent years. ... Without running water or proper sanitation facilities, too, diseases can sometimes spread in encampments and beyond them. ...

Nor do problems like these affect everyone equally. Often, encampments are found in a city's "poorest and most vulnerable neighborhoods.". ... With encampments dotting neighborhood sidewalks, adults and children in these communities are sometimes forced to navigate around used needles, human waste, and other hazards to make their way to school, the grocery store, or work. ...

As many cities see it, even as they have expanded shelter capacity and other public services, their unsheltered populations have continued to grow. ... [C]ities tell us that "the vast majority of their homeless populations are not actively seeking shelter and refuse all services.". ... Some may reject shelter because accepting it would take them further from family and local ties ... because of concerns for their safety or the rules some shelters impose regarding curfews, drug use, or religious practices. ... But whatever the causes, local governments say, this dynamic significantly complicates their efforts to address the challenges of homelessness.

Rather than focus on a single policy to meet the challenges associated with homelessness, many States and cities have pursued a range of policies and programs ... some have reinvested in mental-health and substance-abuse treatment programs ... others have chosen to pair these efforts with the enforcement of laws that restrict camping in public places, like parks, streets, and sidewalks. ...

Laws like those are commonplace. By one count, "a majority of cities have laws restricting camping in public spaces," and nearly forty percent "have one or more laws prohibiting camping citywide.". ... Some have argued that the enforcement of these laws can create a "revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back."

But many cities take a different view ... that ... these public-camping regulations are not usually deployed as a front-line response "to criminalize homelessness.". ... Instead, they are used to provide city employees with the legal authority to address "encampments that pose significant health and safety risks" and to encourage their inhabitants to accept other alternatives like shelters, drug treatment programs, and mental-health facilities. ...

The federal government also restricts "the storage of ... sleeping bags," as well as other "sleeping activities," on park lands. ...

Five years ago, the U. S. Court of Appeals for the Ninth Circuit took one of those tools off the table. In *Martin v. Boise* (2019) ... the Eighth Amendment's Cruel and Unusual Punishments Clause barred Boise from enforcing its public-camping ordinance against homeless individuals who lacked "access to alternative shelter." Id., at 615. That "access" was lacking, the court said, whenever " 'there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters.' ". ... No other circuit has followed *Martin*'s lead with respect to public-camping laws. ...

. ... Many cities ... report that, rather than help alleviate the homelessness crisis, *Martin* injunctions have inadvertently contributed to it. The numbers of "[u]nsheltered homelessness," they represent, have "increased dramatically in the Ninth Circuit since *Martin*." ... they say, *Martin* injunctions have contributed to this trend by "weaken[ing]" the ability of public officials "to persuade persons experiencing homelessness to accept shelter beds and [other] services.". ...

Like many American cities, Grants Pass has laws restricting camping in public spaces. Three are relevant here. The first prohibits sleeping "on public sidewalks, streets, or alleyways.". ... The second prohibits "[c]amping" on public property. ... The third prohibits "[c]amping" and "[o]vernight parking" in the city's parks. ... An initial violation may trigger a fine ... multiple citations may be subject to an order barring them from city parks for 30 days ... in turn, violations of those orders can constitute criminal trespass, punishable by a maximum of 30 days in prison and a $1,250 fine. ...

Neither of the named plaintiffs before us has been subjected to an order barring them from city property or to criminal trespass charges. ... Still, shortly after the panel decision in *Martin*, two homeless individuals, Gloria Johnson and John Logan, filed suit challenging the city's public-camping laws. ... They claimed, among other things, that the city's ordinances violated the Eighth Amendment's Cruel and Unusual Punishments Clause.

... [T]he Eighth Amendment's prohibition against "cruel and unusual punishments" focuses on what happens next. That Clause "has always been considered, and properly so, to be directed at the method or kind of punishment" a government may "impos[e] for the violation of criminal statutes." *Powell v. Texas* (1968). ... The Cruel and Unusual Punishments Clause focuses on the question what "method or kind of punishment" a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense. ... To the extent the Constitution speaks to those other matters, it does so, as we have seen, in other provisions.

Nor, focusing on the criminal punishments Grant Pass imposes, can we say they qualify as cruel and unusual. Recall that, under the city's ordinances, an initial offense may trigger a civil fine. Repeat offenses may trigger an order temporarily barring an individual from camping in a public park. Only those who later violate an order like that may face a criminal punishment of up to 30 days in jail and a larger fine. ... None of the city's sanctions qualifies as cruel because none is

designed to "superad[d]" "terror, pain, or disgrace." *Bucklew* [*v. Precythe* (2019)]. ... Nor are the city's sanctions unusual, because similar punishments have been and remain among "the usual mode[s]" for punishing offenses throughout the country. ...

Instead, the plaintiffs and the dissent pursue an entirely different theory ... echoing the Ninth Circuit in *Martin*, they insist one notable exception exists.

In *Robinson v. California*, (1962), the plaintiffs and the dissent observe, this Court addressed a challenge to a criminal conviction under a California statute providing that " '[n]o person shall ... be addicted to the use of narcotics.' ". ... The Court recognized that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual.". ... But, the Court reasoned, when punishing " 'status,' " "[e]ven one day in prison would be ... cruel and unusual.". ...

Bypassing Mr. Robinson's primary Due Process Clause argument, the Court charted its own course, reading the Cruel and Unusual Punishments Clause to impose a limit not just on what punishments may follow a criminal conviction but what a State may criminalize to begin with. It was a view unprecedented in the history of the Court before 1962. ... Still, no one has asked us to reconsider *Robinson*. Nor do we see any need to do so today. Whatever its persuasive force as an interpretation of the Eighth Amendment, it cannot sustain the Ninth Circuit's course since *Martin*. In *Robinson*, the Court expressly recognized ... that they may criminalize knowing or intentional drug use even by those suffering from addiction. ... The Court held only that a State may not criminalize the " 'status' " of being an addict. ... In criminalizing a mere status, *Robinson* stressed, California had taken a historically anomalous approach toward criminal liability. One, in fact, this Court has not encountered since *Robinson* itself.

Public camping ordinances like those before us are nothing like the law at issue in *Robinson* ... Grants Pass forbids actions like "occupy[ing] a campsite" on public property "for the purpose of maintaining a temporary place to live.". ... Under the city's laws, it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest on the lawn of a municipal building ... because laws like these do not criminalize mere status, *Robinson* is not implicated.

. ... Still, the plaintiffs and the dissent insist, laws like these seek to regulate actions that are in some sense "involuntary," for some homeless persons cannot help but do what the law forbids. ... To rule otherwise, the argument goes, would " 'effectively' " allow cities to punish a person because of his status. ...

The problem is, this Court has already rejected that view. In *Powell v. Texas* (1968), the Court confronted a defendant who had been convicted under a Texas statute making it a crime to " 'get drunk or be found in a state of intoxication in any public place.' ". ... Like the plaintiffs here, Mr. Powell argued that his drunkenness was an " 'involuntary' " byproduct of his status as an alcoholic. ... The Court did not agree.

. ... This case is no different from *Powell*. ... Just as there, the plaintiffs here seek to extend its rule beyond laws addressing "mere status" to laws addressing actions that ... might "in some sense" qualify as " 'involuntary.' ". ... And, just as in *Powell*, we discern nothing in the Eighth Amendment that might provide us with lawful authority to extend *Robinson* beyond its narrow holding. ... [N]othing in today's decision prevents States, cities, and counties from going a step further and declining to criminalize public camping altogether.

. ... Under *Martin*, judges take from elected representatives the questions whether and when someone who has committed a proscribed act with a requisite mental state should be "relieved of responsibility" for lack of "moral culpability.". ...

Start with this problem. Under *Martin*, cities must allow public camping by those who are "involuntarily" homeless. ... Cities across the West report that the Ninth Circuit's ill-defined involuntariness test has proven "unworkable.". ... The Ninth Circuit said a city needs to consider individuals "involuntarily" homeless (and thus entitled to camp on public property) only when the overall homeless population exceeds the total number of "adequate" and "practically available" shelter beds. ... City officials report that it can be "monumentally difficult" to keep an accurate accounting of those experiencing homelessness on any given day. ... [C]ities face questions over which shelter beds count as "adequate" and "available" under *Martin*. ... Is a bed "available" to a smoker if the shelter requires residents to abstain from nicotine, as the shelter in Grants Pass does?. ...

... [S]ince the trial court entered its injunction against Grants Pass, the city shelter reports that utilization of its resources has fallen by roughly 40 percent. ... Many other cities offer similar accounts about their experiences after *Martin*, telling us the decision has made it more difficult, not less, to help the homeless accept shelter off city streets. ... *Martin* has undermined their efforts to balance conflicting public needs and mired them in litigation at a time when the homelessness crisis calls for action.

... [M]any substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless. ... The only question we face is whether one specific provision of the Constitution—the Cruel and Unusual Punishments Clause of the Eighth Amendment—prohibits the enforcement of public-camping laws.

. ... [T]he dissent does not dispute that the law *Robinson* faced was an anomaly, punishing mere status. ... And the dissent all but ignores *Robinson*'s own insistence that a different result would have obtained in that case if the law there had proscribed an act rather than status alone. ...

Homelessness is complex. Its causes are many. So may be the public policy responses required to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and devising those responses. It does not. ... The Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy. The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Excerpted by Sobhi Sidani

Contributors

Andrew Hoekman is an economics major with a minor in political science at Oregon State University. He will graduate in spring 2025 and plans to attend Gonzaga University School of Law, where he aims to specialize in tax or business law. During his undergraduate studies, Andrew engaged in coursework exploring government powers, leading to an excerpt of his work on *Trump v. United States* (PS 381, Fall 2024) being included in this textbook. He hopes to practice law in the Eugene, Oregon area

Katherine McKenna is a political science major with a concentration in law and politics along with a minor in Spanish at Oregon State University. She is a member of the Women's Rowing team and will graduate by Spring of 2027. After graduation, she is hoping to attend law school and practice civil rights law.

Charlotte Pietrzak is a double major studying Psychology and Political Science with a concentration in law and politics at Oregon State University. She is also minoring in Sociology. She currently works for Community Engagement & Leadership on campus to involve students in service work and current events and intends to continue that work until her graduation in Winter 2026. Ms. Pietrzak plans to spend her final year on campus applying to work with The Peace Corps for the immediate years following graduation. Upon conclusion of her time, she intends to return to academia to continue her study of social sciences and sees herself in legal and political work in the far future.

Fox Perez is a political science major and journalism student at Oregon State University with a concentration in American law and politics. He graduates in the spring term of 2026. He has worked as the OSU student government beat reporter for The Daily Barometer, telling stories about the lives of those in Corvallis. After graduation, Mr. Perez plans to become a political journalist and one day pursue a law degree.

Makenna Perry is a Political Science Major with an emphasis in Law and Politics, also with a minor in psychology at Oregon State University. She will be graduating in the spring of 2025. She also is the Secretary of the Oregon State Pre-Law Society. After graduation she plans on working as a legal assistant for a year before going to law school hopefully in Oregon. She hopes to work as a criminal prosecutor, but eventually would like to specialize in working for special victims.

Jacob Staab is an economics major with a minor in political science. He graduates in June of 2025. He was president of the Oregon State University economics club, and afterward served as a student advisor. He plans to attend law school in Oregon. He hopes to go into tax law, practicing somewhere in the Pacific Northwest.

Sloan Harmel is a political science major with minors in both sociology and French. Graduating in 2025, she will be taking a gap year to work as a legal administrative assistant before attending law school back home in Colorado. She also participated in the American Politics Research Group conducting research surrounding the Supreme Court Confirmation process under the guidance of Professor Rorie Solberg and served as treasurer for the Pre-Law Society during her time at Oregon State. Ms. Harmel hopes to work as an employment and ERISA lawyer upon completing law school. Go beavs!

Alex Nobiletti is majoring in political science at Oregon State University, following the law and politics option. Alex is finishing his bachelor's degree at OSU after receiving two associates degrees from Linn Benton Community College, one in political science and one in communications. He will be attending Willamette University's School of Law in the fall of 2025, study constitutional law, and hopes to become a judge at some point in his career.

Sobhi Sidani is a finance major with a minor in Political Science with a concentration of Law and Politics. Sobhi graduates in spring of 2025. After graduation Sobhi plans on attending law school and practicing corporate law.

Justices Serving on the Court 1790 - 1834

The following tables include the names of the Justices serving on the Court for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1790

Justices serving on the Court, 1790

Justice	President	Party of President	Years Served
John	Washington	None	1789-1795
Rutledge	Washington	None	1790-1791
Wilson	Washington	None	1789-1798
Blair	Washington	None	1790-1795
Iredell	Washington	None	1790-1799

1791 – 1792

Justices serving on the Court, 1791 – 1792

Justice	President	Party of President	Years Served
John	Washington	None	1789-1795
Johnson	Washington	None	1791-1793
Wilson	Washington	None	1789-1798
Blair	Washington	None	1790-1795
Iredell	Washington	None	1790-1799

1793 – 1795

Justices serving on the Court, 1793 – 1795

Justice	President	Party of President	Years Served
John	Washington	None	1789-1795
Paterson	Washington	None	1793-1806
Wilson	Washington	None	1789-1798
Blair	Washington	None	1790-1795
Iredell	Washington	None	1790-1799

1796 – 1797

Justices serving on the Court, 1796 – 1797

Justice	President	Party of President	Years Served
Ellsworth	Washington	None	1796-1800
Paterson	Washington	None	1793-1806
Wilson	Washington	None	1789-1798
Iredell	Washington	None	1790-1799
Chase	Washington	None	1796-1811

1798 – 1799

Justices serving on the Court, 1798 – 1799

Justice	President	Party of President	Years Served
Ellsworth	Washington	None	1796-1800
Paterson	Washington	None	1793-1806
Washington	Adams	Federalist	1798-1829
Iredell	Washington	None	1790-1799
Chase	Washington	None	1796-1811

1800 – 1803

Justices serving on the Court, 1800 – 1803

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Paterson	Washington	None	1793-1806
Washington	Adams	Federalist	1798-1829
Moore	Adams	Federalist	1800-1804
Chase	Washington	None	1796-1811

1804 – 1805

Justices serving on the Court, 1804 – 1805

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Paterson	Washington	None	1793-1806
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Chase	Washington	None	1796-1811

1806

Justices serving on the Court, 1806

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Chase	Washington	None	1796-1811

1807 – 1810

Justices serving on the Court, 1807 – 1810

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Chase	Washington	None	1796-1811
Todd	Jefferson	Dem-Rep	1807-1826

1811

Justices serving on the Court, 1811

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Todd	Jefferson	Dem-Rep	1807-1826

1812 – 1822

Justices serving on the Court, 1812 – 1822

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Livingston	Jefferson	Dem-Rep	1806-1823
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Todd	Jefferson	Dem-Rep	1807-1826
Story	Madison	Dem-Rep	1812-1845

1823 – 1825

Justices serving on the Court, 1823 – 1825

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Todd	Jefferson	Dem-Rep	1807-1826
Story	Madison	Dem-Rep	1812-1845

1826 – 1828

Justices serving on the Court, 1826 – 1828

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
Trimble	Adams, J.Q.	Jacksonian	1826-1828
Story	Madison	Dem-Rep	1812-1845

1829

Justices serving on the Court, 1829

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Washington	Adams	Federalist	1798-1829
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845

1830 – 1834

Justices serving on the Court, 1830 – 1834

Justice	President	Party of President	Years Served
Marshall	Adams	Federalist	1800-1835
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Johnson	Jefferson	Dem-Rep	1804-1834
Duvall	Madison	Dem-Rep	1811-1835
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845

Justices Serving on the Court 1835 - 1889

The following tables include the names of the Justices serving on the Court for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1835 – 1836

Justices serving on the Court, 1835 – 1836

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Wayne	Jackson	Democrat	1835-1867
Barbour	Jackson	Democrat	1835-1841
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845

1837 – 1841

Justices serving on the Court, 1837 – 1841

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Wayne	Jackson	Democrat	1835-1867
Barbour	Jackson	Democrat	1835-1841
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1842 – 1844

Justices serving on the Court, 1842 – 1844

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Thompson	Monroe	Dem-Rep	1823-1843
Baldwin	Jackson	Jacksonian	1830-1844
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Story	Madison	Dem-Rep	1812-1845
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1845 – 1850

Justices serving on the Court, 1845 – 1850

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Woodbury	Polk	Democrat	1845-1851
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1851 – 1852

Justices serving on the Court, 1851 – 1852

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Curtis	Filmore	Whig	1851-1857
Catron	Jackson	Democrat	1837-1865
McKinley	Van Buren	Democrat	1838-1852

1853 – 1857

Justices serving on the Court, 1853 – 1857

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Curtis	Filmore	Whig	1851-1857
Catron	Jackson	Democrat	1837-1865
Campbell	Pierce	Democrat	1853-1861

1858 – 1861

Justices serving on the Court, 1858 – 1861

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Daniel	Van Buren	Democrat	1842-1860
McLean	Jackson	Jacksonian	1829-1861
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Campbell	Pierce	Democrat	1853-1861

1862

Justices serving on the Court, 1862

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Davis	Lincoln	Republican	1862-1877

1863

Justices serving on the Court, 1863

Justice	President	Party of President	Years Served
Taney	Jackson	Democrat	1835-1864
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897

1864 – 1869

Justices serving on the Court, 1864 – 1869

Justice	President	Party of President	Years Served
Chase	Lincoln	Republican	1864-1873
Nelson	Tyler	None	1845-1872
Grier	Polk	Democrat	1846-1870
Wayne	Jackson	Democrat	1835-1867
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Catron	Jackson	Democrat	1837-1865
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897

1870 – 1872

Justices serving on the Court, 1870 – 1872

Justice	President	Party of President	Years Served
Chase	Lincoln	Republican	1864-1873
Nelson	Tyler	None	1845-1872
Strong	Grant	Republican	1870-1880
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1873 – 1876

Justices serving on the Court, 1873 – 1876

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Hunt	Grant	Republican	1873-1882
Strong	Grant	Republican	1870-1880
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Davis	Lincoln	Republican	1862-1877
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1877 – 1880

Justices serving on the Court, 1877 – 1880

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Hunt	Grant	Republican	1873-1882
Strong	Grant	Republican	1870-1880
Miller	Lincoln	Republican	1862-1890
Swayne	Lincoln	Republican	1862-1881
Clifford	Buchanan	Democrat	1858-1881
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1881

Justices serving on the Court, 1881

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Hunt	Grant	Republican	1873-1882
Woods	Hayes	Republican	1881-1887
Miller	Lincoln	Republican	1862-1890
Matthews	Garfield	Republican	1881-1889
Clifford	Buchanan	Democrat	1858-1881
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1882 – 1887

Justices serving on the Court, 1882 – 1887

Justice	President	Party of President	Years Served
Waite	Grant	Republican	1874-1888
Blatchford	Arthur	Republican	1882-1893
Woods	Hayes	Republican	1881-1887
Miller	Lincoln	Republican	1862-1890
Matthews	Garfield	Republican	1881-1889
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1888 – 1889

Justices serving on the Court, 1888 – 1889

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Miller	Lincoln	Republican	1862-1890
Matthews	Garfield	Republican	1881-1889
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

Justices Serving on the Court 1890 - 1937

The following tables include the names of the Justices serving on the Court for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1890

Justices serving on the Court, 1890

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Miller	Lincoln	Republican	1862-1890
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1891

Justices serving on the Court, 1891

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Bradley	Grant	Republican	1870-1892

1892

Justices serving on the Court, 1892

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
Blatchford	Arthur	Republican	1882-1893
Lamar	Cleveland	Democrat	1888-1893
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Shiras	Harrison	Republican	1892-1903

1893 – 1895

Justices serving on the Court, 1893 – 1895

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Jackson	Harrison	Republican	1893-1895
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Shiras	Harrison	Republican	1892-1903

1896 – 1897

Justices serving on the Court, 1896 – 1897

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
Field	Lincoln	Republican	1863-1897
Shiras	Harrison	Republican	1892-1903

1898 – 1901

Justices serving on the Court, 1898 – 1901

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Gray	Arthur	Republican	1882-1902
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Shiras	Harrison	Republican	1892-1903

1902

Justices serving on the Court, 1902

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Shiras	Harrison	Republican	1892-1903

1903 – 1905

Justices serving on the Court, 1903 – 1905

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Brown	Harrison	Republican	1891-1906
Brewer	Harrison	Republican	1890-1910
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1906 – 1909

Justices serving on the Court, 1906 – 1909

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Peckham	Cleveland	Democrat	1896-1909
Moody	Roosevelt	Republican	1906-1910
Brewer	Harrison	Republican	1890-1910
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1910

Justices serving on the Court, 1910

Justice	President	Party of President	Years Served
Fuller	Cleveland	Democrat	1888-1910
White	Cleveland	Democrat	1894-1921
Lurton	Taft	Republican	1910-1914
Moody	Roosevelt	Republican	1906-1910
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1911

Justices serving on the Court, 1911

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
Lurton	Taft	Republican	1910-1914
Lamar	Taft	Republican	1911-1916
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Harlan	Hayes	Republican	1877-1911
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1912 – 1913

Justices serving on the Court, 1912 – 1913

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
Lurton	Taft	Republican	1910-1914
Lamar	Taft	Republican	1911-1916
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1914 – 1915

Justices serving on the Court, 1914 – 1915

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Lamar	Taft	Republican	1911-1916
Hughes	Taft	Republican	1910-1916
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1916 – 1921

Justices serving on the Court, 1916 – 1921

Justice	President	Party of President	Years Served
White	Cleveland	Democrat	1894-1921
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Clarke	Wilson	Democrat	1916-1922
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1922

Justices serving on the Court, 1922

Justice	President	Party of President	Years Served
Taft	Harding	Republican	1921-1930
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Pitney	Taft	Republican	1912-1922
McKenna	McKinley	Republican	1898-1925
Day	Roosevelt	Republican	1903-1922

1923 – 1924

Justices serving on the Court, 1923 – 1924

Justice	President	Party of President	Years Served
Taft	Harding	Republican	1921-1930
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Sanford	Harding	Republican	1923-1930
McKenna	McKinley	Republican	1898-1925
Butler	Harding	Republican	1923-1939

1925 – 1929

Justices serving on the Court, 1925 – 1929

Justice	President	Party of President	Years Served
Taft	Harding	Republican	1921-1930
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Sanford	Harding	Republican	1923-1930
Stone	Coolidge	Republican	1925-1946
Butler	Harding	Republican	1923-1939

Olmstead v. United States (1928)

1930 – 1931

Justices serving on the Court, 1930 – 1931

Justice	President	Party of President	Years Served
Hughes	Hoover	Republican	1930-1941
Van Devanter	Taft	Republican	1911-1937
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Holmes	Roosevelt	Republican	1902-1932
Roberts	Hoover	Republican	1930-1945
Stone	Coolidge	Republican	1925-1946
Butler	Harding	Republican	1923-1939

1932 – 1937

Justices serving on the Court, 1932 – 1937

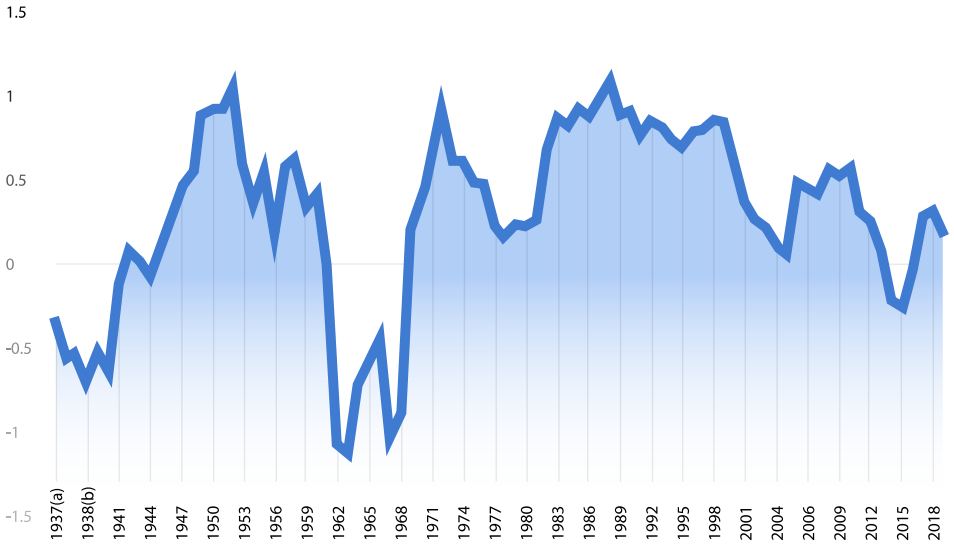
Justice	President	Party of President	Years Served
Hughes	Hoover	Republican	1930-1941
Black	Roosevelt	Democrat	1937-1971
McReynolds	Wilson	Democrat	1914-1941
Brandeis	Wilson	Democrat	1916-1939
Sutherland	Harding	Republican	1922-1938
Cardozo	Hoover	Republican	1932-1938
Roberts	Hoover	Republican	1930-1945
Stone	Coolidge	Republican	1925-1946
Butler	Harding	Republican	1923-1939

Powell v. Alabama (1932)

Brown v. Mississippi (1936)

Median Justice Scores Per Year 1937 - 2018

The following figure provides the Martin Quinn scores for the median (aka middle aka swing) justice for the years available. Positive scores are considered conservative and negative scores liberal. The higher the score, the further along the justice is on the ideological continuum. For more information on these scores, navigate to http://mqscores.wustl.edu/.

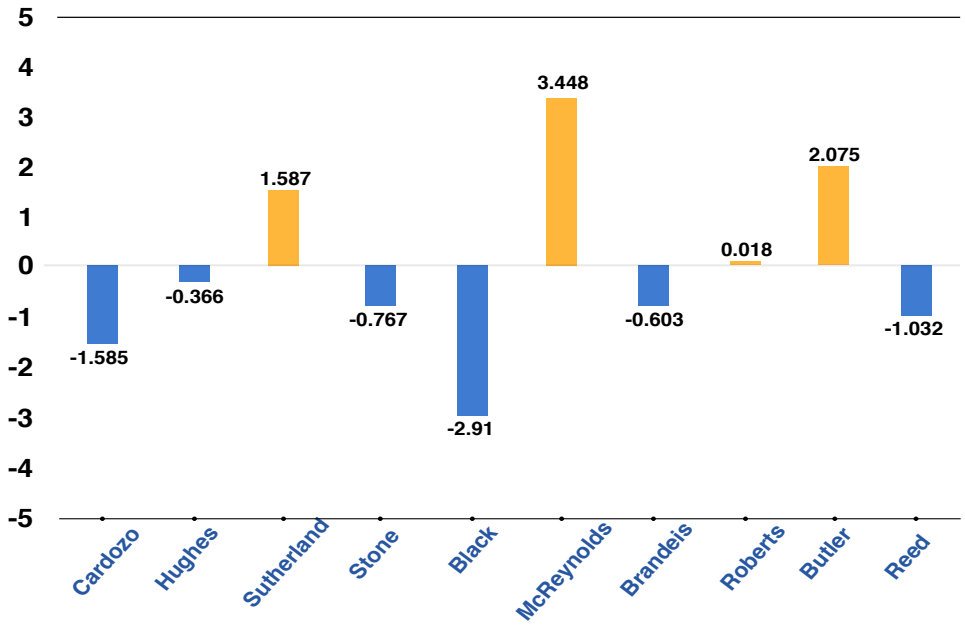


Median Justice Ideology scores per year, 1937 – 2018

Justices Serving on the Court 1937 - 1949

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1937



Justices serving on the Court and Martin Quinn Ideology scores, 1937

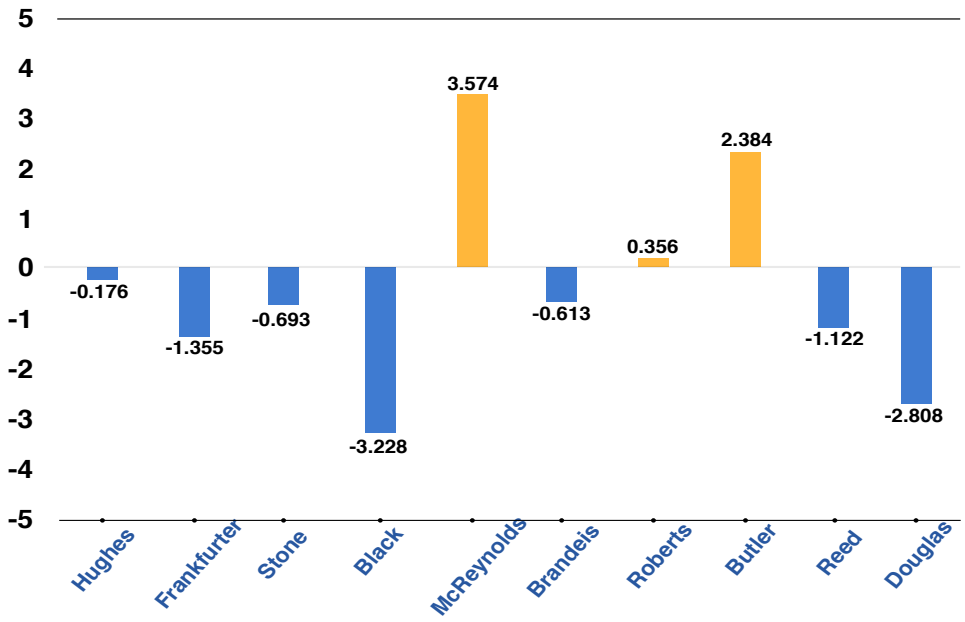
Justices serving on the Court, 1937

Justice	Mean	President	Party of President	Years Served
Cardozo	-1.585	Hoover	Republican	1932-1938
Hughes	-0.366	Hoover	Republican	1930-1941
Sutherland	1.587	Harding	Republican	1922-1938
Stone	-0.767	Coolidge	Republican	1925-1946
Black	-2.91	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.448	Wilson	Democrat	1914-1941
Brandeis	-0.603	Wilson	Democrat	1916-1939
Roberts	0.018	Hoover	Republican	1930-1945
Butler	2.075	Harding	Republican	1923-1939
Reed	-1.032	F.D. Roosevelt	Democrat	1938-1957

Chief Justice, 1937

Chief Justice	Median	Court Score
Hughes	-0.333	-0.01
Hughes	-0.559	-0.01

1938



Justices serving on the Court and Martin Quinn Ideology scores, 1938

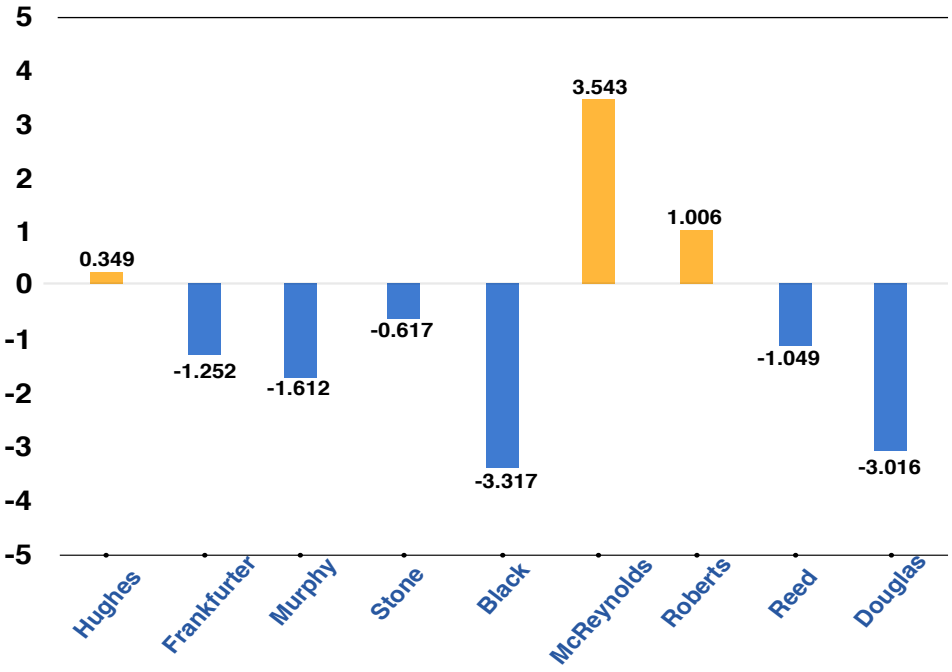
Justices serving on the Court, 1938

Justice	Mean	President	Party of President	Years Served
Hughes	-0.176	Hoover	Republican	1930-1941
Frankfurter	-1.355	F.D. Roosevelt	Democrat	1939-1962
Stone	-0.693	Coolidge	Republican	1925-1946
Black	-3.228	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.574	Wilson	Democrat	1914-1941
Brandeis	-0.613	Wilson	Democrat	1916-1939
Roberts	0.356	Hoover	Republican	1930-1945
Butler	2.384	Harding	Republican	1923-1939
Reed	-1.122	F.D. Roosevelt	Democrat	1938-1957
Douglas	-2.808	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1938

Chief Justice	Median	Court Score
Hughes	-0.526	-0.37
Hughes (2)	-0.681	-0.37

1939



Justices serving on the Court and Martin Quinn Ideology scores, 1939

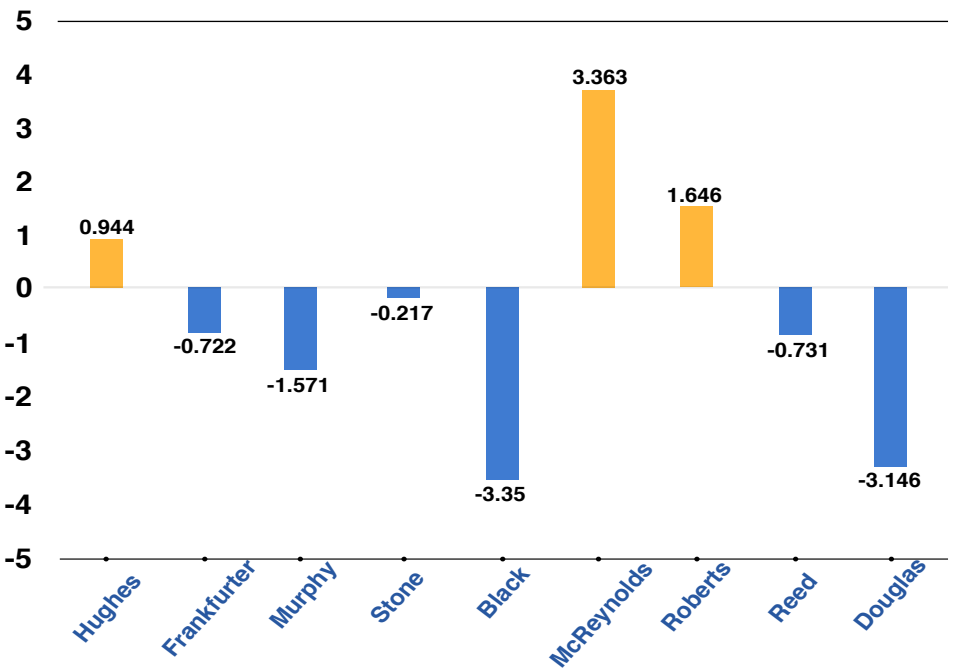
Justices serving on the Court, 1939

Justice	Mean	President	Party of President	Years Served
Hughes	0.349	Hoover	Republican	1930-1941
Frankfurter	-1.252	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.612	F.D. Roosevelt	Democrat	1940-1949
Stone	-0.617	Coolidge	Republican	1925-1946
Black	-3.317	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.543	Wilson	Democrat	1914-1941
Roberts	1.006	Hoover	Republican	1930-1945
Reed	-1.049	F.D. Roosevelt	Democrat	1938-1957
Douglas	-3.016	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1939

Chief Justice	Median	Court Score
Hughes	-0.526	-0.66

1940



Justices serving on the Court and Martin Quinn Ideology scores, 1940

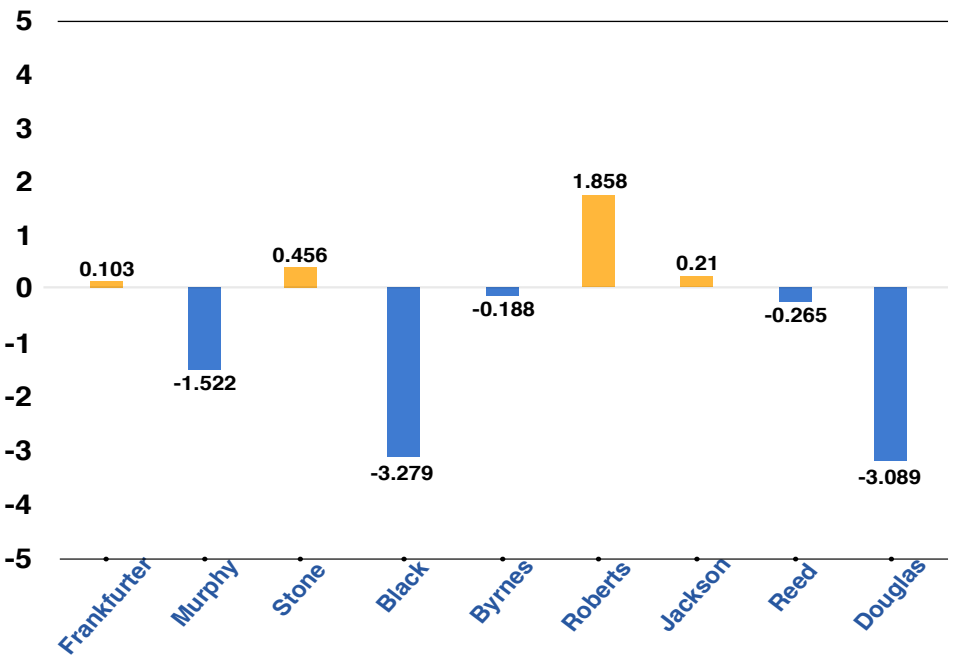
Justices serving on the Court, 1940

Justice	Mean	President	Party of President	Years Served
Hughes	0.944	Hoover	Republican	1930-1941
Frankfurter	-0.722	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.571	F.D. Roosevelt	Democrat	1940-1949
Stone	-0.217	Coolidge	Republican	1925-1946
Black	-3.35	F.D. Roosevelt	Democrat	1937-1971
McReynolds	3.363	Wilson	Democrat	1914-1941
Roberts	1.646	Hoover	Republican	1930-1945
Reed	-0.731	F.D. Roosevelt	Democrat	1938-1957
Douglas	-3.146	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1940

Chief Justice	Median	Court Score
Hughes	-0.624	-0.42

1941



Justices serving on the Court and Martin Quinn Ideology scores, 1941

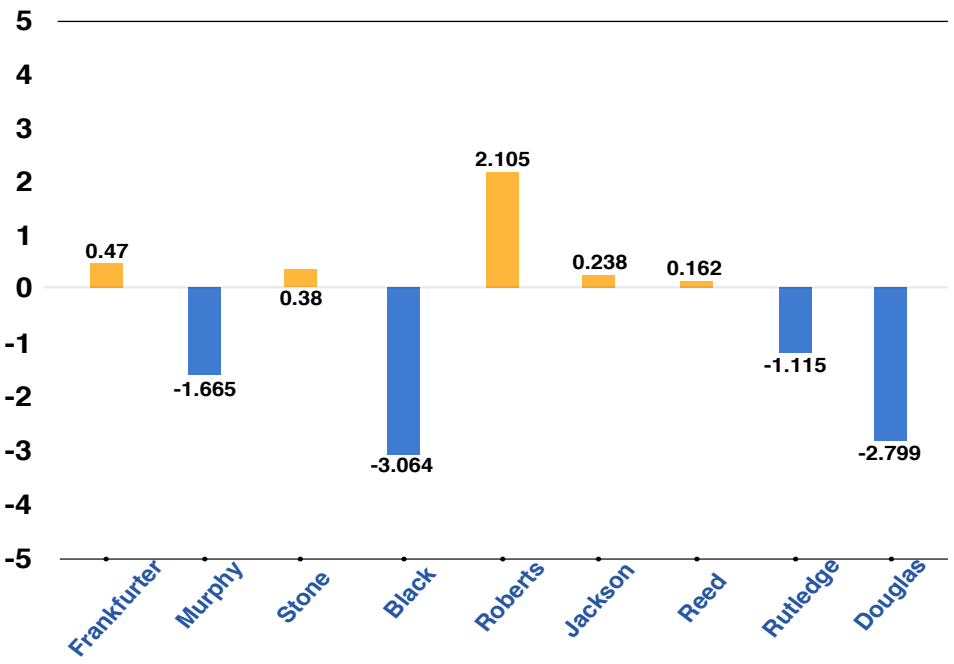
Justices serving on the Court, 1941

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.103	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.522	F.D. Roosevelt	Democrat	1940-1949
Stone	0.456	Coolidge	Republican	1925-1946
Black	-3.279	F.D. Roosevelt	Democrat	1937-1971
Byrnes	-0.188	F.D. Roosevelt	Democrat	1941-1942
Roberts	1.858	Hoover	Republican	1930-1945
Jackson	0.21	F.D. Roosevelt	Democrat	1941-1954
Reed	-0.265	F.D. Roosevelt	Democrat	1938-1957
Douglas	-3.089	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1941

Chief Justice	Median	Court Score
Stone	-0.141	-0.64

1942



Justices serving on the Court and Martin Quinn Ideology scores, 1942

Justices serving on the Court, 1942

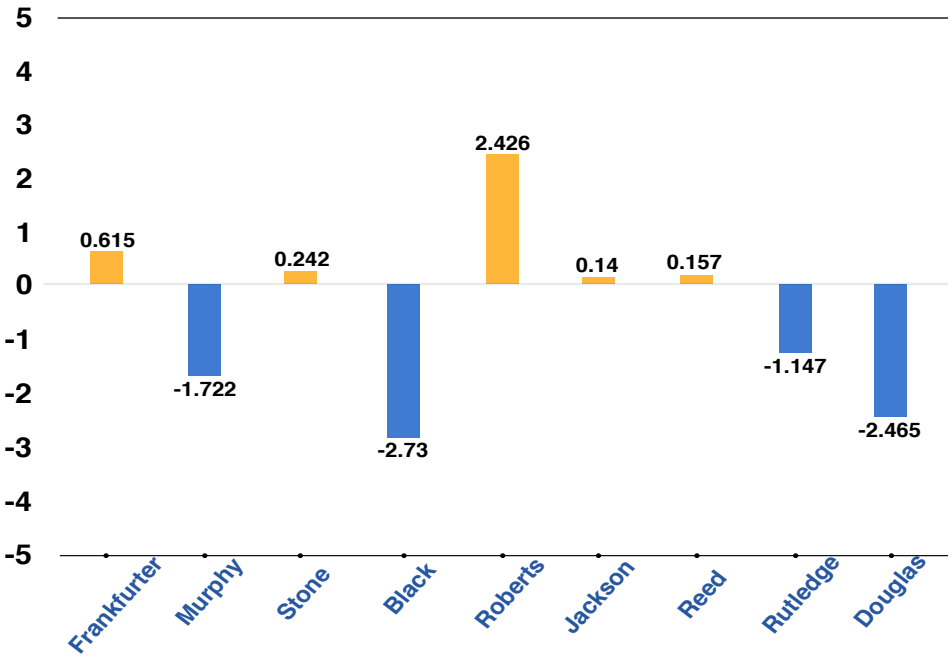
Justice	Mean	President	Party of President	Years Served
Frankfurter	0.47	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.665	F.D. Roosevelt	Democrat	1940-1949
Stone	0.38	Coolidge	Republican	1925-1946
Black	-3.064	F.D. Roosevelt	Democrat	1937-1971
Roberts	2.105	Hoover	Republican	1930-1945
Jackson	0.238	F.D. Roosevelt	Democrat	1941-1954
Reed	0.162	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.115	F.D. Roosevelt	Democrat	1943-1949
Douglas	-2.799	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1942

Chief Justice	Median	Court Score
Stone	0.094	-0.59

Betts v. Brady (1942)

1943



Justices serving on the Court and Martin Quinn Ideology scores, 1943

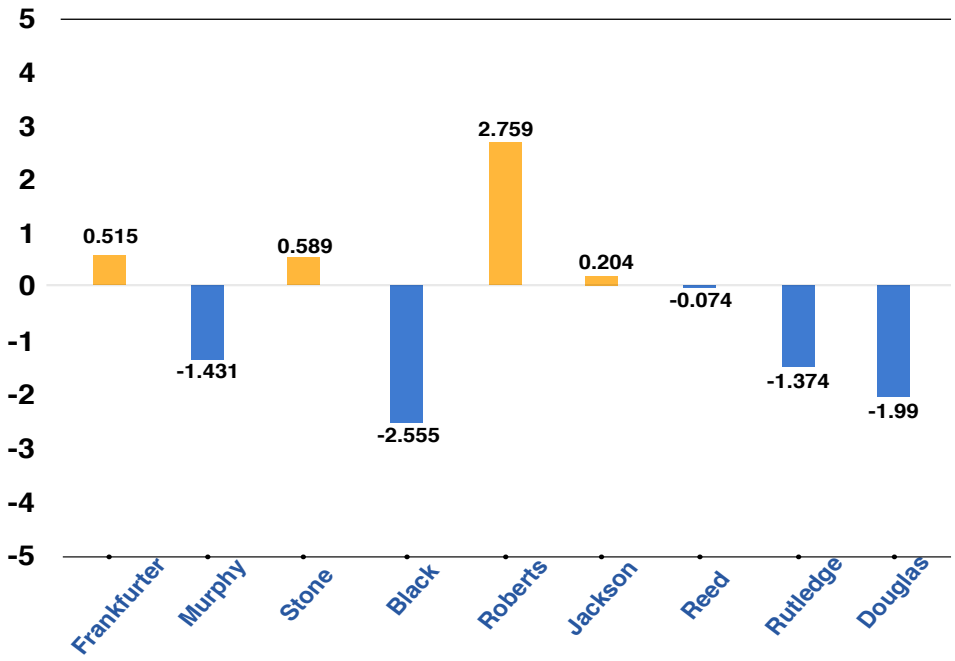
Justices serving on the Court, 1943

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.615	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.722	F.D. Roosevelt	Democrat	1940-1949
Stone	0.242	Coolidge	Republican	1925-1946
Black	-2.73	F.D. Roosevelt	Democrat	1937-1971
Roberts	2.426	Hoover	Republican	1930-1945
Jackson	0.14	F.D. Roosevelt	Democrat	1941-1954
Reed	0.157	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.147	F.D. Roosevelt	Democrat	1943-1949
Douglas	-2.465	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1943

Chief Justice	Median	Court Score
Stone	0.038	-0.50

1944



Justices serving on the Court and Martin Quinn Ideology scores, 1944

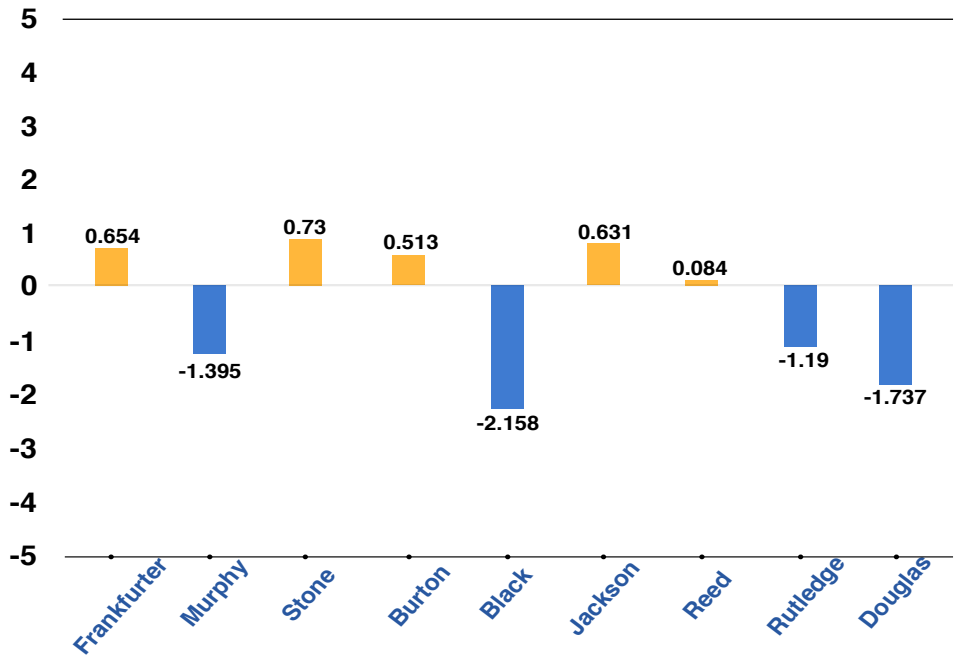
Justices serving on the Court, 1944

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.515	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.431	F.D. Roosevelt	Democrat	1940-1949
Stone	0.589	Coolidge	Republican	1925-1946
Black	-2.555	F.D. Roosevelt	Democrat	1937-1971
Roberts	2.759	Hoover	Republican	1930-1945
Jackson	0.204	F.D. Roosevelt	Democrat	1941-1954
Reed	-0.074	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.374	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.99	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1944

Chief Justice	Median	Court Score
Stone	-0.084	-0.37

1945



Justices serving on the Court and Martin Quinn Ideology scores, 1945

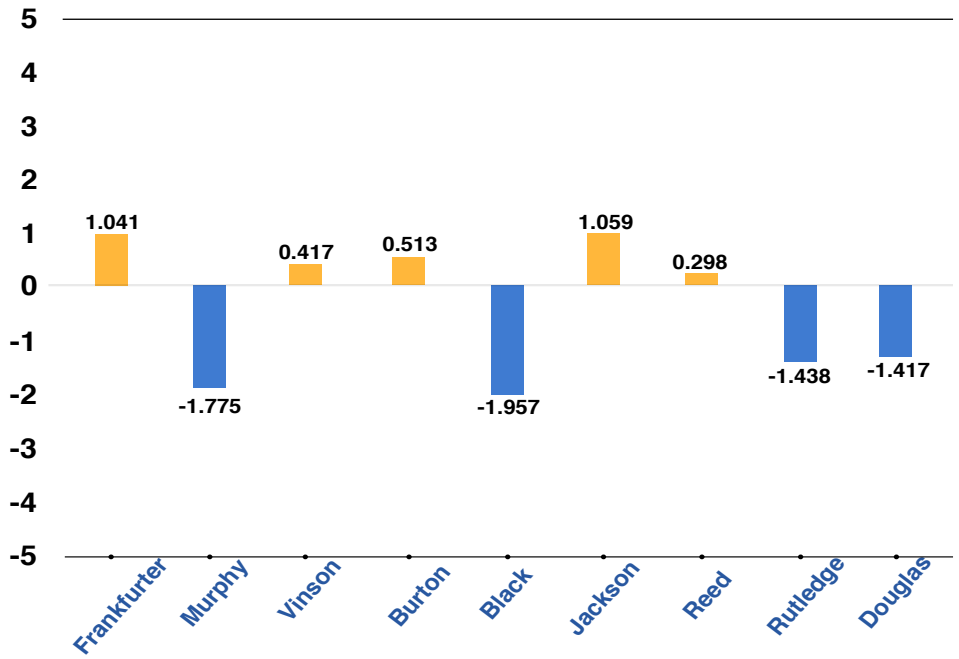
Justices serving on the Court, 1945

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.654	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.395	F.D. Roosevelt	Democrat	1940-1949
Stone	0.73	Coolidge	Republican	1925-1946
Burton	0.513	Truman	Democrat	1945-1958
Black	-2.158	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.631	F.D. Roosevelt	Democrat	1941-1954
Reed	0.084	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.19	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.737	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1945

Chief Justice	Median	Court Score
Stone	0.069	-0.43

1946



Justices serving on the Court and Martin Quinn Ideology scores, 1946

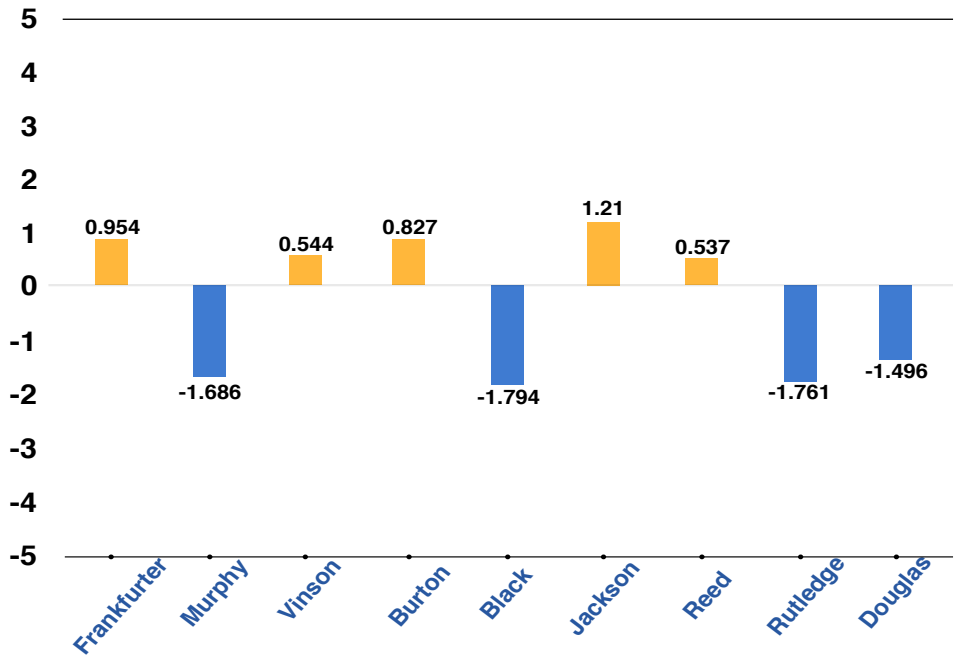
Justices serving on the Court, 1946

Justice	Mean	President	Party of President	Years Served
Frankfurter	1.041	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.775	F.D. Roosevelt	Democrat	1940-1949
Vinson	0.417	Truman	Democrat	1946-1953
Burton	0.531	Truman	Democrat	1945-1958
Black	-1.957	F.D. Roosevelt	Democrat	1937-1971
Jackson	1.059	F.D. Roosevelt	Democrat	1941-1954
Reed	0.298	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.438	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.417	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1946

Chief Justice	Median	Court Score
Vinson	0.245	-0.36

1947



Justices serving on the Court and Martin Quinn Ideology scores, 1947

Justices serving on the Court, 1947

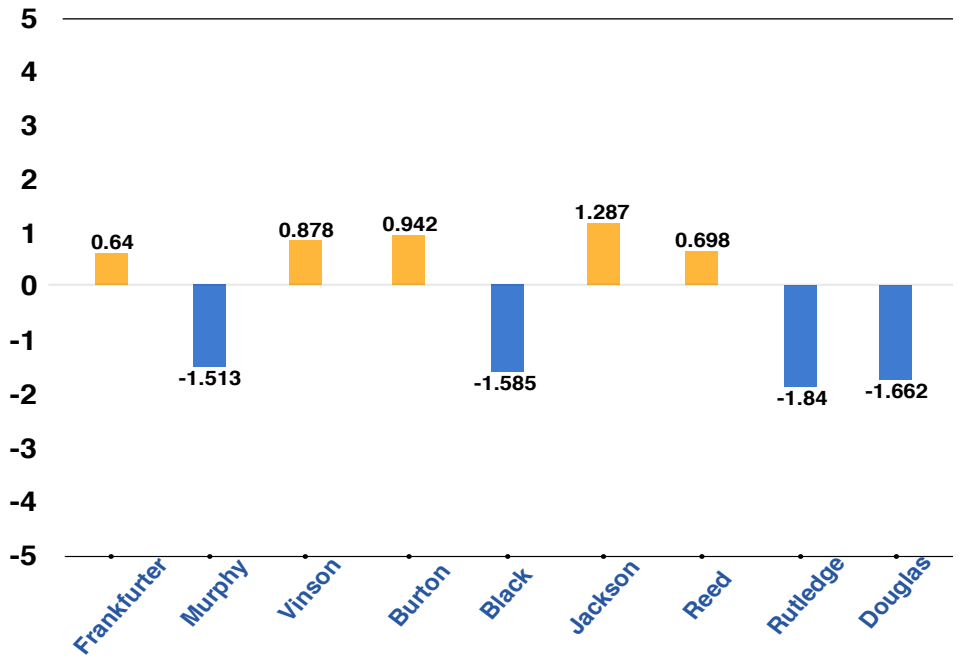
Justice	Mean	President	Party of President	Years Served
Frankfurter	0.954	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.686	F.D. Roosevelt	Democrat	1940-1949
Vinson	0.544	Truman	Democrat	1946-1953
Burton	0.827	Truman	Democrat	1945-1958
Black	-1.794	F.D. Roosevelt	Democrat	1937-1971
Jackson	1.21	F.D. Roosevelt	Democrat	1941-1954
Reed	0.537	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.761	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.496	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1947

Chief Justice	Median	Court Score
Vinson	0.448	-0.30

Palko v. Connecticut (1947)

1948



Justices serving on the Court and Martin Quinn Ideology scores, 1948

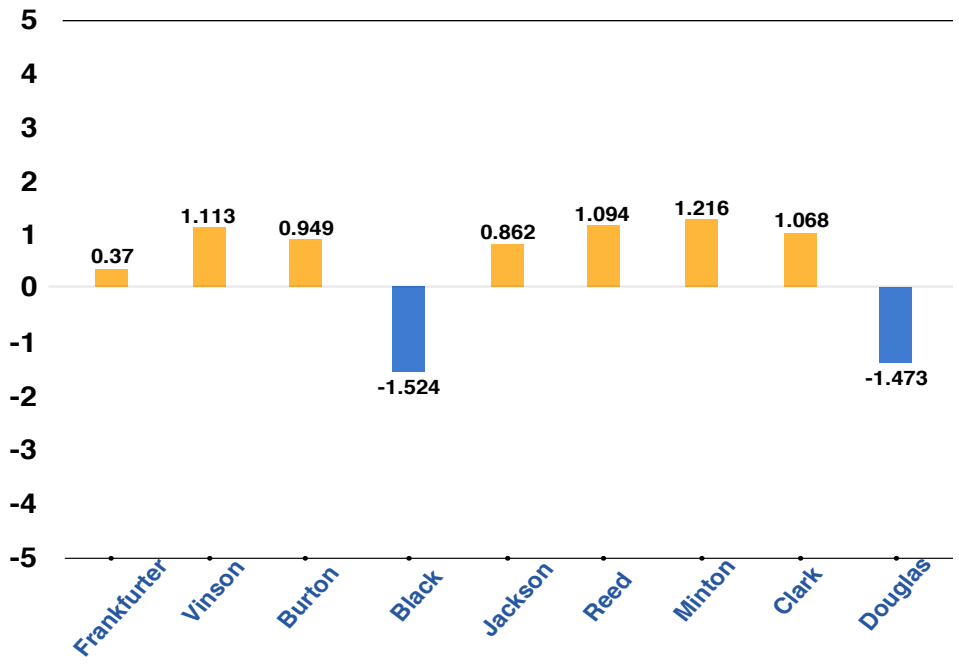
Justices serving on the Court, 1948

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.64	F.D. Roosevelt	Democrat	1939-1962
Murphy	-1.513	F.D. Roosevelt	Democrat	1940-1949
Vinson	0.878	Truman	Democrat	1946-1953
Burton	0.942	Truman	Democrat	1945-1958
Black	-1.585	F.D. Roosevelt	Democrat	1937-1971
Jackson	1.287	F.D. Roosevelt	Democrat	1941-1954
Reed	0.698	F.D. Roosevelt	Democrat	1938-1957
Rutledge	-1.84	F.D. Roosevelt	Democrat	1943-1949
Douglas	-1.662	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1948

Chief Justice	Median	Court Score
Vinson	0.549	-0.24

1949



Justices serving on the Court and Martin Quinn Ideology scores, 1949

Justices serving on the Court, 1949

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.37	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.113	Truman	Democrat	1946-1953
Burton	0.949	Truman	Democrat	1945-1958
Black	-1.524	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.862	F.D. Roosevelt	Democrat	1941-1954
Reed	1.094	F.D. Roosevelt	Democrat	1941-1954
Minton	1.216	Truman	Democrat	1949-1956
Clark	1.068	Truman	Democrat	1949-1967
Douglas	-1.473	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1949

Chief Justice	Median	Court Score
Vinson	0.88	0.41

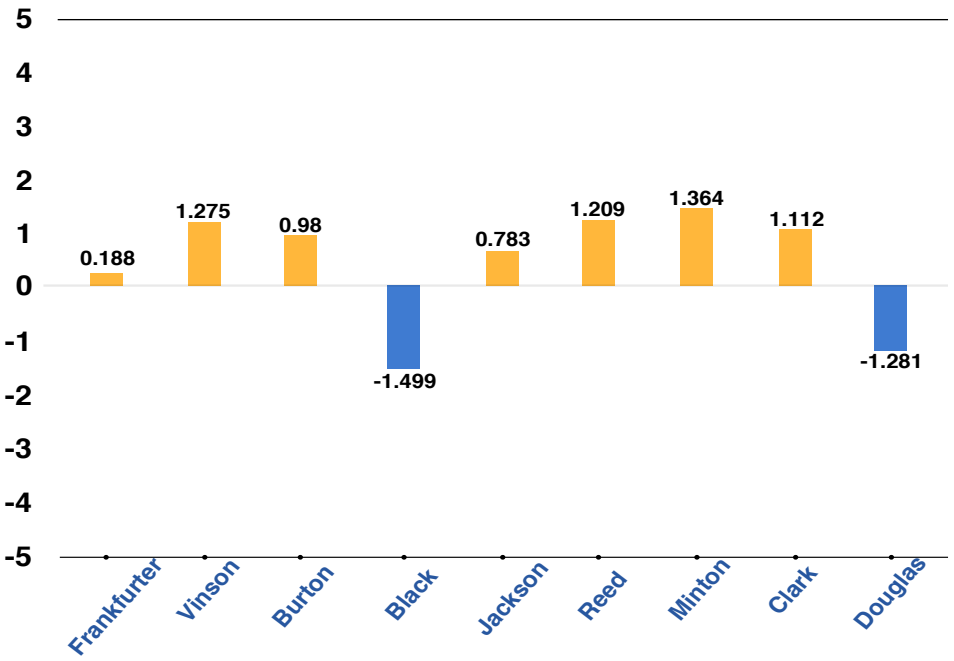
Wolf v. Colorado (1949)

Wolf v. Colorado (1949)

Justices Serving on the Court 1950 - 1969

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1950



Justices serving on the Court and Martin Quinn Ideology scores, 1950

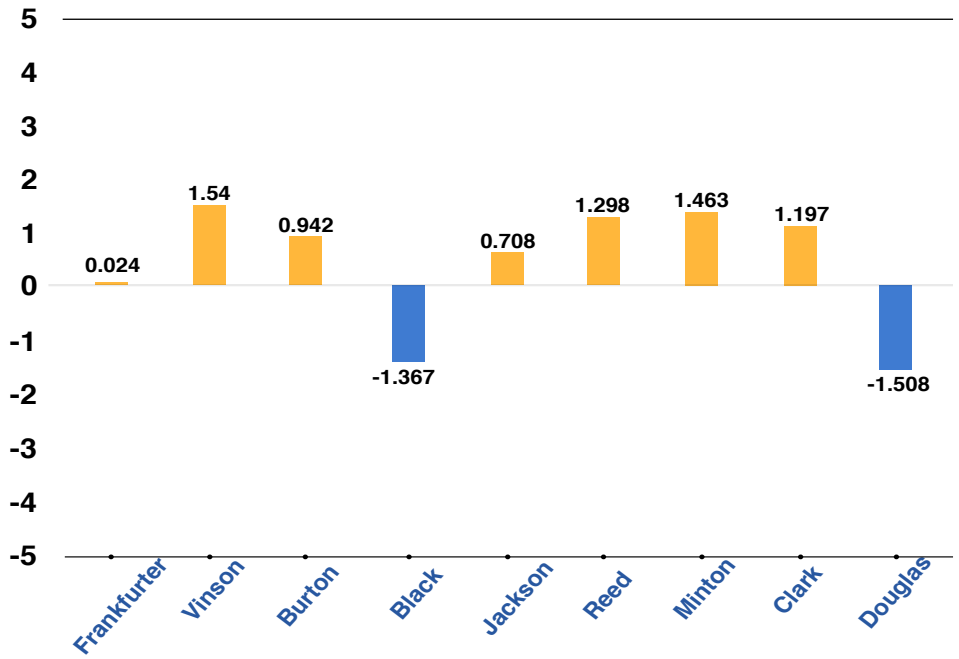
Justices serving on the Court, 1950

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.188	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.275	Truman	Democrat	1946-1953
Burton	0.98	Truman	Democrat	1945-1958
Black	-1.499	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.783	F.D. Roosevelt	Democrat	1941-1954
Reed	1.209	F.D. Roosevelt	Democrat	1941-1954
Minton	1.364	Truman	Democrat	1949-1956
Clark	1.112	Truman	Democrat	1949-1967
Douglas	-1.281	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1950

Chief Justice	Median	Court Score
Vinson	0.923	0.46

1951



Justices serving on the Court and Martin Quinn Ideology scores, 1951

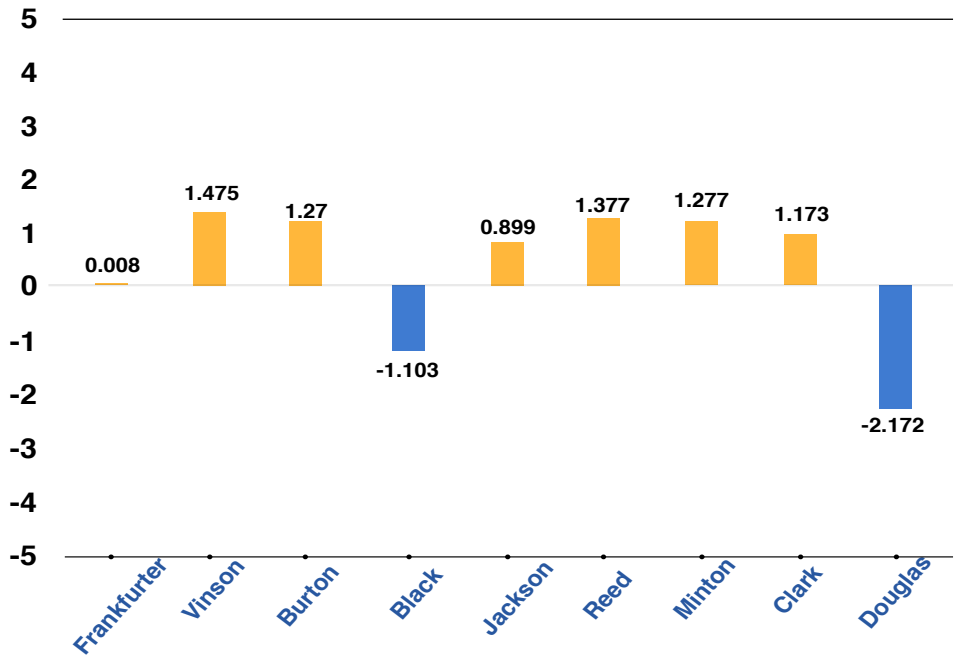
Justices serving on the Court, 1951

Justice	Mean	President	Party of President	Years Served
Frankfurter	0.024	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.54	Truman	Democrat	1946-1953
Burton	0.942	Truman	Democrat	1945-1958
Black	-1.367	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.708	F.D. Roosevelt	Democrat	1941-1954
Reed	1.298	F.D. Roosevelt	Democrat	1941-1954
Minton	1.463	Truman	Democrat	1949-1956
Clark	1.197	Truman	Democrat	1949-1967
Douglas	-1.508	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1951

Chief Justice	Median	Court Score
Vinson	0.929	0.48

1952



Justices serving on the Court and Martin Quinn Ideology scores, 1952

Justices serving on the Court, 1952

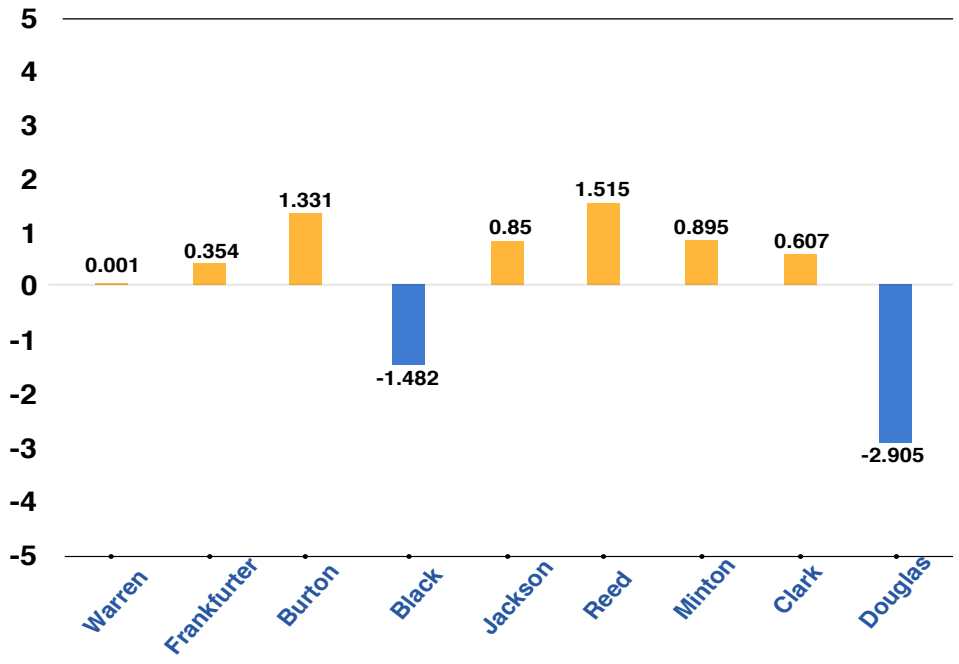
Justice	Mean	President	Party of President	Years Served
Frankfurter	0.008	F.D. Roosevelt	Democrat	1939-1962
Vinson	1.475	Truman	Democrat	1946-1953
Burton	1.27	Truman	Democrat	1945-1958
Black	-1.103	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.899	F.D. Roosevelt	Democrat	1941-1954
Reed	1.377	F.D. Roosevelt	Democrat	1941-1954
Minton	1.277	Truman	Democrat	1949-1956
Clark	1.173	Truman	Democrat	1949-1967
Douglas	-2.172	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1952

Chief Justice	Median	Court Score
Vinson	1.064	0.47

Rochin v. California (1952)

1953



Justices serving on the Court and Martin Quinn Ideology scores, 1953

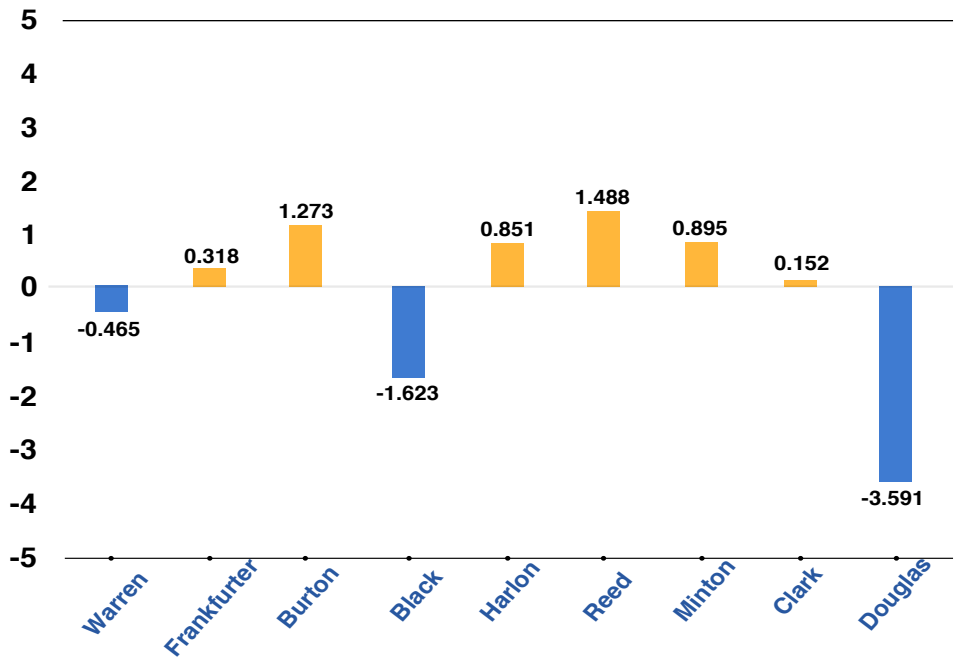
Justices serving on the Court, 1953

Justice	Mean	President	Party of President	Years Served
Warren	0.001	Eisenhower	Republican	1953-1969
Frankfurter	0.354	F.D. Roosevelt	Democrat	1939-1962
Burton	1.331	Truman	Democrat	1945-1958
Black	-1.482	F.D. Roosevelt	Democrat	1937-1971
Jackson	0.85	F.D. Roosevelt	Democrat	1941-1954
Reed	1.515	F.D. Roosevelt	Democrat	1941-1954
Minton	0.895	Truman	Democrat	1949-1956
Clark	0.607	Truman	Democrat	1949-1967
Douglas	-2.905	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1953

Chief Justice	Median	Court Score
Warren	0.574	0.13

1954



Justices serving on the Court and Martin Quinn Ideology scores, 1954

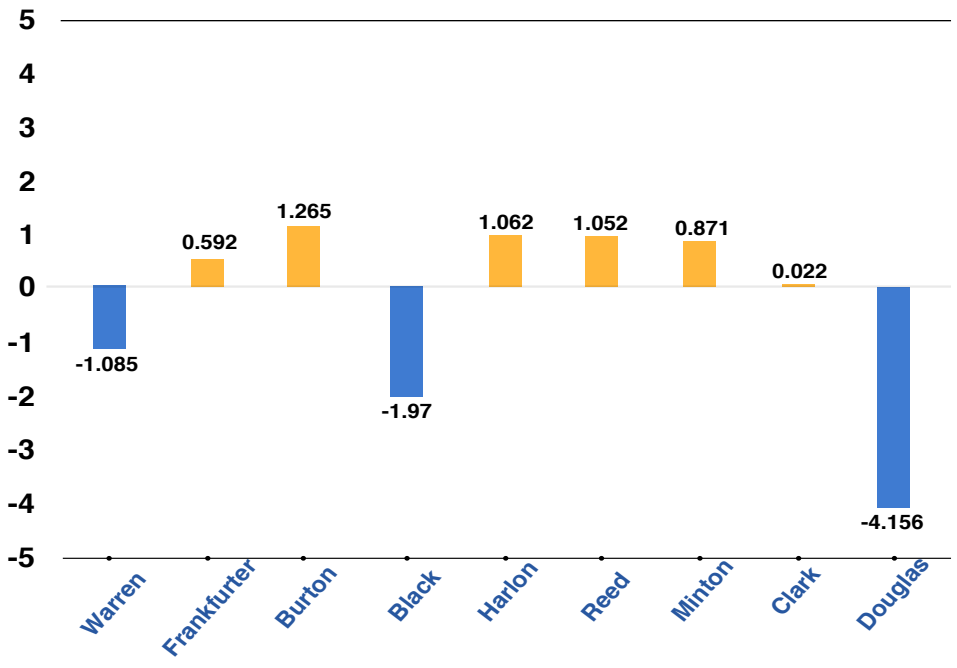
Justices serving on the Court, 1954

Justice	Mean	President	Party of President	Years Served
Warren	-0.465	Eisenhower	Republican	1953-1969
Frankfurter	0.318	F.D. Roosevelt	Democrat	1939-1962
Burton	1.273	Truman	Democrat	1945-1958
Black	-1.623	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.851	Eisenhower	Republican	1954-1971
Reed	1.488	F.D. Roosevelt	Democrat	1941-1954
Minton	0.895	Truman	Democrat	1949-1956
Clark	0.152	Truman	Democrat	1949-1967
Douglas	-3.591	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1954

Chief Justice	Median	Court Score
Warren	0.348	-0.08

1955



Justices serving on the Court and Martin Quinn Ideology scores, 1955

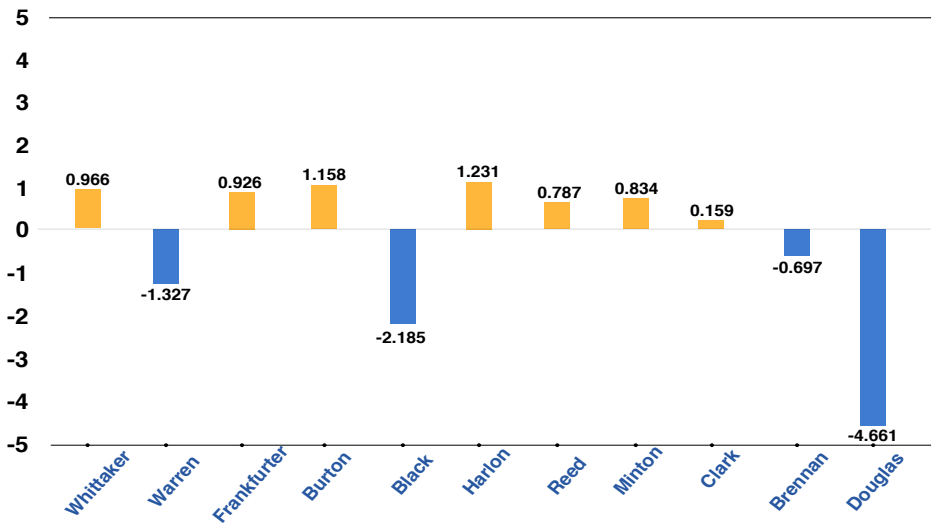
Justices serving on the Court, 1955

Justice	Mean	President	Party of President	Years Served
Warren	-1.085	Eisenhower	Republican	1953-1969
Frankfurter	0.592	F.D. Roosevelt	Democrat	1939-1962
Burton	1.265	Truman	Democrat	1945-1958
Black	-1.97	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.062	Eisenhower	Republican	1954-1971
Reed	1.052	F.D. Roosevelt	Democrat	1941-1954
Minton	0.871	Truman	Democrat	1949-1956
Clark	0.022	Truman	Democrat	1949-1967
Douglas	-4.156	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1955

Chief Justice	Median	Court Score
Warren	0.56	-0.26

1956



Justices serving on the Court and Martin Quinn Ideology scores, 1956

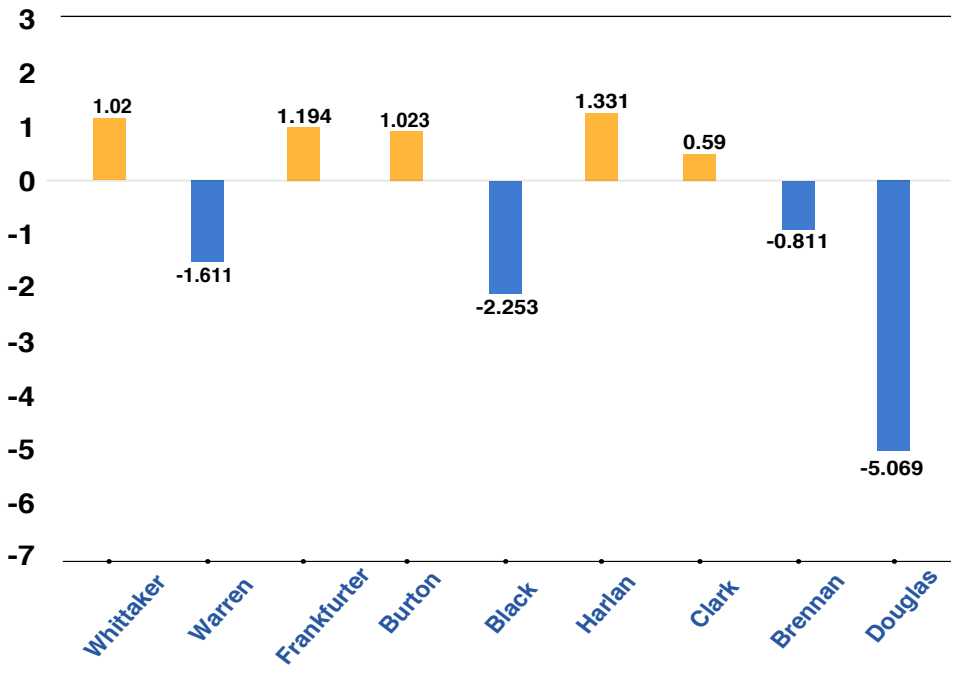
Justices serving on the Court, 1956

Justice	Mean	President	Party of President	Years Served
Whittaker	0.966	Eisenhower	Republican	1957-1962
Warren	-1.327	Eisenhower	Republican	1953-1969
Frankfurter	0.926	F.D. Roosevelt	Democrat	1939-1962
Burton	1.158	Truman	Democrat	1945-1958
Black	-2.185	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.231	Eisenhower	Republican	1954-1971
Reed	0.787	F.D. Roosevelt	Democrat	1941-1954
Minton	0.834	Truman	Democrat	1949-1956
Clark	0.159	Truman	Democrat	1949-1967
Brennan	-0.697	Eisenhower	Republican	1956-1990
Douglas	-4.661	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1956

Chief Justice	Median	Court Score
Warren	0.158	-0.26
Warren (2)	0.159	-0.26

1957



Justices serving on the Court and Martin Quinn Ideology scores, 1957

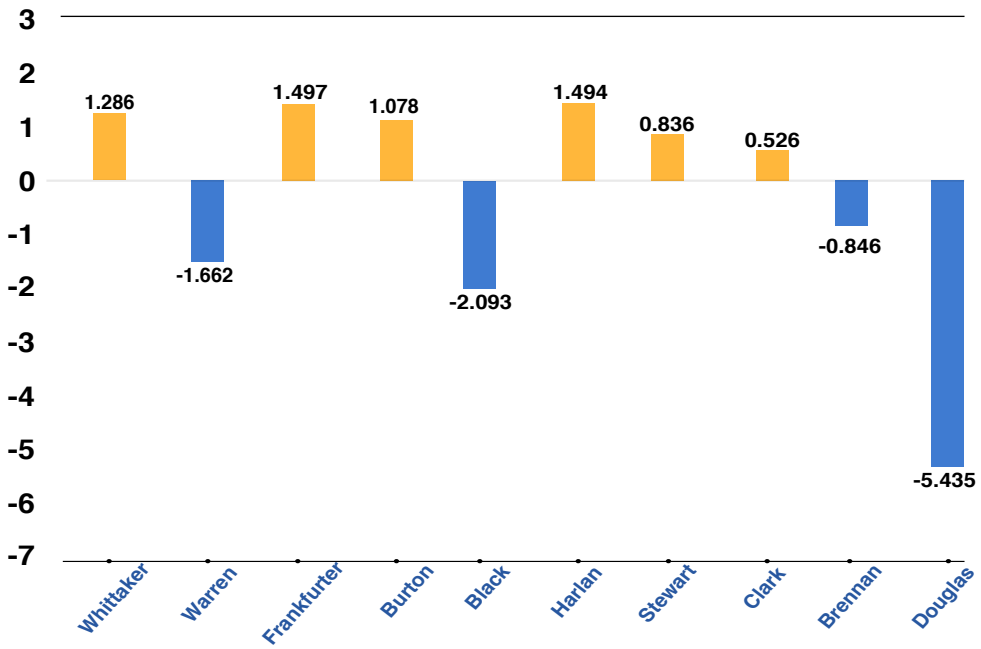
Justices serving on the Court, 1957

Justice	Mean	President	Party of President	Years Served
Whittaker	1.02	Eisenhower	Republican	1957-1962
Warren	-1.611	Eisenhower	Republican	1953-1969
Frankfurter	1.194	F.D. Roosevelt	Democrat	1939-1962
Burton	1.023	Truman	Democrat	1945-1958
Black	-2.253	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.331	Eisenhower	Republican	1954-1971
Clark	0.59	Truman	Democrat	1949-1967
Brennan	-0.811	Eisenhower	Republican	1956-1990
Douglas	-5.069	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1957

Chief Justice	Median	Court Score
Warren	0.585	-0.51

1958



Justices serving on the Court and Martin Quinn Ideology scores, 1958

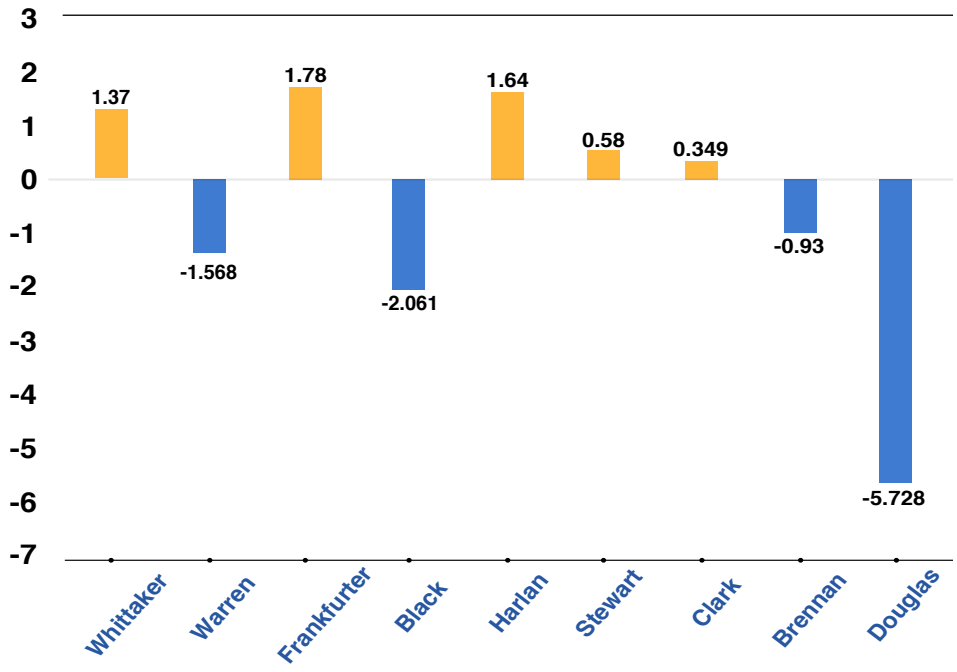
Justices serving on the Court, 1958

Justice	Mean	President	Party of President	Years Served
Whittaker	1.286	Eisenhower	Republican	1957-1962
Warren	-1.662	Eisenhower	Republican	1953-1969
Frankfurter	1.497	F.D. Roosevelt	Democrat	1939-1962
Burton	1.078	Truman	Democrat	1945-1958
Black	-2.093	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.494	Eisenhower	Republican	1954-1971
Stewart	0.836	Eisenhower	Republican	1958-1981
Clark	0.526	Truman	Democrat	1949-1967
Brennan	-0.846	Eisenhower	Republican	1956-1990
Douglas	-5.435	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1958

Chief Justice	Median	Court Score
Warren	0.643	-0.33

1959



Justices serving on the Court and Martin Quinn Ideology scores, 1959

Justices serving on the Court, 1959

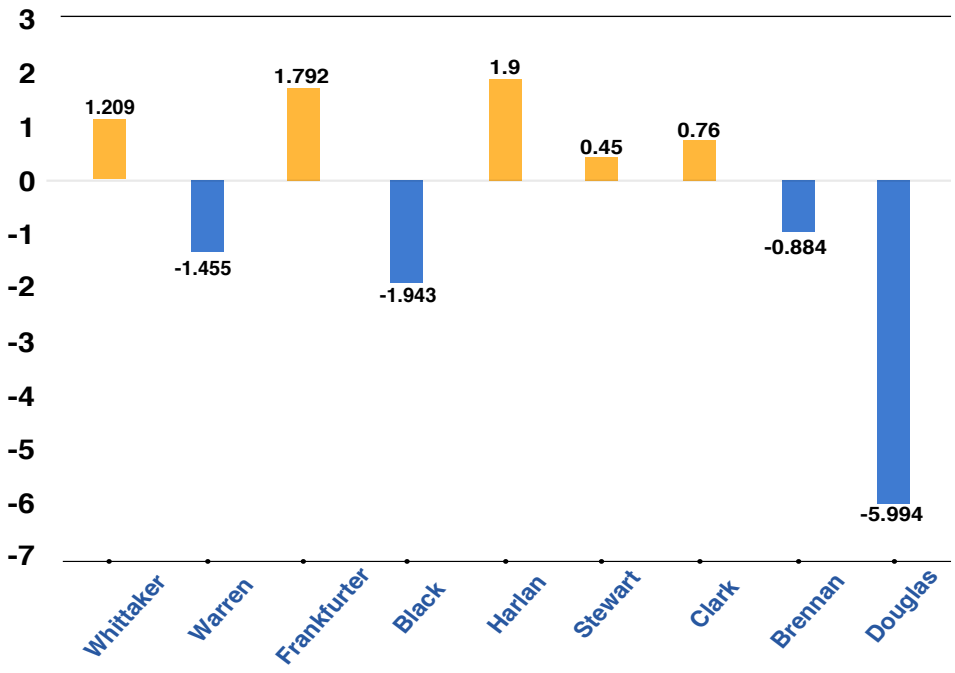
Justice	Mean	President	Party of President	Years Served
Whittaker	1.37	Eisenhower	Republican	1957-1962
Warren	-1.568	Eisenhower	Republican	1953-1969
Frankfurter	1.78	F.D. Roosevelt	Democrat	1939-1962
Black	-2.061	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.64	Eisenhower	Republican	1954-1971
Stewart	0.58	Eisenhower	Republican	1958-1981
Clark	0.349	Truman	Democrat	1949-1967
Brennan	-0.93	Eisenhower	Republican	1956-1990
Douglas	-5.728	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1959

Chief Justice	Median	Court Score
Warren	0.335	-0.51

Spano v. New York (1959)

1960



Justices serving on the Court and Martin Quinn Ideology scores, 1960

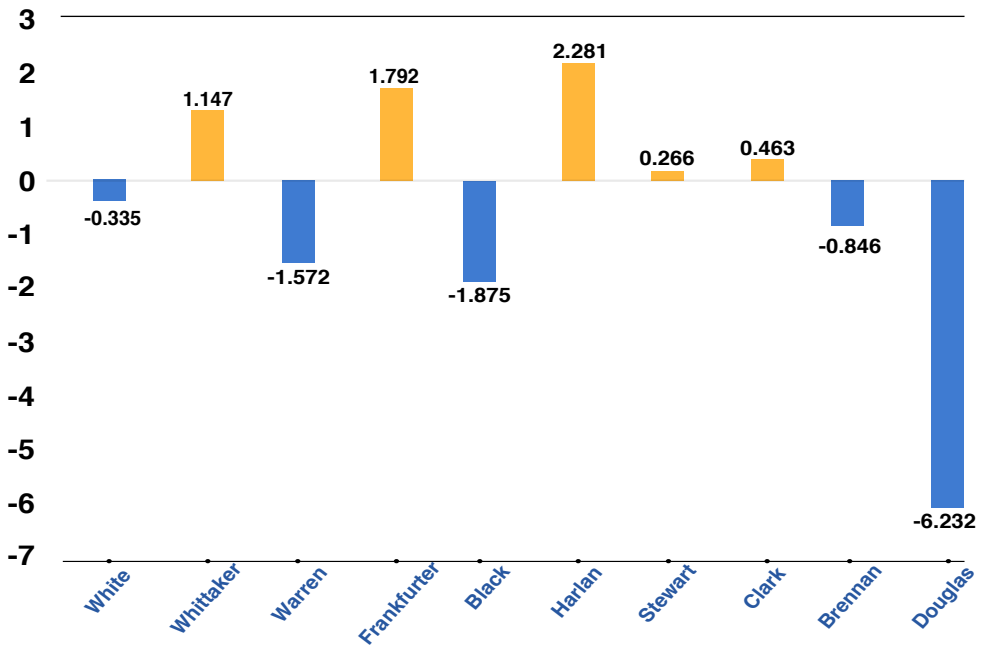
Justices serving on the Court, 1960

Justice	Mean	President	Party of President	Years Served
Whittaker	1.209	Eisenhower	Republican	1957-1962
Warren	-1.455	Eisenhower	Republican	1953-1969
Frankfurter	1.792	F.D. Roosevelt	Democrat	1939-1962
Black	-1.943	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.9	Eisenhower	Republican	1954-1971
Stewart	0.45	Eisenhower	Republican	1958-1981
Clark	0.76	Truman	Democrat	1949-1967
Brennan	-0.884	Eisenhower	Republican	1956-1990
Douglas	-5.994	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1960

Chief Justice	Median	Court Score
Warren	0.442	-0.46

1961



Justices serving on the Court and Martin Quinn Ideology scores, 1961

Justices serving on the Court, 1961

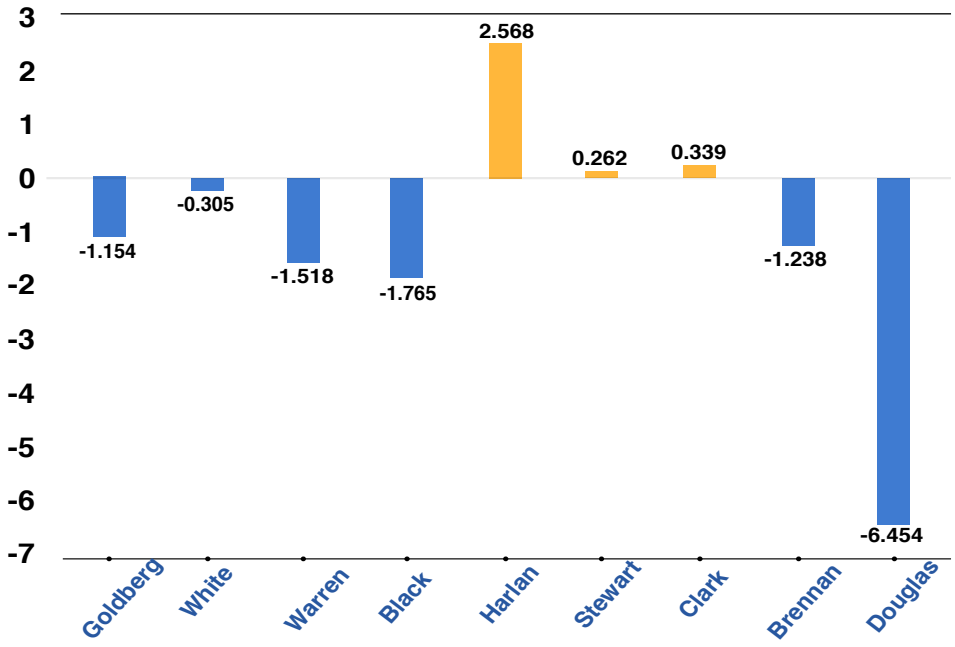
Justice	Mean	President	Party of President	Years Served
White	-0.335	Kennedy	Democrat	1961-1993
Whittaker	1.147	Eisenhower	Republican	1957-1962
Warren	-1.572	Eisenhower	Republican	1953-1969
Frankfurter	1.792	F.D. Roosevelt	Democrat	1939-1962
Black	-1.875	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.281	Eisenhower	Republican	1954-1971
Stewart	0.266	Eisenhower	Republican	1958-1981
Clark	0.463	Truman	Democrat	1949-1967
Brennan	-0.846	Eisenhower	Republican	1956-1990
Douglas	-6.232	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1961

Chief Justice	Median	Court Score
Warren	-0.043	-0.49

Mapp v. Ohio (1961)

1962



Justices serving on the Court and Martin Quinn Ideology scores, 1962

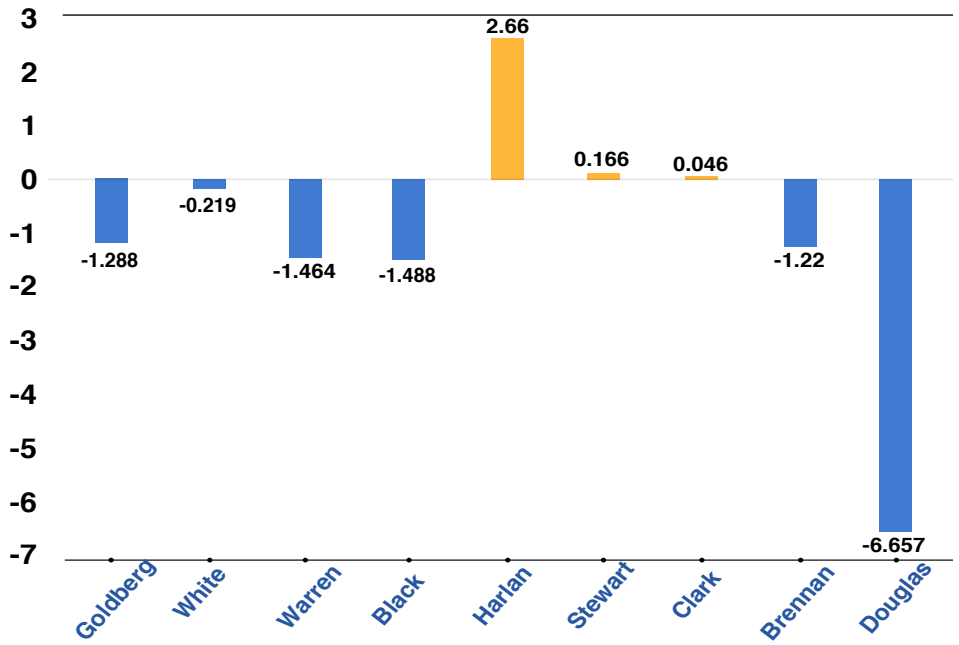
Justices serving on the Court, 1962

Justice	Mean	President	Party of President	Years Served
Goldberg	-1.154	Kennedy	Democrat	1962-1965
White	-0.305	Kennedy	Democrat	1961-1993
Warren	-1.518	Eisenhower	Republican	1953-1969
Black	-1.765	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.568	Eisenhower	Republican	1954-1971
Stewart	0.262	Eisenhower	Republican	1958-1981
Clark	0.339	Truman	Democrat	1949-1967
Brennan	-1.238	Eisenhower	Republican	1956-1990
Douglas	-6.454	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1962

Chief Justice	Median	Court Score
Warren	-1.078	-1.03

1963



Justices serving on the Court and Martin Quinn Ideology scores, 1963

Justices serving on the Court, 1963

Justice	Mean	President	Party of President	Years Served
Goldberg	-1.288	Kennedy	Democrat	1962-1965
White	-0.219	Kennedy	Democrat	1961-1993
Warren	-1.464	Eisenhower	Republican	1953-1969
Black	-1.488	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.66	Eisenhower	Republican	1954-1971
Stewart	0.166	Eisenhower	Republican	1958-1981
Clark	0.046	Truman	Democrat	1949-1967
Brennan	-1.22	Eisenhower	Republican	1956-1990
Douglas	-6.657	F.D. Roosevelt	Democrat	1939-1975

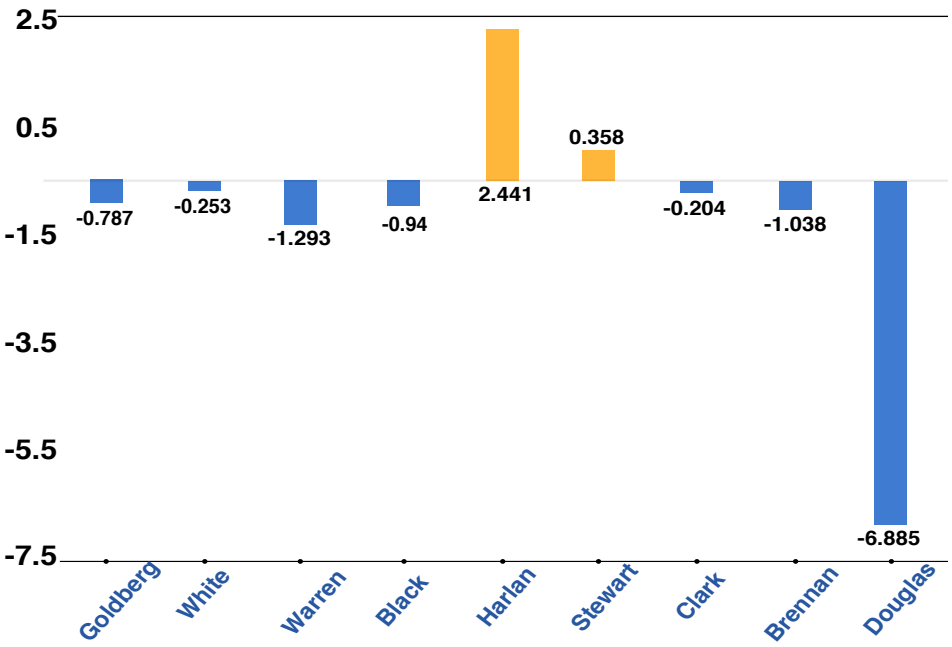
Chief Justice, 1963

Chief Justice	Median	Court Score
Warren	-1.131	-1.05

Gideon v. Wainwright (1963)

Gideon v. Wainwright (1963)

1964



Justices serving on the Court and Martin Quinn Ideology scores, 1964

Justices serving on the Court, 1964

Justice	Mean	President	Party of President	Years Served
Goldberg	-0.787	Kennedy	Democrat	1962-1965
White	-0.253	Kennedy	Democrat	1961-1993
Warren	-1.293	Eisenhower	Republican	1953-1969
Black	-0.94	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.441	Eisenhower	Republican	1954-1971
Stewart	0.358	Eisenhower	Republican	1958-1981
Clark	-0.204	Truman	Democrat	1949-1967
Brennan	-1.038	Eisenhower	Republican	1956-1990
Douglas	-6.885	F.D. Roosevelt	Democrat	1939-1975

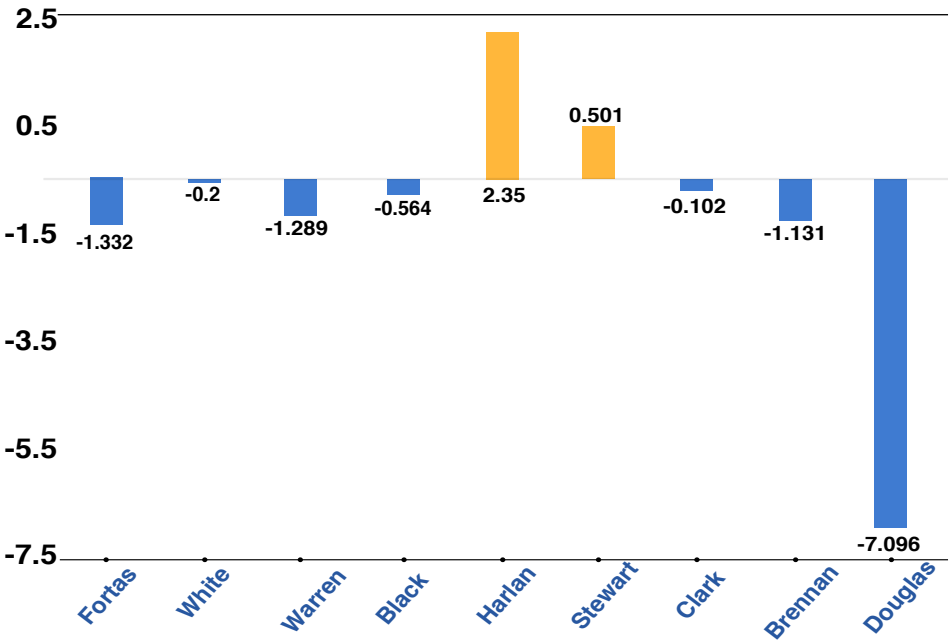
Chief Justice, 1964

Chief Justice	Median	Court Score
Warren	-0.708	-0.96

Stoner v. California (1964)

Escobedo v. Illinois (1964)

1965



Justices serving on the Court and Martin Quinn Ideology scores, 1965

Justices serving on the Court, 1965

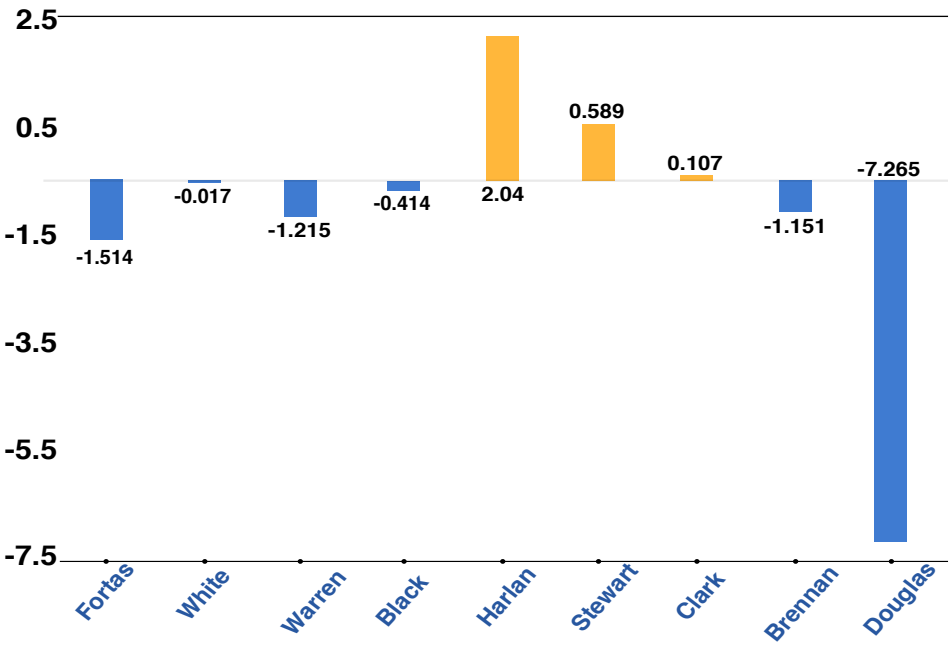
Justice	Mean	President	Party of President	Years Served
Fortas	-1.332	Johnson	Democrat	1965-1969
White	-0.2	Kennedy	Democrat	1961-1993
Warren	-1.289	Eisenhower	Republican	1953-1969
Black	-0.564	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.35	Eisenhower	Republican	1954-1971
Stewart	0.501	Eisenhower	Republican	1958-1981
Clark	-0.102	Truman	Democrat	1949-1967
Brennan	-1.131	Eisenhower	Republican	1956-1990
Douglas	-7.096	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1965

Chief Justice	Median	Court Score
Warren	-0.569	-0.98

Pointer v. Texas (1965)

1966



Justices serving on the Court and Martin Quinn Ideology scores, 1966

Justices serving on the Court, 1966

Justice	Mean	President	Party of President	Years Served
Fortas	-1.514	Johnson	Democrat	1965-1969
White	-0.017	Kennedy	Democrat	1961-1993
Warren	-1.215	Eisenhower	Republican	1953-1969
Black	-0.414	F.D. Roosevelt	Democrat	1937-1971
Harlan	2.04	Eisenhower	Republican	1954-1971
Stewart	0.589	Eisenhower	Republican	1958-1981
Clark	0.107	Truman	Democrat	1949-1967
Brennan	-1.151	Eisenhower	Republican	1956-1990
Douglas	-7.265	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1966

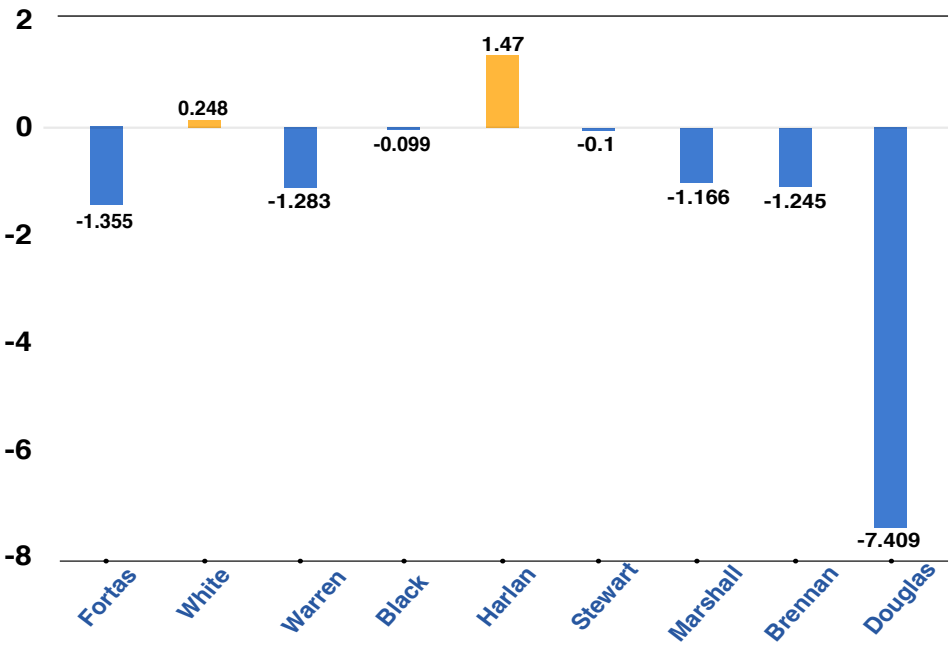
Chief Justice	Median	Court Score
Warren	-0.416	-0.98

Miranda v. Arizona (1966)

Oregon v. Mathiason (1966)

Sheppard v. Maxwell (1966)

1967



Justices serving on the Court and Martin Quinn Ideology scores, 1967

Justices serving on the Court, 1967

Justice	Mean	President	Party of President	Years Served
Fortas	-1.355	Johnson	Democrat	1965-1969
White	0.248	Kennedy	Democrat	1961-1993
Warren	-1.283	Eisenhower	Republican	1953-1969
Black	-0.099	F.D. Roosevelt	Democrat	1937-1971
Harlan	1.47	Eisenhower	Republican	1954-1971
Stewart	-0.1	Eisenhower	Republican	1958-1981
Marshall	-1.166	Johnson	Democrat	1967-1991
Brennan	-1.245	Eisenhower	Republican	1956-1990
Douglas	-7.409	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1967

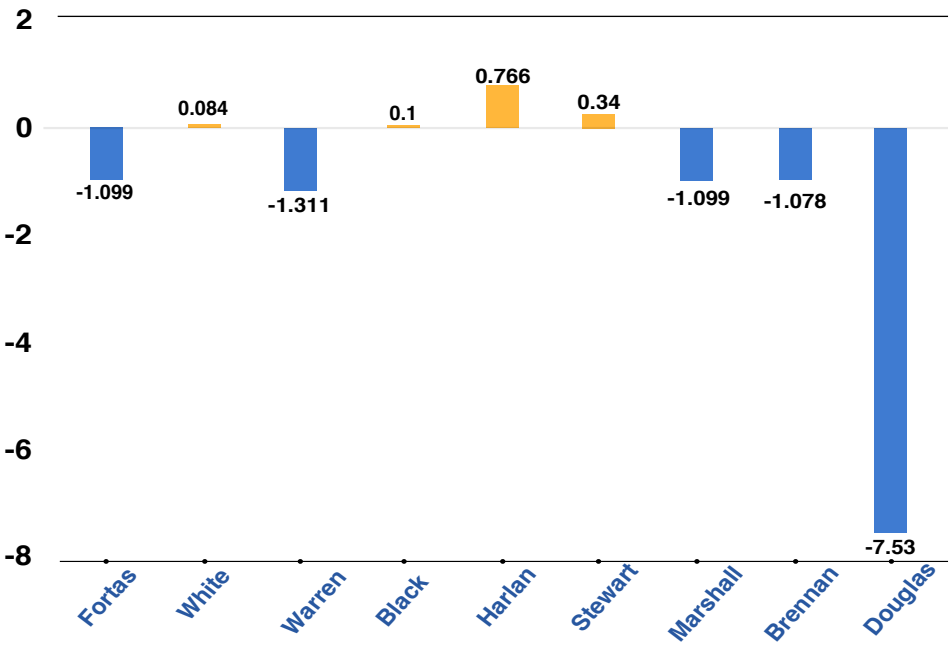
Chief Justice	Median	Court Score
Warren	-1.046	-1.22

Warden v. Hayden (1967)

Katz v. United States (1967)

United States v. Wade (1967)

1968



Justices serving on the Court and Martin Quinn Ideology scores, 1968

Justices serving on the Court, 1968

Justice	Mean	President	Party of President	Years Served
Fortas	-1.099	Johnson	Democrat	1965-1969
White	0.084	Kennedy	Democrat	1961-1993
Warren	-1.311	Eisenhower	Republican	1953-1969
Black	0.1	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.766	Eisenhower	Republican	1954-1971
Stewart	0.34	Eisenhower	Republican	1958-1981
Marshall	-1.099	Johnson	Democrat	1967-1991
Brennan	-1.078	Eisenhower	Republican	1956-1990
Douglas	-7.53	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1968

Chief Justice	Median	Court Score
Warren	-0.9	-1.20

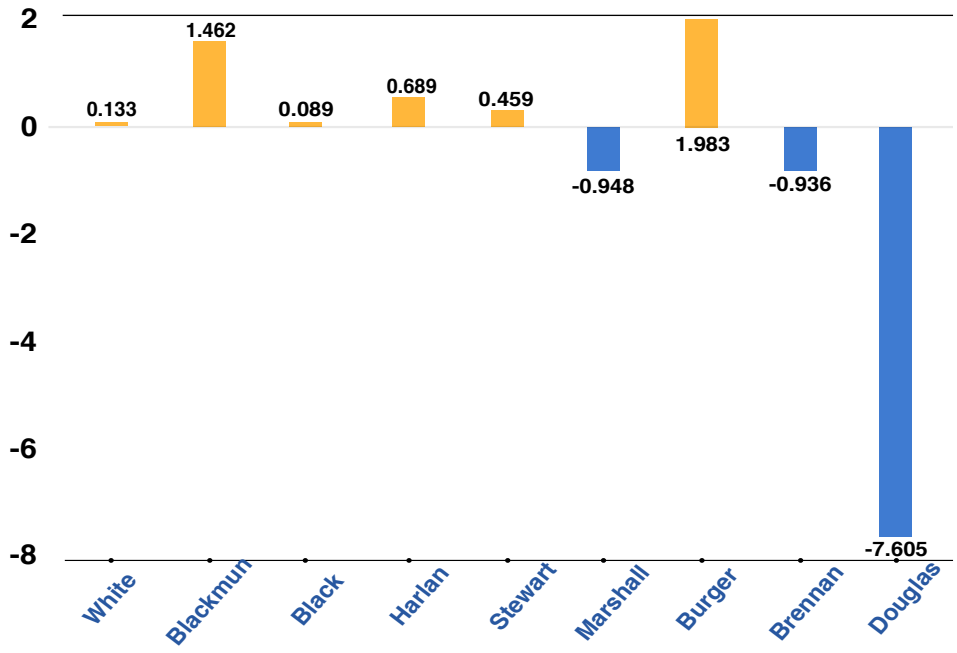
Duncan v. Louisiana (1968)

Terry v. Ohio (1968)

Bumper v. North Carolina (1968)

Duncan v. Louisiana (1968)

1969



Justices serving on the Court and Martin Quinn Ideology scores, 1969

Justices serving on the Court, 1969

Justice	Mean	President	Party of President	Years Served
White	0.133	Kennedy	Democrat	1961-1993
Blackmun	1.462	Nixon	Republican	1969-1994
Black	0.089	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.689	Eisenhower	Republican	1954-1971
Stewart	0.459	Eisenhower	Republican	1958-1981
Marshall	-0.948	Johnson	Democrat	1967-1991
Burger	1.983	Nixon	Republican	1969-1986
Brennan	-0.936	Eisenhower	Republican	1956-1990
Douglas	-7.605	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1969

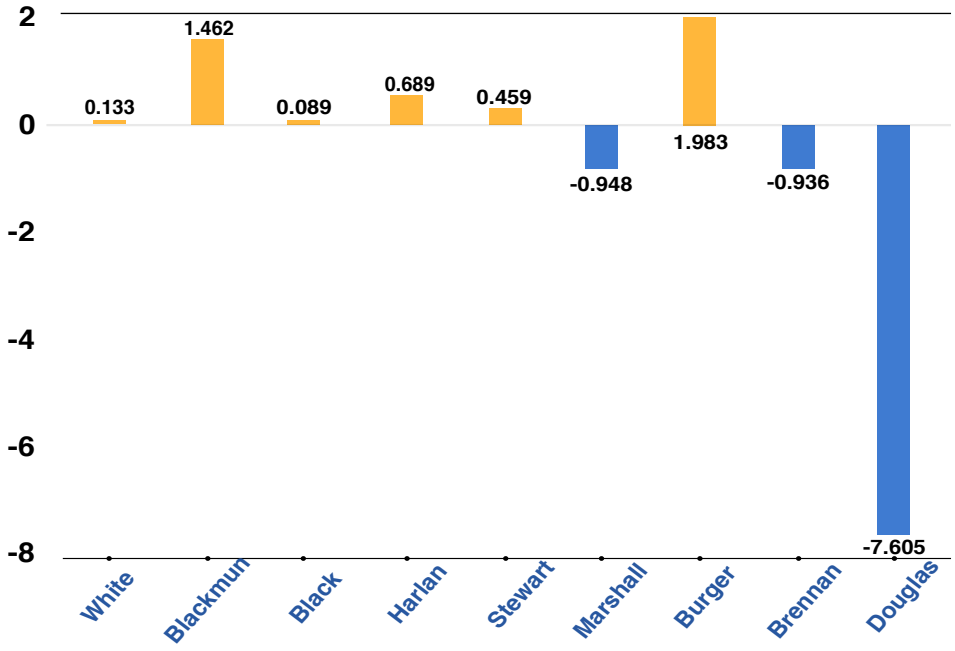
Chief Justice	Median	Court Score
Burger	0.193	-0.52

Chimel v. California (1969)

Justices Serving on the Court 1970 - 1989

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1970



Justices serving on the Court and Martin Quinn Ideology scores, 1970

Justices serving on the Court, 1970

Justice	Mean	President	Party of President	Years Served
White	0.133	Kennedy	Democrat	1961-1993
Blackmun	1.462	Nixon	Republican	1969-1994
Black	0.089	F.D. Roosevelt	Democrat	1937-1971
Harlan	0.689	Eisenhower	Republican	1954-1971
Stewart	0.459	Eisenhower	Republican	1958-1981
Marshall	-0.948	Johnson	Democrat	1967-1991
Burger	1.983	Nixon	Republican	1969-1986
Brennan	-0.936	Eisenhower	Republican	1956-1990
Douglas	-7.605	F.D. Roosevelt	Democrat	1939-1975

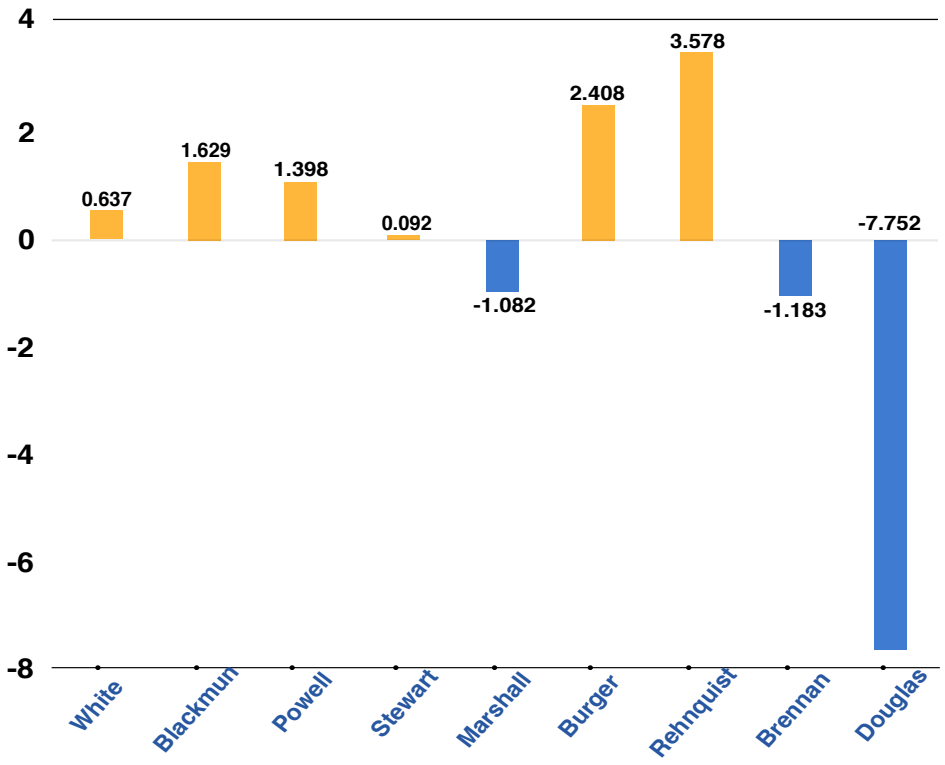
Chief Justice, 1970

Chief Justice	Median	Court Score
Burger	0.378	-0.52

Chambers v. Maroney (1970)

Illinois v. Allen (1970)

1971



Justices serving on the Court and Martin Quinn Ideology scores, 1971

Justices serving on the Court, 1971

Justice	Mean	President	Party of President	Years Served
White	0.637	Kennedy	Democrat	1961-1993
Blackmun	1.629	Nixon	Republican	1969-1994
Powell	1.398	Nixon	Republican	1971-1987
Stewart	0.092	Eisenhower	Republican	1958-1981
Marshall	-1.082	Johnson	Democrat	1967-1991
Burger	2.408	Nixon	Republican	1969-1986
Rehnquist	3.578	Nixon	Republican	1971-2005
Brennan	-1.183	Eisenhower	Republican	1956-1990
Douglas	-7.752	F.D. Roosevelt	Democrat	1939-1975

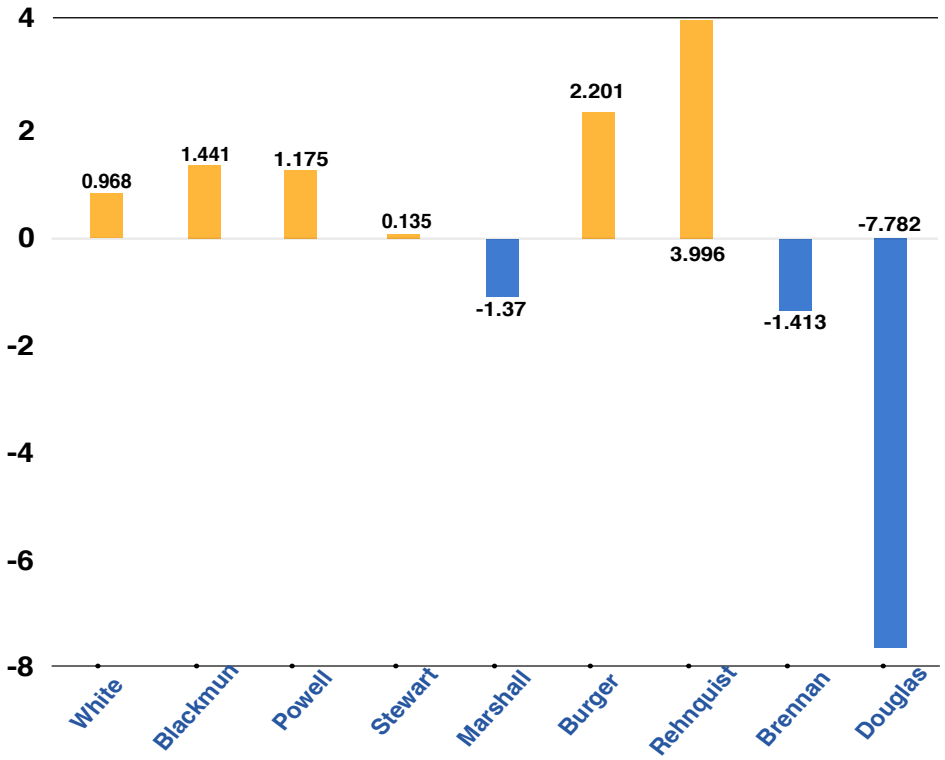
Chief Justice, 1971

Chief Justice	Median	Court Score
Burger	0.637	-0.03

Harris v. New York (1971)

United States v. Marion (1971)

1972



Justices serving on the Court and Martin Quinn Ideology scores, 1972

Justices serving on the Court, 1972

Justice	Mean	President	Party of President	Years Served
White	0.968	Kennedy	Democrat	1961-1993
Blackmun	1.441	Nixon	Republican	1969-1994
Powell	1.175	Nixon	Republican	1971-1987
Stewart	0.135	Eisenhower	Republican	1958-1981
Marshall	-1.37	Johnson	Democrat	1967-1991
Burger	2.201	Nixon	Republican	1969-1986
Rehnquist	3.996	Nixon	Republican	1971-2005
Brennan	-1.413	Eisenhower	Republican	1956-1990
Douglas	-7.782	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1972

Chief Justice	Median	Court Score
Burger	0.944	-0.07

Adams v. Williams (1972)

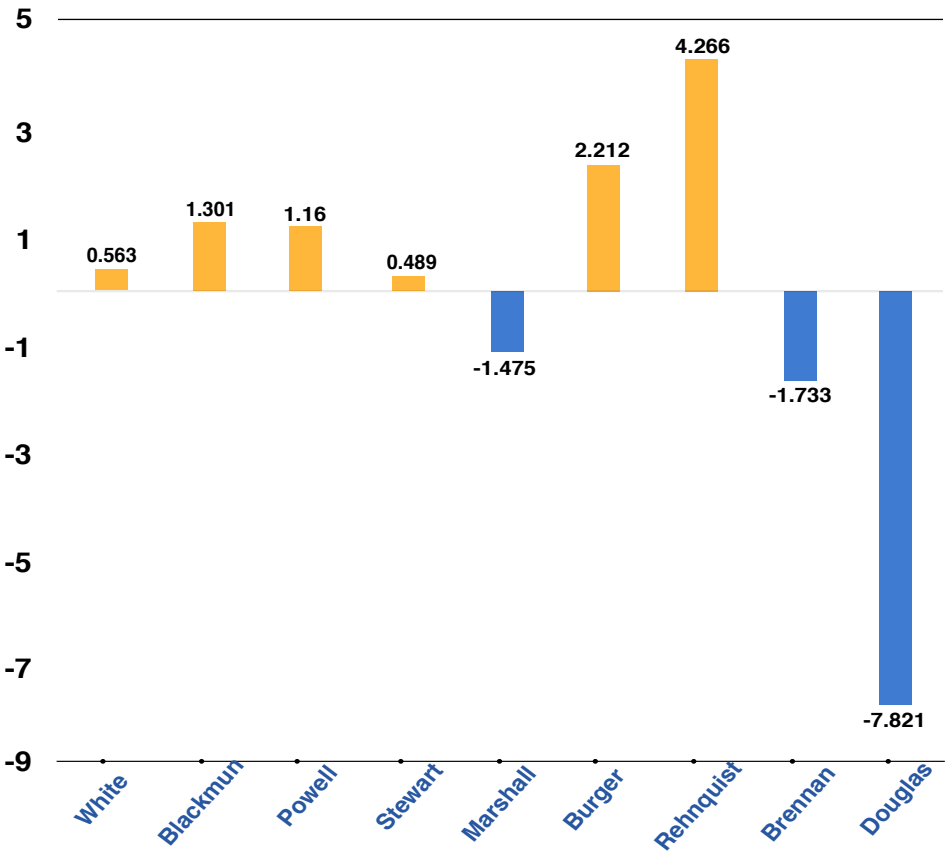
Kirby v. Illinois (1972)

Argersinger v. Hamlin (1972)

Barker v. Wingo (1972)

Furman v. Georgia (1972)

1973



Justices serving on the Court and Martin Quinn Ideology scores, 1973

Justices serving on the Court, 1973

Justice	Mean	President	Party of President	Years Served
White	0.563	Kennedy	Democrat	1961-1993
Blackmun	1.301	Nixon	Republican	1969-1994
Powell	1.16	Nixon	Republican	1971-1987
Stewart	0.489	Eisenhower	Republican	1958-1981
Marshall	-1.475	Johnson	Democrat	1967-1991
Burger	2.212	Nixon	Republican	1969-1986
Rehnquist	4.266	Nixon	Republican	1971-2005
Brennan	-1.733	Eisenhower	Republican	1956-1990
Douglas	-7.821	F.D. Roosevelt	Democrat	1939-1975

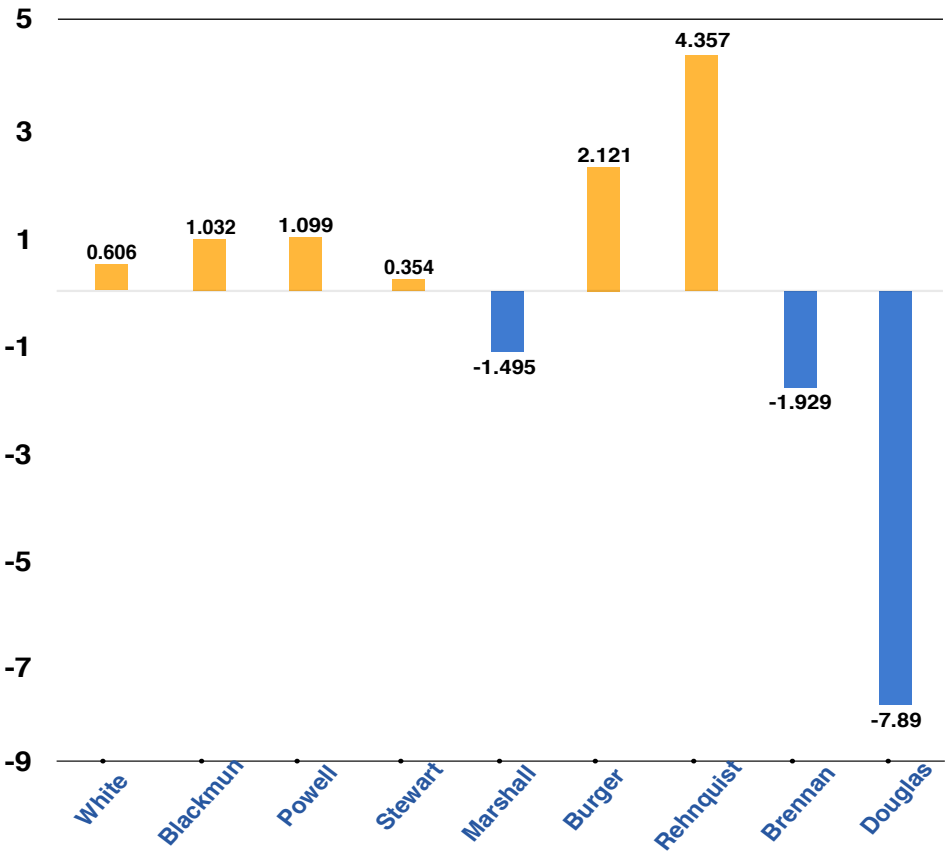
Chief Justice, 1973

Chief Justice	Median	Court Score
Burger	0.61	-0.12

Cupp v. Murphy (1973)

United States v. Dionisio (1973)

1974



Justices serving on the Court and Martin Quinn Ideology scores, 1974

Justices serving on the Court, 1974

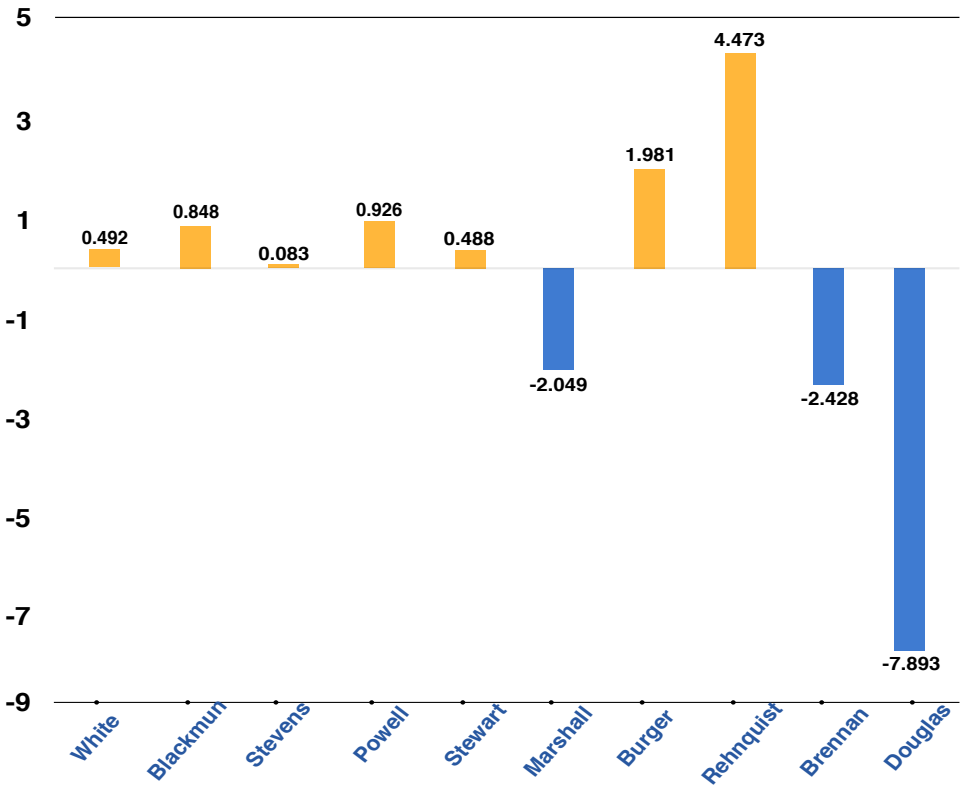
Justice	Mean	President	Party of President	Years Served
White	0.606	Kennedy	Democrat	1961-1993
Blackmun	1.032	Nixon	Republican	1969-1994
Powell	1.099	Nixon	Republican	1971-1987
Stewart	0.354	Eisenhower	Republican	1958-1981
Marshall	-1.495	Johnson	Democrat	1967-1991
Burger	2.121	Nixon	Republican	1969-1986
Rehnquist	4.357	Nixon	Republican	1971-2005
Brennan	-1.929	Eisenhower	Republican	1956-1990
Douglas	-7.89	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1974

Chief Justice	Median	Court Score
Burger	0.614	-0.19

United States v. Matlock (1974)

1975



Justices serving on the Court and Martin Quinn Ideology scores, 1975

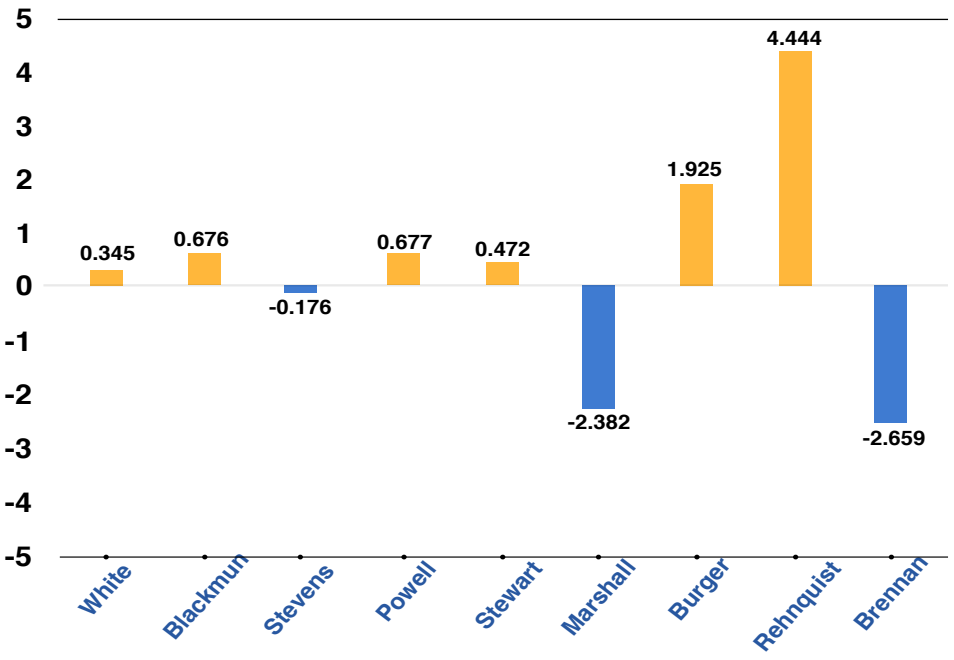
Justices serving on the Court, 1975

Justice	Mean	President	Party of President	Years Served
White	0.492	Kennedy	Democrat	1961-1993
Blackmun	0.848	Nixon	Republican	1969-1994
Stevens	0.083	Ford	Republican	1975-2010
Powell	0.926	Nixon	Republican	1971-1987
Stewart	0.488	Eisenhower	Republican	1958-1981
Marshall	-2.049	Johnson	Democrat	1967-1991
Burger	1.981	Nixon	Republican	1969-1986
Rehnquist	4.473	Nixon	Republican	1971-2005
Brennan	-2.428	Eisenhower	Republican	1956-1990
Douglas	-7.893	F.D. Roosevelt	Democrat	1939-1975

Chief Justice, 1975

Chief Justice	Median	Court Score
Burger	0.489	-0.36

1976



Justices serving on the Court and Martin Quinn Ideology scores, 1976

Justices serving on the Court, 1976

Justice	Mean	President	Party of President	Years Served
White	0.345	Kennedy	Democrat	1961-1993
Blackmun	0.676	Nixon	Republican	1969-1994
Stevens	-0.176	Ford	Republican	1975-2010
Powell	0.677	Nixon	Republican	1971-1987
Stewart	0.472	Eisenhower	Republican	1958-1981
Marshall	-2.382	Johnson	Democrat	1967-1991
Burger	1.925	Nixon	Republican	1969-1986
Rehnquist	4.444	Nixon	Republican	1971-2005
Brennan	-2.659	Eisenhower	Republican	1956-1990

Chief Justice, 1976

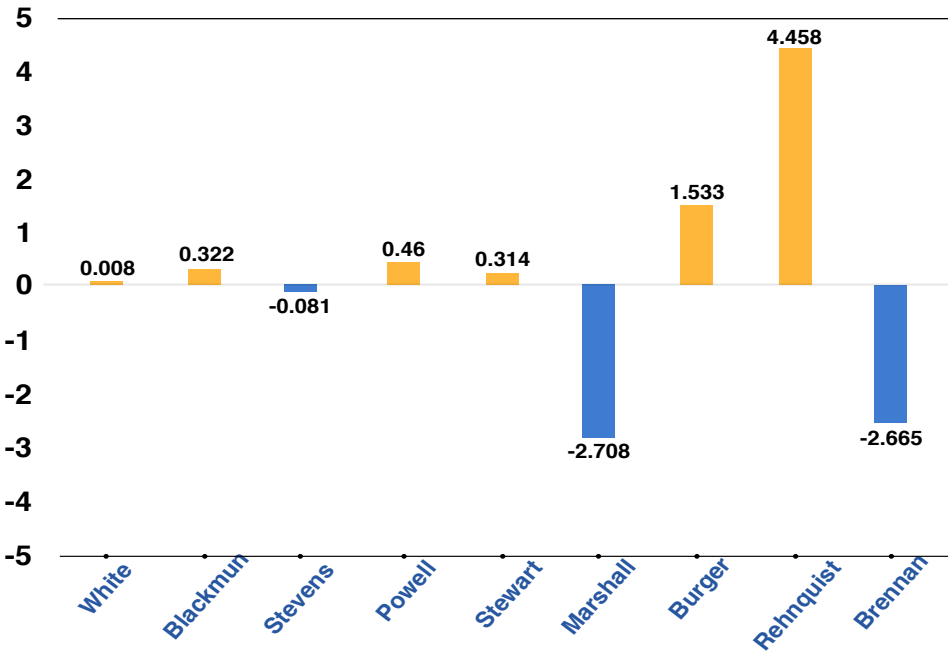
Chief Justice	Median	Court Score
Burger	0.474	0.37

South Dakota v. Opperman (1976)

Estelle v. Williams (1976)

Gregg v. Georgia (1976)

1977



Justices serving on the Court and Martin Quinn Ideology scores, 1977

Justices serving on the Court, 1977

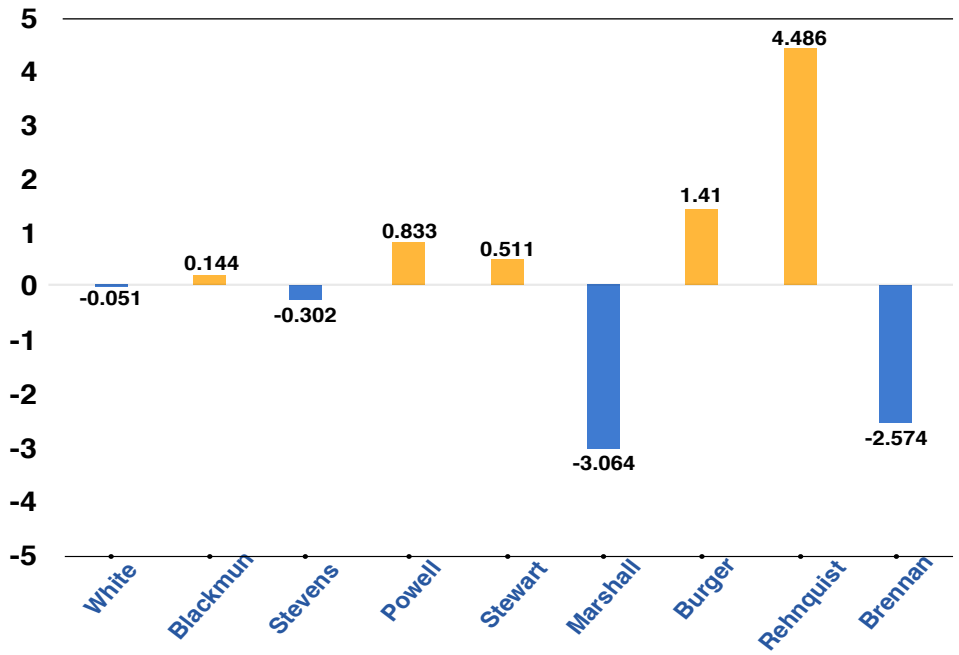
Justice	Mean	President	Party of President	Years Served
White	0.008	Kennedy	Democrat	1961-1993
Blackmun	0.322	Nixon	Republican	1969-1994
Stevens	-0.081	Ford	Republican	1975-2010
Powell	0.46	Nixon	Republican	1971-1987
Stewart	0.314	Eisenhower	Republican	1958-1981
Marshall	-2.708	Johnson	Democrat	1967-1991
Burger	1.533	Nixon	Republican	1969-1986
Rehnquist	4.458	Nixon	Republican	1971-2005
Brennan	-2.665	Eisenhower	Republican	1956-1990

Chief Justice, 1977

Chief Justice	Median	Court Score
Burger	0.234	0.18

Brewer v. Williams (1977)

1978



Justices serving on the Court and Martin Quinn Ideology scores, 1978

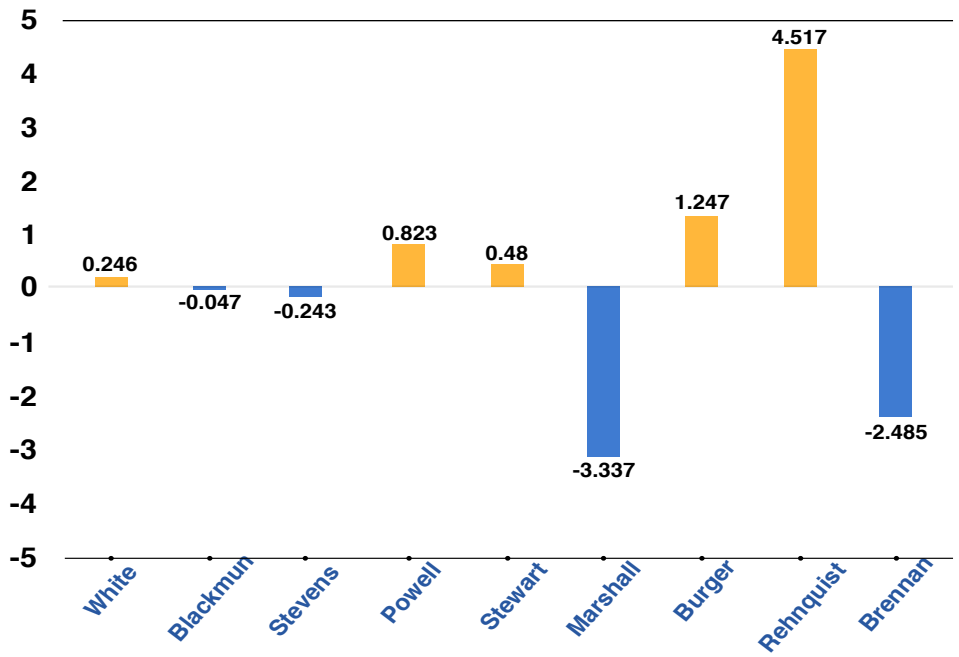
Justices serving on the Court, 1978

Justice	Mean	President	Party of President	Years Served
White	-0.051	Kennedy	Democrat	1961-1993
Blackmun	0.144	Nixon	Republican	1969-1994
Stevens	-0.302	Ford	Republican	1975-2010
Powell	0.833	Nixon	Republican	1971-1987
Stewart	0.511	Eisenhower	Republican	1958-1981
Marshall	-3.064	Johnson	Democrat	1967-1991
Burger	1.41	Nixon	Republican	1969-1986
Rehnquist	4.486	Nixon	Republican	1971-2005
Brennan	-2.574	Eisenhower	Republican	1956-1990

Chief Justice, 1978

Chief Justice	Median	Court Score
Burger	0.156	0.15

1979



Justices serving on the Court and Martin Quinn Ideology scores, 1979

Justices serving on the Court, 1979

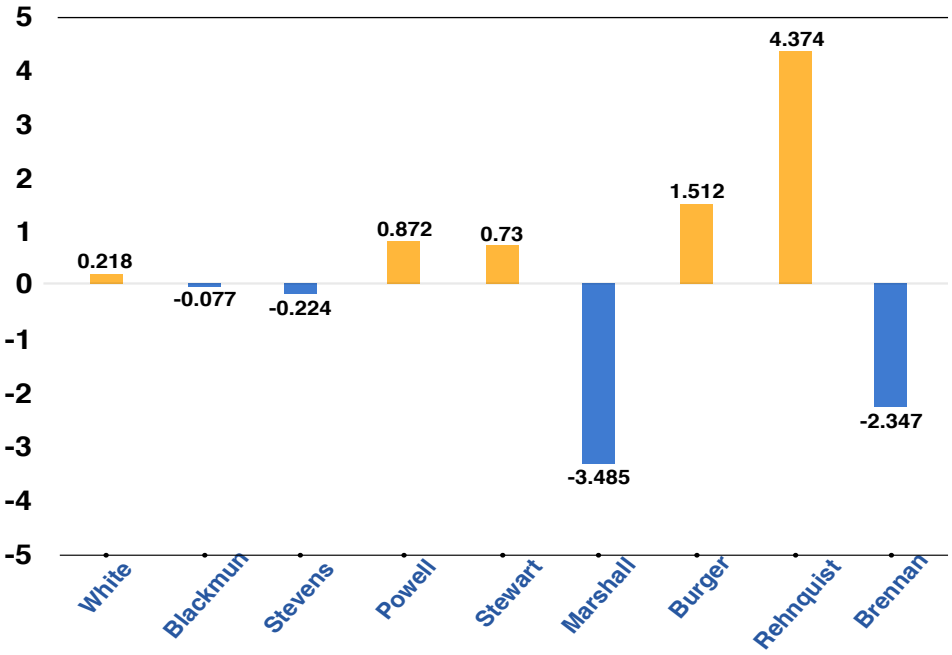
Justice	Mean	President	Party of President	Years Served
White	0.246	Kennedy	Democrat	1961-1993
Blackmun	-0.047	Nixon	Republican	1969-1994
Stevens	-0.243	Ford	Republican	1975-2010
Powell	0.823	Nixon	Republican	1971-1987
Stewart	0.48	Eisenhower	Republican	1958-1981
Marshall	-3.337	Johnson	Democrat	1967-1991
Burger	1.247	Nixon	Republican	1969-1986
Rehnquist	4.517	Nixon	Republican	1971-2005
Brennan	-2.485	Eisenhower	Republican	1956-1990

Chief Justice, 1979

Chief Justice	Median	Court Score
Burger	0.239	0.13

Brown v. Texas (1979)

1980



Justices serving on the Court and Martin Quinn Ideology scores, 1980

Justices serving on the Court, 1980

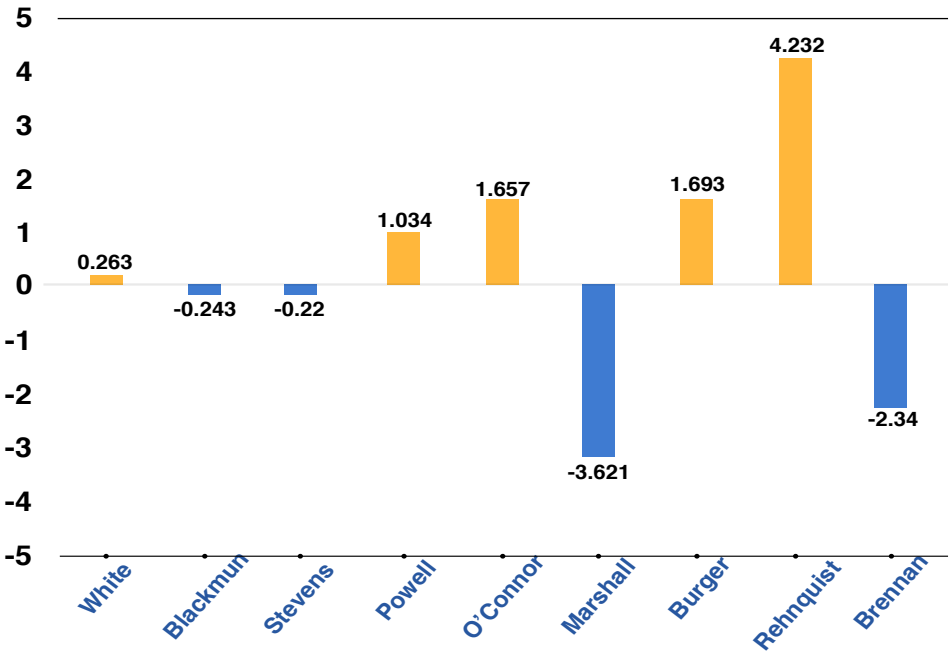
Justice	Mean	President	Party of President	Years Served
White	0.218	Kennedy	Democrat	1961-1993
Blackmun	-0.077	Nixon	Republican	1969-1994
Stevens	-0.224	Ford	Republican	1975-2010
Powell	0.872	Nixon	Republican	1971-1987
Stewart	0.73	Eisenhower	Republican	1958-1981
Marshall	-3.485	Johnson	Democrat	1967-1991
Burger	1.512	Nixon	Republican	1969-1986
Rehnquist	4.374	Nixon	Republican	1971-2005
Brennan	-2.347	Eisenhower	Republican	1956-1990

Chief Justice, 1980

Chief Justice	Median	Court Score
Burger	0.224	0.17

Rhode Island v. Innis (1980)

1981



Justices serving on the Court and Martin Quinn Ideology scores, 1981

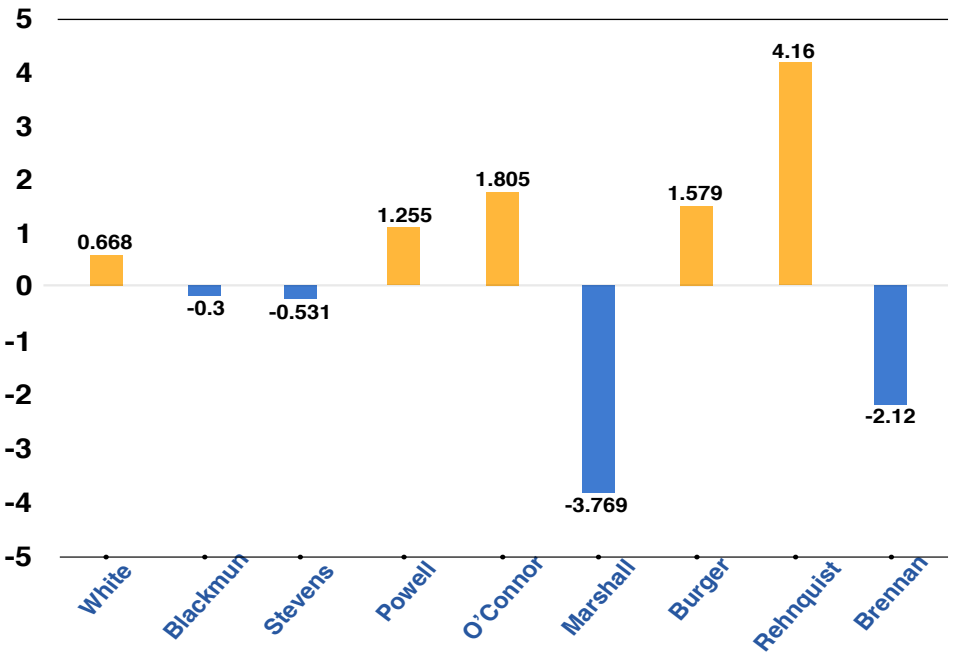
Justices serving on the Court, 1981

Justice	Mean	President	Party of President	Years Served
White	0.263	Kennedy	Democrat	1961-1993
Blackmun	-0.243	Nixon	Republican	1969-1994
Stevens	-0.22	Ford	Republican	1975-2010
Powell	1.034	Nixon	Republican	1971-1987
O'Connor	1.657	Reagan	Republican	1981-2006
Marshall	-3.621	Johnson	Democrat	1967-1991
Burger	1.693	Nixon	Republican	1969-1986
Rehnquist	4.232	Nixon	Republican	1971-2005
Brennan	-2.34	Eisenhower	Republican	1956-1990

Chief Justice, 1981

Chief Justice	Median	Court Score
Burger	0.263	0.27

1982



Justices serving on the Court and Martin Quinn Ideology scores, 1982

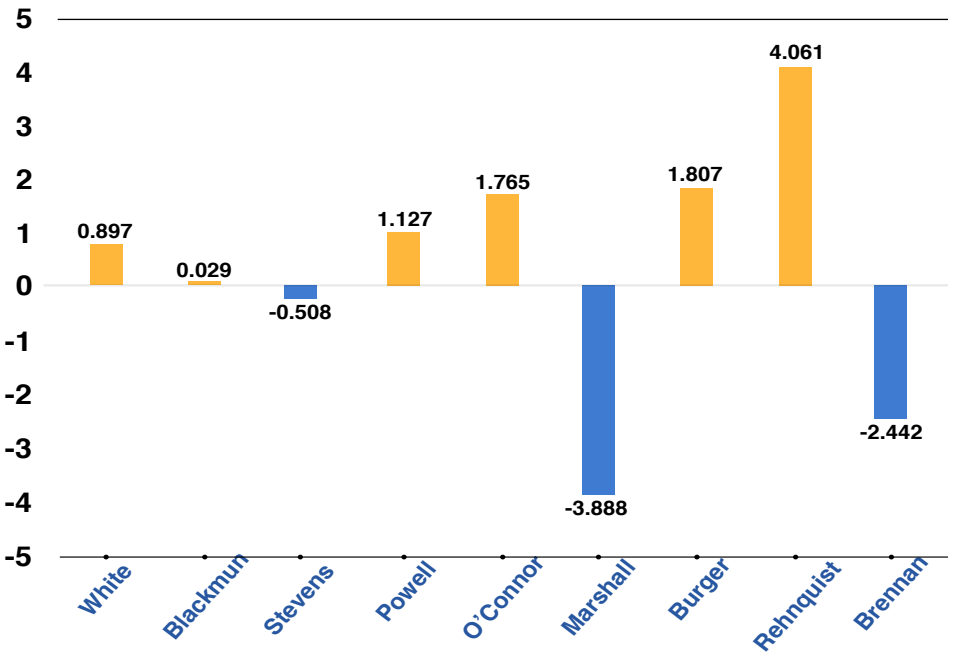
Justices serving on the Court, 1982

Justice	Mean	President	Party of President	Years Served
White	0.668	Kennedy	Democrat	1961-1993
Blackmun	-0.3	Nixon	Republican	1969-1994
Stevens	-0.531	Ford	Republican	1975-2010
Powell	1.255	Nixon	Republican	1971-1987
O'Connor	1.805	Reagan	Republican	1981-2006
Marshall	-3.796	Johnson	Democrat	1967-1991
Burger	1.579	Nixon	Republican	1969-1986
Rehnquist	4.16	Nixon	Republican	1971-2005
Brennan	-2.12	Eisenhower	Republican	1956-1990

Chief Justice, 1982

Chief Justice	Median	Court Score
Burger	0.667	0.30

1983



Justices serving on the Court and Martin Quinn Ideology scores, 1983

Justices serving on the Court, 1983

Justice	Mean	President	Party of President	Years Served
White	0.897	Kennedy	Democrat	1961-1993
Blackmun	0.029	Nixon	Republican	1969-1994
Stevens	-0.508	Ford	Republican	1975-2010
Powell	1.127	Nixon	Republican	1971-1987
O'Connor	1.765	Reagan	Republican	1981-2006
Marshall	-3.888	Johnson	Democrat	1967-1991
Burger	1.807	Nixon	Republican	1969-1986
Rehnquist	4.061	Nixon	Republican	1971-2005
Brennan	-2.442	Eisenhower	Republican	1956-1990

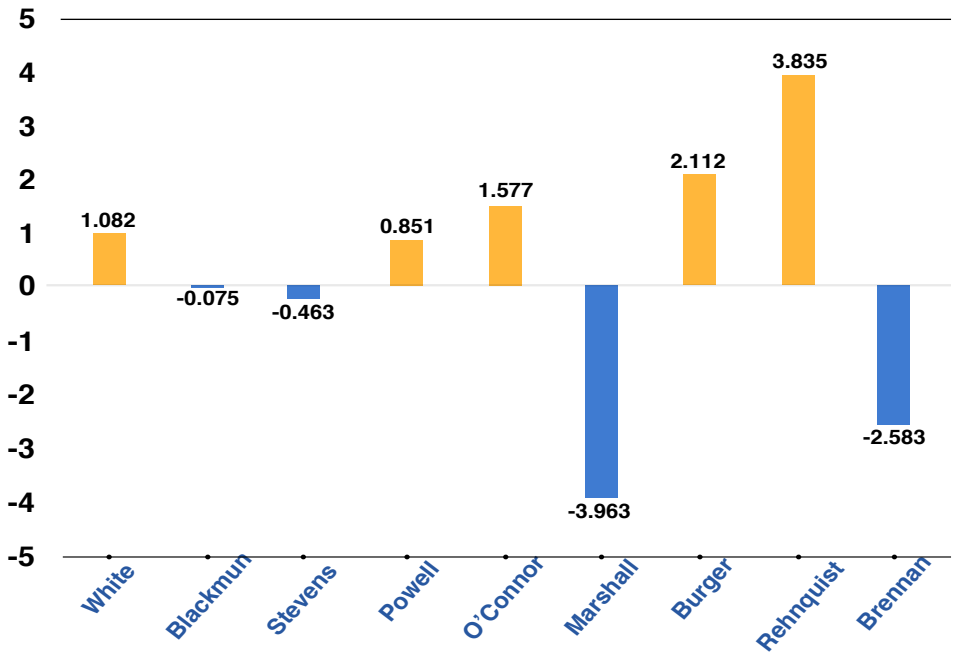
Chief Justice, 1983

Chief Justice	Median	Court Score
Burger	0.875	0.32

Illinois v. Gates (1983)

Solem v. Helm (1983)

1984



Justices serving on the Court and Martin Quinn Ideology scores, 1984

Justices serving on the Court, 1984

Justice	Mean	President	Party of President	Years Served
White	1.082	Kennedy	Democrat	1961-1993
Blackmun	-0.075	Nixon	Republican	1969-1994
Stevens	-0.463	Ford	Republican	1975-2010
Powell	0.851	Nixon	Republican	1971-1987
O'Connor	1.577	Reagan	Republican	1981-2006
Marshall	-3.963	Johnson	Democrat	1967-1991
Burger	2.112	Nixon	Republican	1969-1986
Rehnquist	3.835	Nixon	Republican	1971-2005
Brennan	-2.583	Eisenhower	Republican	1956-1990

Chief Justice, 1984

Chief Justice	Median	Court Score
Burger	0.824	0.26

United States v. Leon (1984)

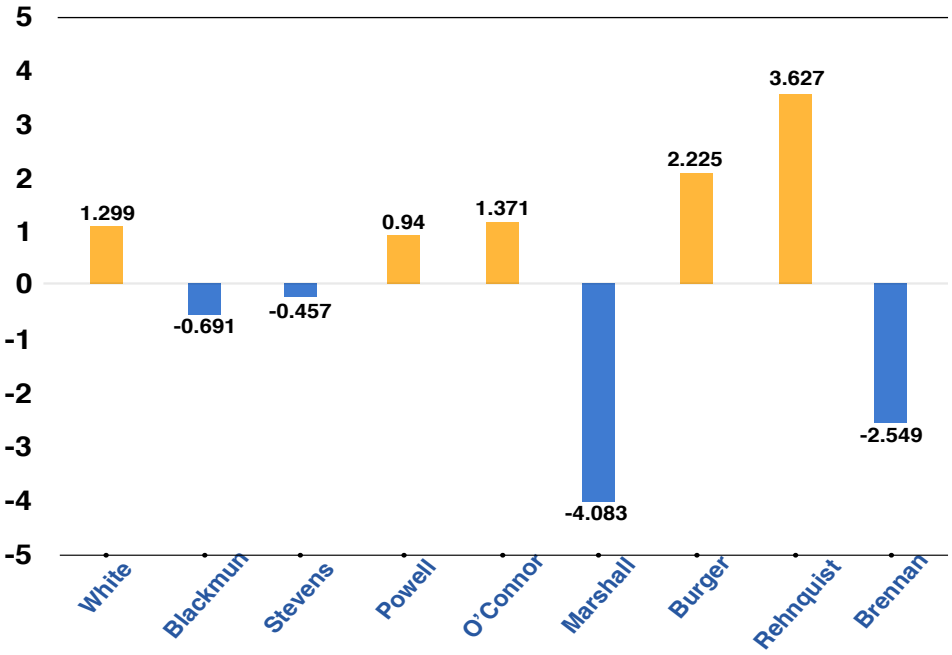
Nix v. Williams (1984)

Oliver v. United States (1984)

United States v. Cronic (1984)

Strickland v. Washington (1984)

1985



Justices serving on the Court and Martin Quinn Ideology scores, 1985

Justices serving on the Court, 1985

Justice	Mean	President	Party of President	Years Served
White	1.299	Kennedy	Democrat	1961-1993
Blackmun	-0.691	Nixon	Republican	1969-1994
Stevens	-0.457	Ford	Republican	1975-2010
Powell	0.94	Nixon	Republican	1971-1987
O'Connor	1.371	Reagan	Republican	1981-2006
Marshall	-4.083	Johnson	Democrat	1967-1991
Burger	2.225	Nixon	Republican	1969-1986
Rehnquist	3.627	Nixon	Republican	1971-2005
Brennan	-2.549	Eisenhower	Republican	1956-1990

Chief Justice, 1985

Chief Justice	Median	Court Score
Burger	0.93	0.19

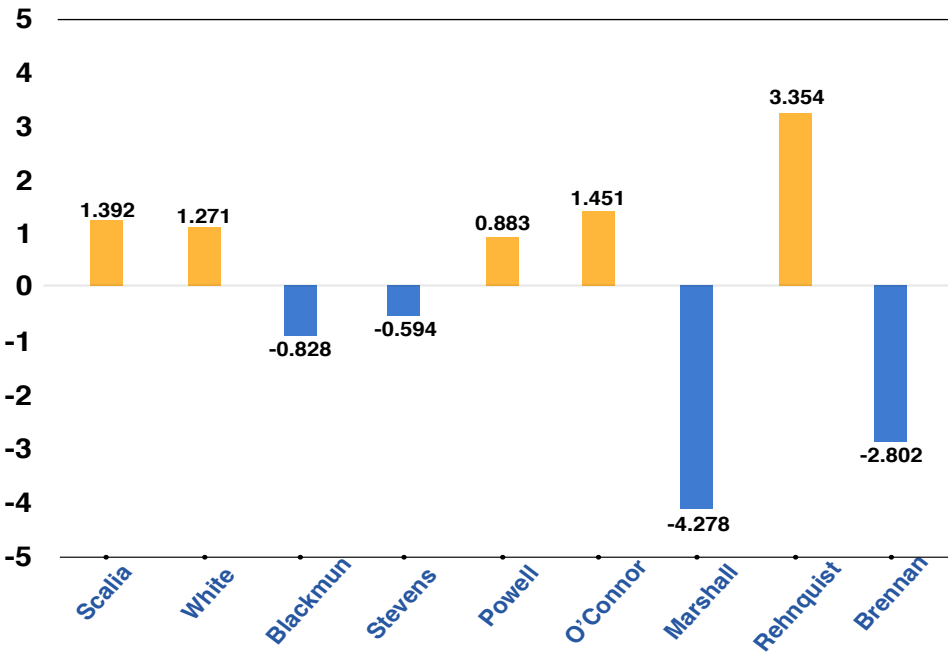
New Jersey v. T.L.O. (1985)

Oregon v. Elstad (1985)

Winston v. Lee (1985)

Hayes v. Florida (1985)

1986



Justices serving on the Court and Martin Quinn Ideology scores, 1986

Justices serving on the Court, 1986

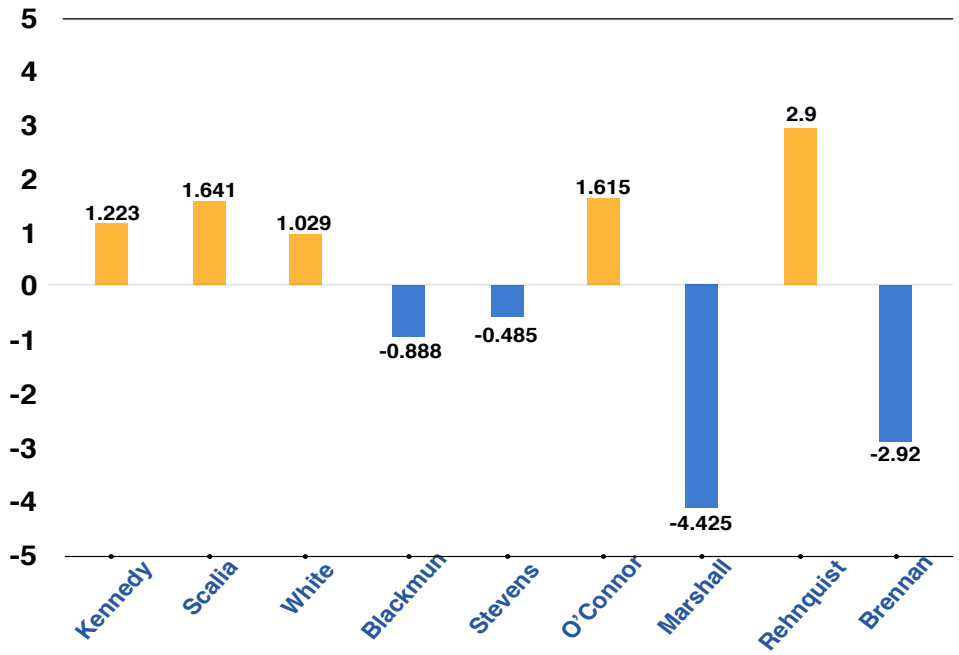
Justice	Mean	President	Party of President	Years Served
Scalia	1.392	Reagan	Republican	1986-2016
White	1.271	Kennedy	Democrat	1961-1993
Blackmun	-0.828	Nixon	Republican	1969-1994
Stevens	-0.594	Ford	Republican	1975-2010
Powell	0.883	Nixon	Republican	1971-1987
O'Connor	1.451	Reagan	Republican	1981-2006
Marshall	-4.278	Johnson	Democrat	1967-1991
Rehnquist	3.354	Nixon	Republican	1971-2005
Brennan	-2.802	Eisenhower	Republican	1956-1990

Chief Justice, 1986

Chief Justice	Median	Court Score
Rehnquist	0.875	-0.02

Batson v. Kentucky (1986)

1987



Justices serving on the Court and Martin Quinn Ideology scores, 1987

Justices serving on the Court, 1987

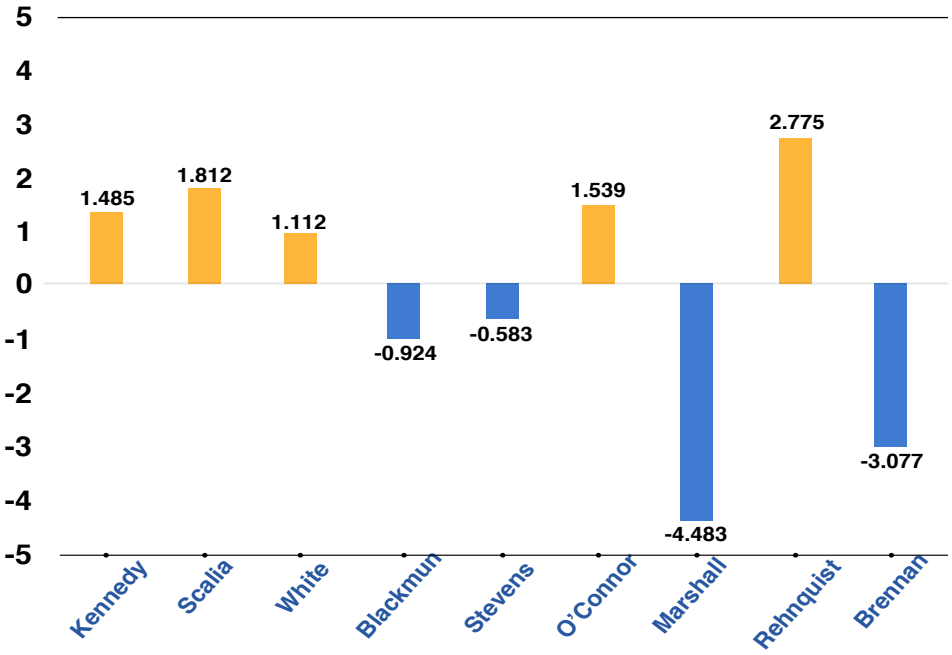
Justice	Mean	President	Party of President	Years Served
Kennedy	1.223	Reagan	Republican	1987-2018
Scalia	1.641	Reagan	Republican	1986-2016
White	1.029	Kennedy	Democrat	1961-1993
Blackmun	-0.888	Nixon	Republican	1969-1994
Stevens	-0.485	Ford	Republican	1975-2010
O'Connor	1.615	Reagan	Republican	1981-2006
Marshall	-4.425	Johnson	Democrat	1967-1991
Rehnquist	2.9	Nixon	Republican	1971-2005
Brennan	-2.92	Eisenhower	Republican	1956-1990

Chief Justice, 1987

Chief Justice	Median	Court Score
Rehnquist	0.974	-0.03

Arizona v. Hicks (1987)

1988



Justices serving on the Court and Martin Quinn Ideology scores, 1988

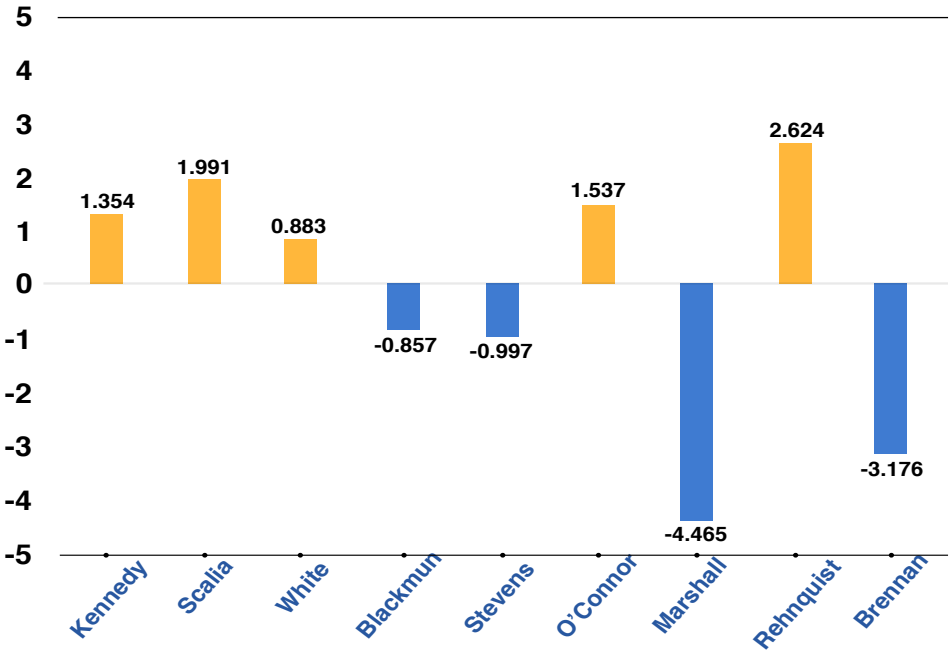
Justices serving on the Court, 1988

Justice	Mean	President	Party of President	Years Served
Kennedy	1.485	Reagan	Republican	1987-2018
Scalia	1.812	Reagan	Republican	1986-2016
White	1.112	Kennedy	Democrat	1961-1993
Blackmun	-0.924	Nixon	Republican	1969-1994
Stevens	-0.583	Ford	Republican	1975-2010
O'Connor	1.539	Reagan	Republican	1981-2006
Marshall	-4.483	Johnson	Democrat	1967-1991
Rehnquist	2.775	Nixon	Republican	1971-2005
Brennan	-3.077	Eisenhower	Republican	1956-1990

Chief Justice, 1988

Chief Justice	Median	Court Score
Rehnquist	1.094	-0.04

1989



Justices serving on the Court and Martin Quinn Ideology scores, 1989

Justices serving on the Court, 1989

Justice	Mean	President	Party of President	Years Served
Kennedy	1.354	Reagan	Republican	1987-2018
Scalia	1.991	Reagan	Republican	1986-2016
White	0.883	Kennedy	Democrat	1961-1993
Blackmun	-0.857	Nixon	Republican	1969-1994
Stevens	-0.997	Ford	Republican	1975-2010
O'Connor	1.537	Reagan	Republican	1981-2006
Marshall	-4.465	Johnson	Democrat	1967-1991
Rehnquist	2.624	Nixon	Republican	1971-2005
Brennan	-3.176	Eisenhower	Republican	1956-1990

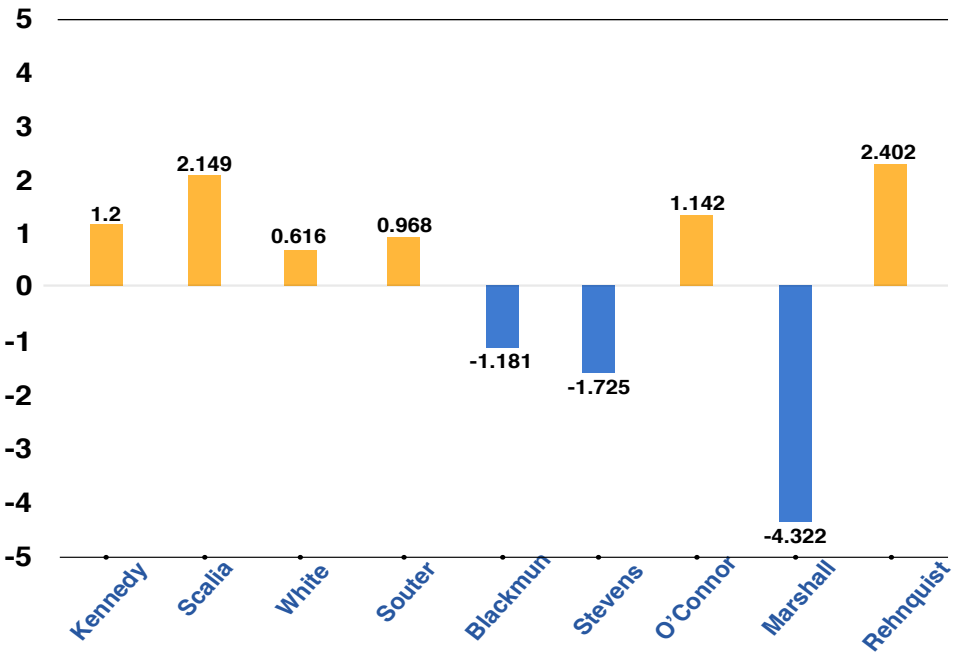
Chief Justice, 1989

Chief Justice	Median	Court Score
Rehnquist	0.88	-0.12

Justices Serving on the Court 1990 - 2009

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

1990



Justices serving on the Court and Martin Quinn Ideology scores, 1990

Justices serving on the Court, 1990

Justice	Mean	President	Party of President	Years Served
Kennedy	1.2	Reagan	Republican	1987-2018
Scalia	2.149	Reagan	Republican	1986-2016
White	0.616	Kennedy	Democrat	1961-1993
Souter	0.968	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.181	Nixon	Republican	1969-1994
Stevens	-1.725	Ford	Republican	1975-2010
O'Connor	1.142	Reagan	Republican	1981-2006
Marshall	-4.322	Johnson	Democrat	1967-1991
Rehnquist	2.402	Nixon	Republican	1971-2005

Chief Justice, 1990

Chief Justice	Median	Court Score
Rehnquist	0.916	0.14

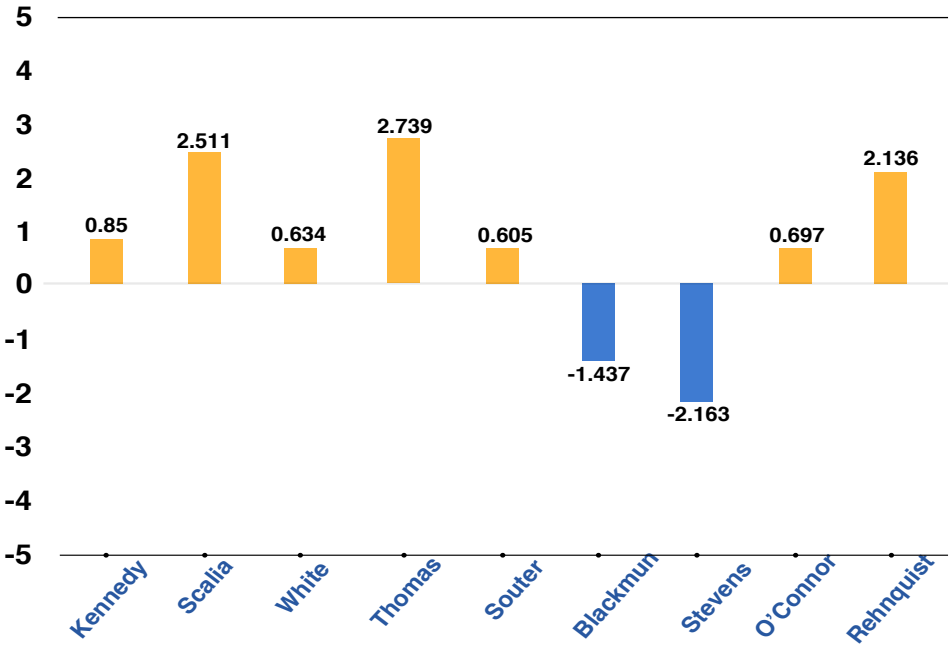
Minnesota v. Olson (1990)

Horton v. California (1990)

Maryland v. Buie (1990)

New York v. Harris (1990)

1991



Justices serving on the Court and Martin Quinn Ideology scores, 1991

Justices serving on the Court, 1991

Justice	Mean	President	Party of President	Years Served
Kennedy	0.85	Reagan	Republican	1987-2018
Scalia	2.511	Reagan	Republican	1986-2016
White	0.634	Kennedy	Democrat	1961-1993
Thomas	2.739	Bush, G.H.W	Republican	1991-
Souter	0.605	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.437	Nixon	Republican	1969-1994
Stevens	-2.163	Ford	Republican	1975-2010
O'Connor	0.697	Reagan	Republican	1981-2006
Rehnquist	2.136	Nixon	Republican	1971-2005

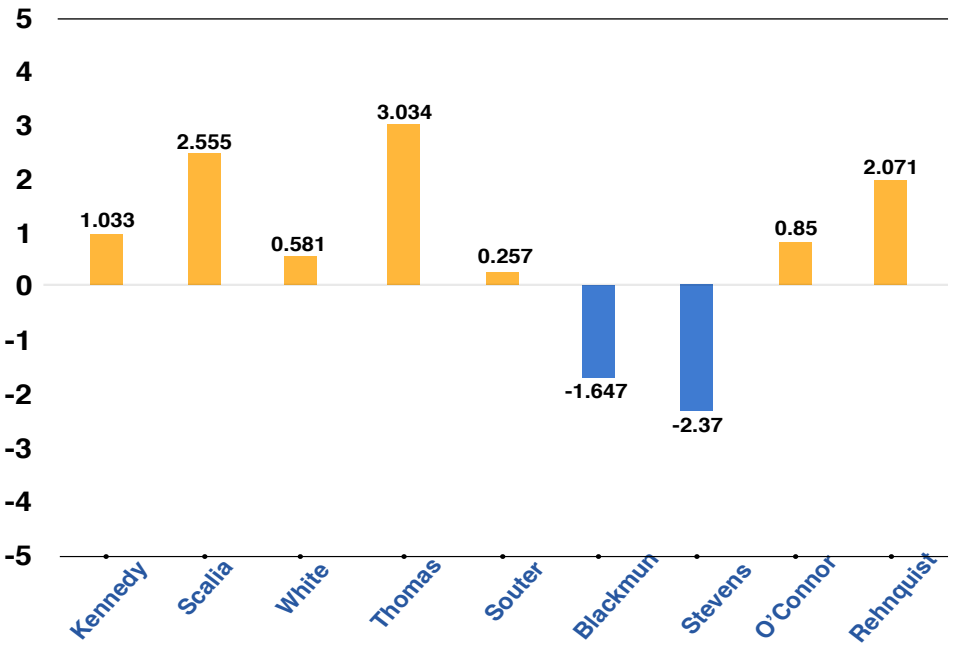
Chief Justice, 1991

Chief Justice	Median	Court Score
Rehnquist	0.753	0.73

California v. Acevedo (1991)

Florida v. Bostick (1991)

1992



Justices serving on the Court and Martin Quinn Ideology scores, 1992

Justices serving on the Court, 1992

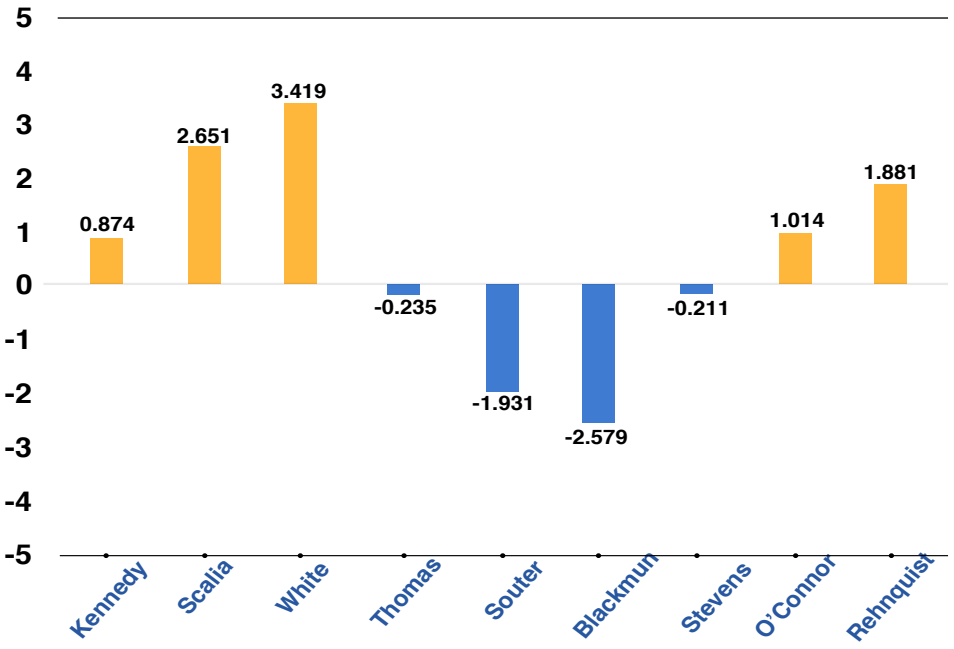
Justice	Mean	President	Party of President	Years Served
Kennedy	1.033	Reagan	Republican	1987-2018
Scalia	2.555	Reagan	Republican	1986-2016
White	0.581	Kennedy	Democrat	1961-1993
Thomas	3.034	Bush, G.H.W	Republican	1991-
Souter	0.257	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.647	Nixon	Republican	1969-1994
Stevens	-2.37	Ford	Republican	1975-2010
O'Connor	0.85	Reagan	Republican	1981-2006
Rehnquist	2.071	Nixon	Republican	1971-2005

Chief Justice, 1992

Chief Justice	Median	Court Score
Rehnquist	0.853	0.71

Georgia v. McCollum Et Al. (1992)

1993



Justices serving on the Court and Martin Quinn Ideology scores, 1993

Justices serving on the Court, 1993

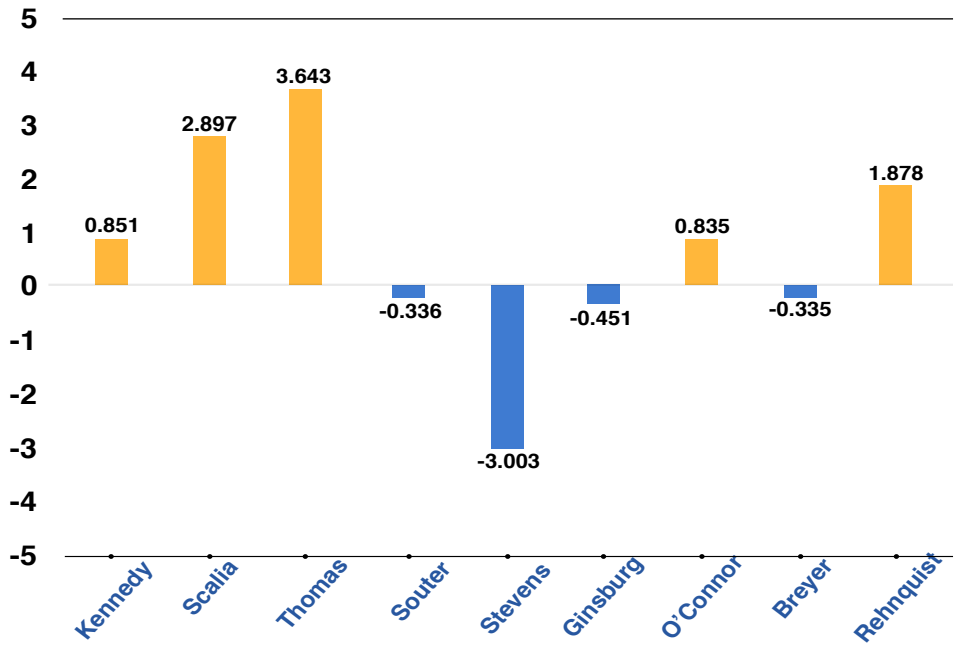
Justice	Mean	President	Party of President	Years Served
Kennedy	0.874	Reagan	Republican	1987-2018
Scalia	2.651	Reagan	Republican	1986-2016
Thomas	3.419	Bush, G.H.W	Republican	1991-
Souter	-0.235	Bush, G.H.W	Republican	1990-2009
Blackmun	-1.931	Nixon	Republican	1969-1994
Stevens	-2.579	Ford	Republican	1975-2010
Ginsburg	-0.211	Clinton	Democrat	1993-2020
O'Connor	1.014	Reagan	Republican	1981-2006
Rehnquist	1.881	Nixon	Republican	1971-2005

Chief Justice, 1993

Chief Justice	Median	Court Score
Rehnquist	0.82	0.54

Minnesota v. Dickerson (1993)

1994



Justices serving on the Court and Martin Quinn Ideology scores, 1994

Justices serving on the Court, 1994

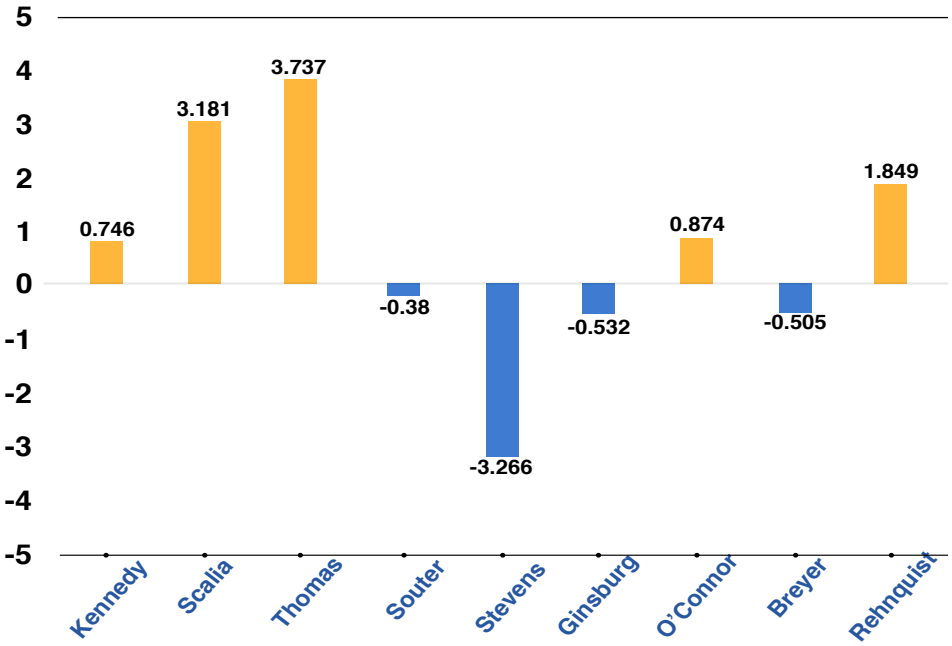
Justice	Mean	President	Party of President	Years Served
Kennedy	0.851	Reagan	Republican	1987-2018
Scalia	2.897	Reagan	Republican	1986-2016
Thomas	3.643	Bush, G.H.W	Republican	1991-
Souter	-0.336	Bush, G.H.W	Republican	1990-2009
Stevens	-3.003	Ford	Republican	1975-2010
Ginsburg	-0.451	Clinton	Democrat	1993-2020
O'Connor	0.835	Reagan	Republican	1981-2006
Breyer	-0.335	Clinton	Democrat	1994-2022
Rehnquist	1.878	Nixon	Republican	1971-2005

Chief Justice, 1994

Chief Justice	Median	Court Score
Rehnquist	0.735	0.66

J.E.B. v. Alabama ex rel. T. B. (1994)

1995



Justices serving on the Court and Martin Quinn Ideology scores, 1995

Justices serving on the Court, 1995

Justice	Mean	President	Party of President	Years Served
Kennedy	0.746	Reagan	Republican	1987-2018
Scalia	3.181	Reagan	Republican	1986-2016
Thomas	3.737	Bush, G.H.W	Republican	1991-
Souter	-0.38	Bush, G.H.W	Republican	1990-2009
Stevens	-3.266	Ford	Republican	1975-2010
Ginsburg	-0.532	Clinton	Democrat	1993-2020
O'Connor	0.874	Reagan	Republican	1981-2006
Breyer	-0.505	Clinton	Democrat	1994-2022
Rehnquist	1.849	Nixon	Republican	1971-2005

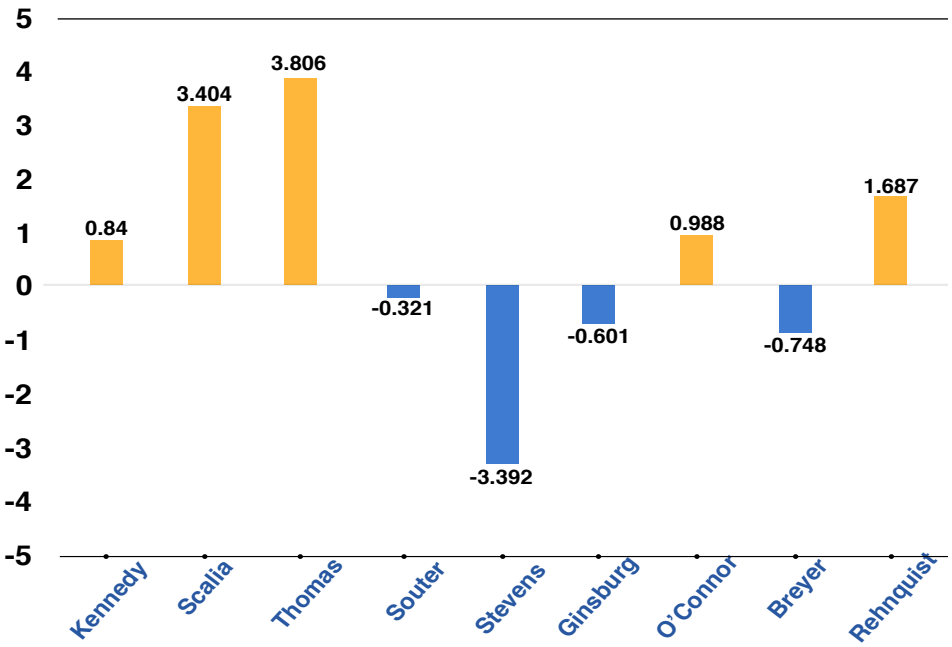
Chief Justice, 1995

Chief Justice	Median	Court Score
Rehnquist	0.689	0.63

Wilson v. Arkansas (1995)

Vernonia School District 47J v. Acton (1995)

1996



Justices serving on the Court and Martin Quinn Ideology scores, 1996

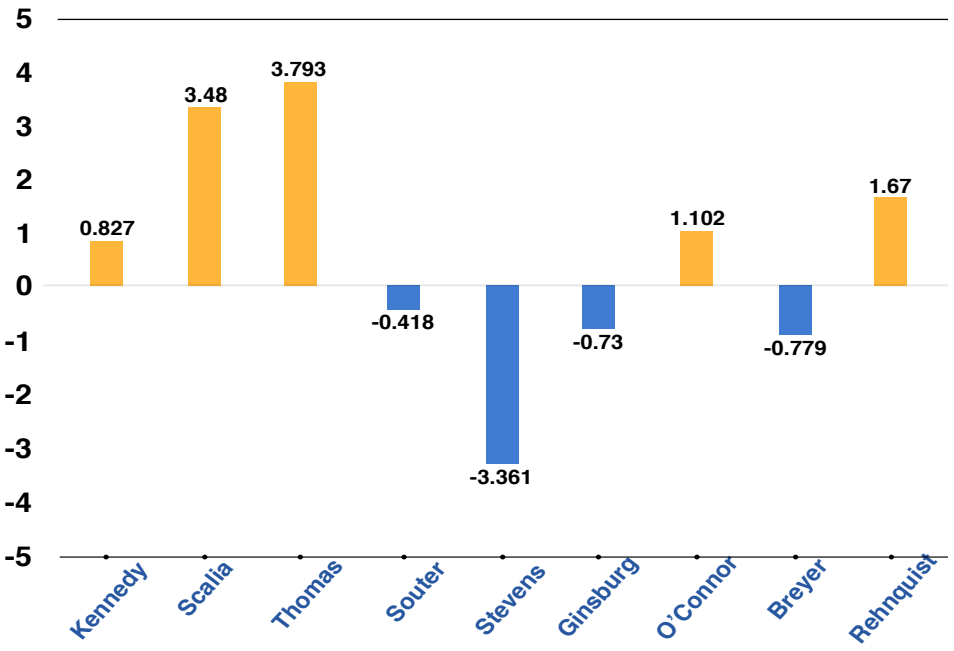
Justices serving on the Court, 1996

Justice	Mean	President	Party of President	Years Served
Kennedy	0.84	Reagan	Republican	1987-2018
Scalia	3.404	Reagan	Republican	1986-2016
Thomas	3.806	Bush, G.H.W	Republican	1991-
Souter	-0.321	Bush, G.H.W	Republican	1990-2009
Stevens	-3.392	Ford	Republican	1975-2010
Ginsburg	-0.601	Clinton	Democrat	1993-2020
O'Connor	0.988	Reagan	Republican	1981-2006
Breyer	-0.748	Clinton	Democrat	1994-2022
Rehnquist	1.687	Nixon	Republican	1971-2005

Chief Justice, 1996

Chief Justice	Median	Court Score
Rehnquist	0.788	0.63

1997



Justices serving on the Court and Martin Quinn Ideology scores, 1997

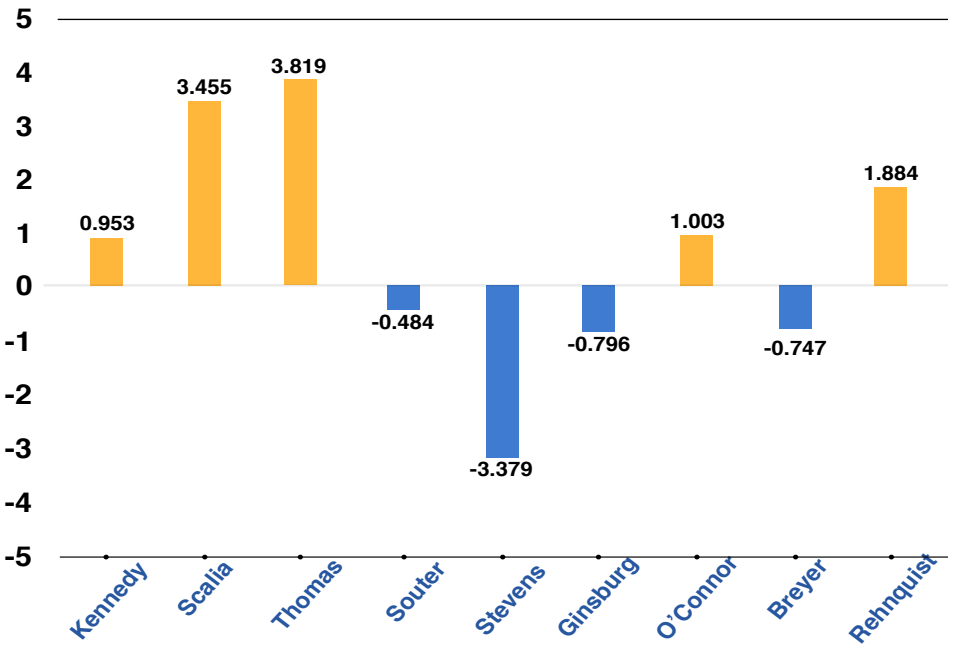
Justices serving on the Court, 1997

Justice	Mean	President	Party of President	Years Served
Kennedy	0.827	Reagan	Republican	1987-2018
Scalia	3.48	Reagan	Republican	1986-2016
Thomas	3.793	Bush, G.H.W	Republican	1991-
Souter	-0.418	Bush, G.H.W	Republican	1990-2009
Stevens	-3.361	Ford	Republican	1975-2010
Ginsburg	-0.73	Clinton	Democrat	1993-2020
O'Connor	1.102	Reagan	Republican	1981-2006
Breyer	-0.779	Clinton	Democrat	1994-2022
Rehnquist	1.67	Nixon	Republican	1971-2005

Chief Justice, 1997

Chief Justice	Median	Court Score
Rehnquist	0.8	0.62

1998



Justices serving on the Court and Martin Quinn Ideology scores, 1998

Justices serving on the Court, 1998

Justice	Mean	President	Party of President	Years Served
Kennedy	0.953	Reagan	Republican	1987-2018
Scalia	3.455	Reagan	Republican	1986-2016
Thomas	3.819	Bush, G.H.W	Republican	1991-
Souter	-0.484	Bush, G.H.W	Republican	1990-2009
Stevens	-3.379	Ford	Republican	1975-2010
Ginsburg	-0.796	Clinton	Democrat	1993-2020
O'Connor	1.003	Reagan	Republican	1981-2006
Breyer	-0.747	Clinton	Democrat	1994-2022
Rehnquist	1.884	Nixon	Republican	1971-2005

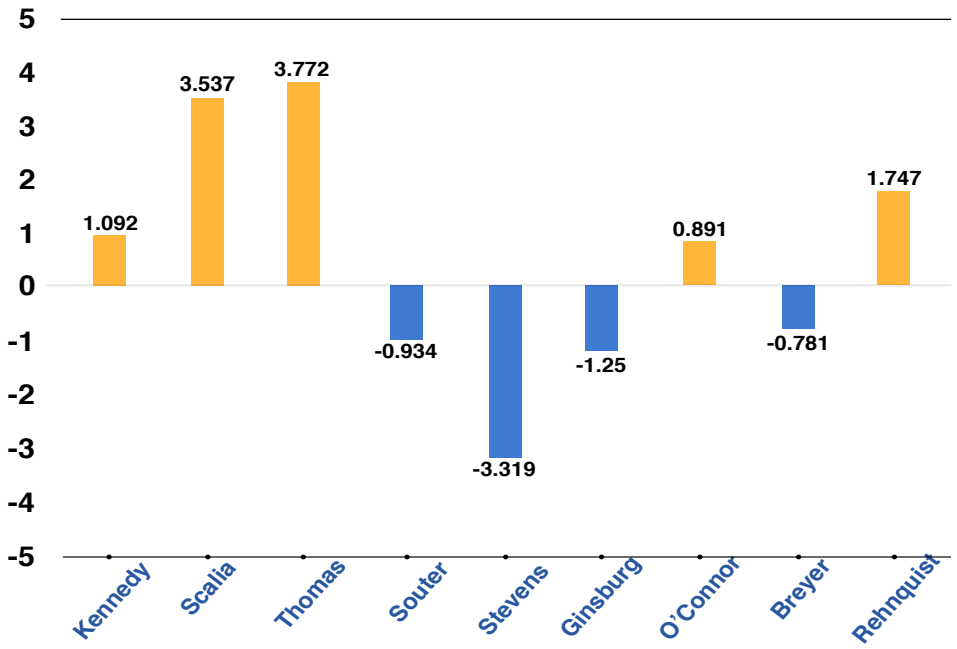
Chief Justice, 1998

Chief Justice	Median	Court Score
Rehnquist	0.863	0.63

Minnesota v. Carter (1998)

Knowles v. Iowa (1998)

1999



Justices serving on the Court and Martin Quinn Ideology scores, 1999

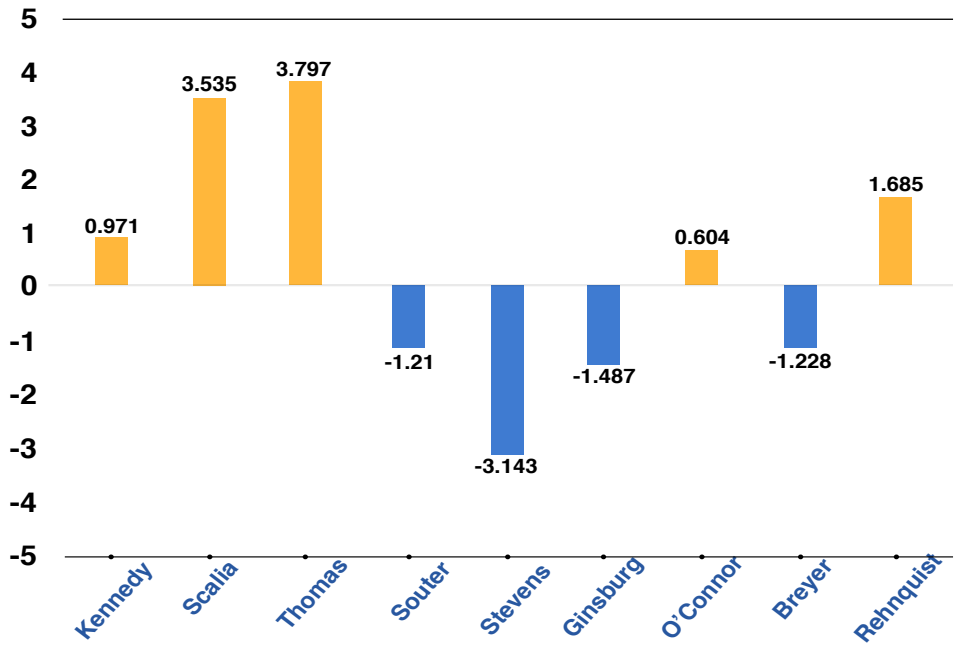
Justices serving on the Court, 1999

Justice	Mean	President	Party of President	Years Served
Kennedy	1.092	Reagan	Republican	1987-2018
Scalia	3.537	Reagan	Republican	1986-2016
Thomas	3.772	Bush, G.H.W	Republican	1991-
Souter	-0.934	Bush, G.H.W	Republican	1990-2009
Stevens	-3.319	Ford	Republican	1975-2010
Ginsburg	-1.25	Clinton	Democrat	1993-2020
O'Connor	0.891	Reagan	Republican	1981-2006
Breyer	-0.781	Clinton	Democrat	1994-2022
Rehnquist	1.747	Nixon	Republican	1971-2005

Chief Justice, 1999

Chief Justice	Median	Court Score
Rehnquist	0.85	0.53

2000



Justices serving on the Court and Martin Quinn Ideology scores, 2000

Justices serving on the Court, 2000

Justice	Mean	President	Party of President	Years Served
Kennedy	0.971	Reagan	Republican	1987-2018
Scalia	3.535	Reagan	Republican	1986-2016
Thomas	3.797	Bush, G.H.W	Republican	1991-
Souter	-1.21	Bush, G.H.W	Republican	1990-2009
Stevens	-3.143	Ford	Republican	1975-2010
Ginsburg	-1.487	Clinton	Democrat	1993-2020
O'Connor	0.604	Reagan	Republican	1981-2006
Breyer	-1.228	Clinton	Democrat	1994-2022
Rehnquist	1.685	Nixon	Republican	1971-2005

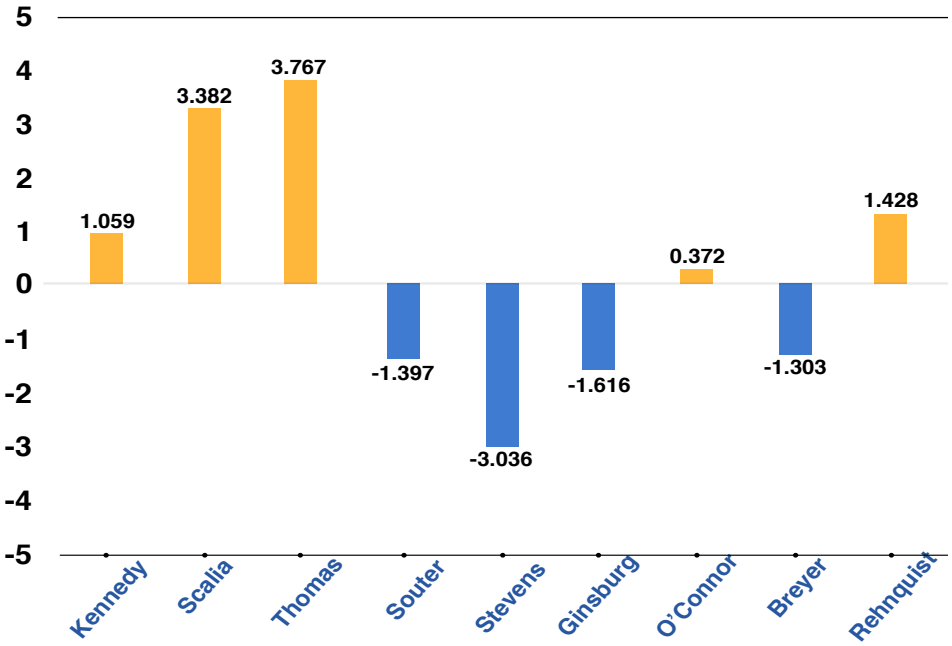
Chief Justice, 2000

Chief Justice	Median	Court Score
Rehnquist	0.594	0.39

Florida v. J.L. (2000)

Illinois v. Wardlow (2000)

2001



Justices serving on the Court and Martin Quinn Ideology scores, 2001

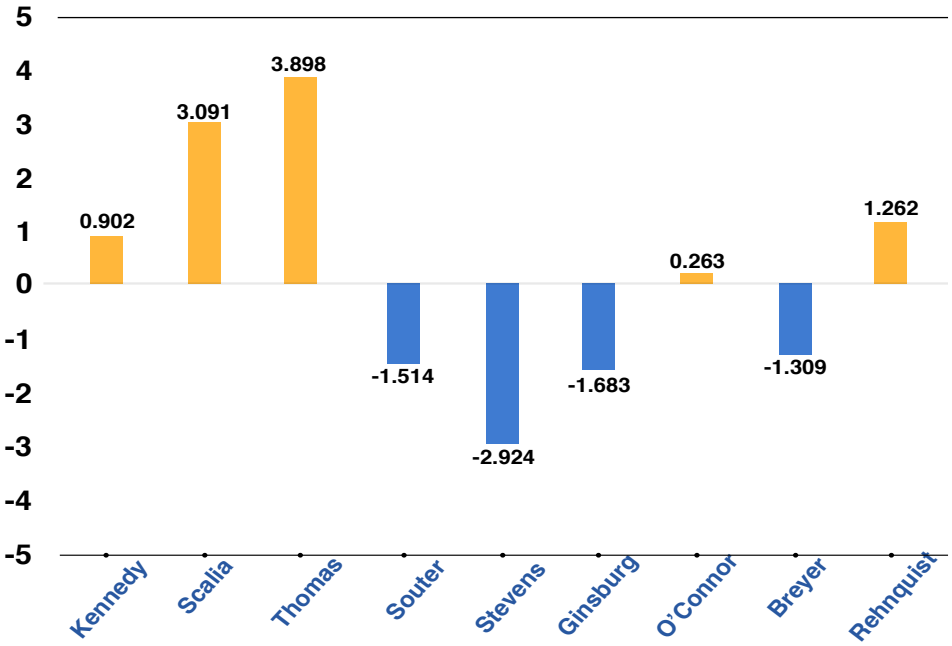
Justices serving on the Court, 2001

Justice	Mean	President	Party of President	Years Served
Kennedy	1.059	Reagan	Republican	1987-2018
Scalia	3.382	Reagan	Republican	1986-2016
Thomas	3.767	Bush, G.H.W	Republican	1991-
Souter	-1.397	Bush, G.H.W	Republican	1990-2009
Stevens	-3.036	Ford	Republican	1975-2010
Ginsburg	-1.616	Clinton	Democrat	1993-2020
O'Connor	0.372	Reagan	Republican	1981-2006
Breyer	-1.303	Clinton	Democrat	1994-2022
Rehnquist	1.428	Nixon	Republican	1971-2005

Chief Justice, 2001

Chief Justice	Median	Court Score
Rehnquist	0.371	0.30

2002



Justices serving on the Court and Martin Quinn Ideology scores, 2002

Justices serving on the Court, 2002

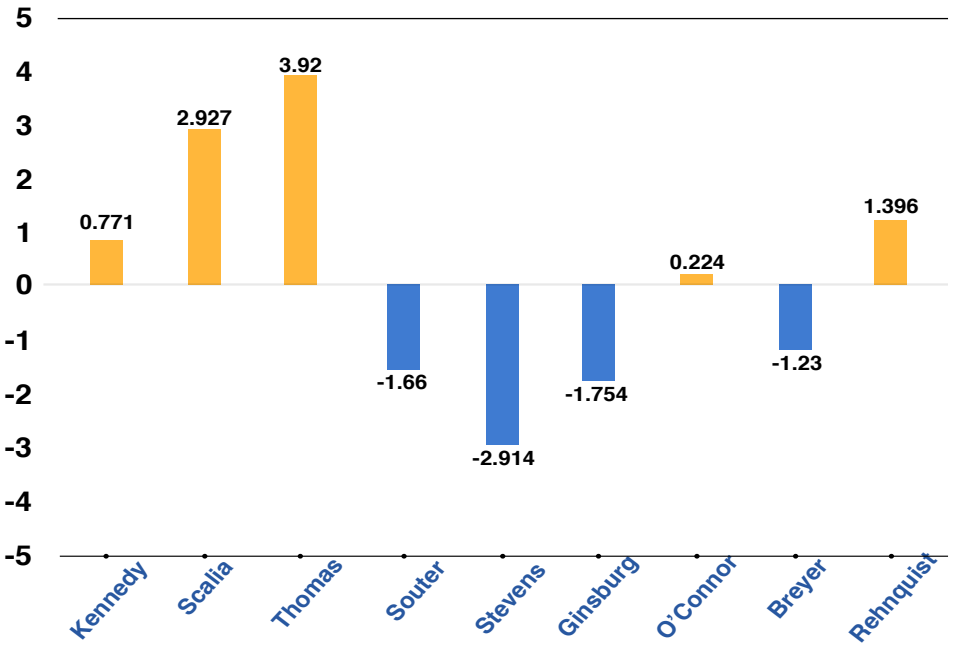
Justice	Mean	President	Party of President	Years Served
Kennedy	0.902	Reagan	Republican	1987-2018
Scalia	3.091	Reagan	Republican	1986-2016
Thomas	3.898	Bush, G.H.W	Republican	1991-
Souter	-1.514	Bush, G.H.W	Republican	1990-2009
Stevens	-2.924	Ford	Republican	1975-2010
Ginsburg	-1.683	Clinton	Democrat	1993-2020
O'Connor	0.263	Reagan	Republican	1981-2006
Breyer	-1.309	Clinton	Democrat	1994-2022
Rehnquist	1.262	Nixon	Republican	1971-2005

Chief Justice, 2002

Chief Justice	Median	Court Score
Rehnquist	0.262	0.22

Atkins v. Virginia (2002)

2003



Justices serving on the Court and Martin Quinn Ideology scores, 2003

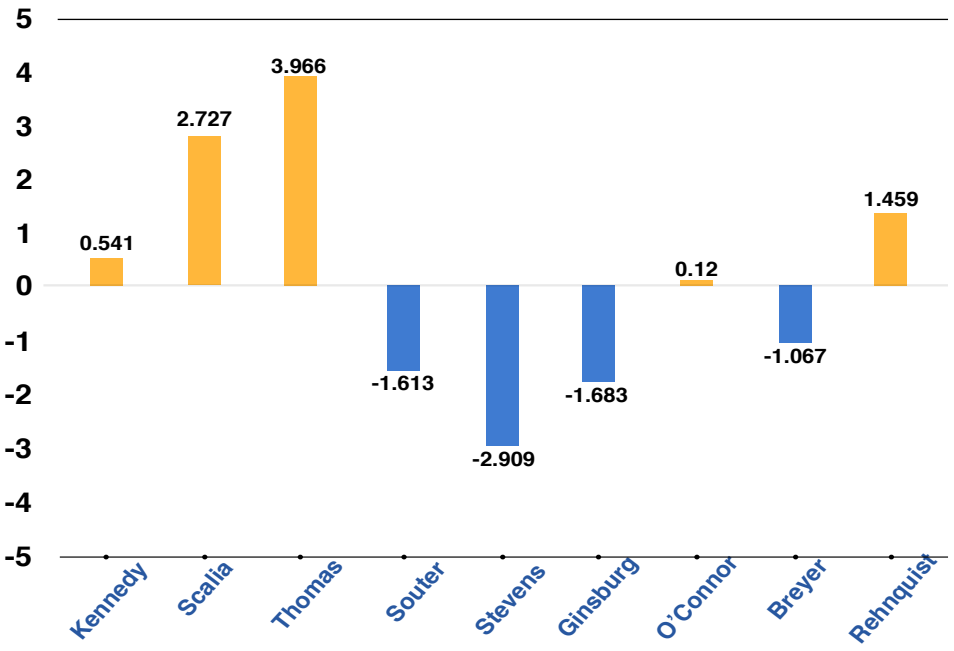
Justices serving on the Court, 2003

Justice	Mean	President	Party of President	Years Served
Kennedy	0.771	Reagan	Republican	1987-2018
Scalia	2.927	Reagan	Republican	1986-2016
Thomas	3.92	Bush, G.H.W	Republican	1991-
Souter	-1.66	Bush, G.H.W	Republican	1990-2009
Stevens	-2.914	Ford	Republican	1975-2010
Ginsburg	-1.754	Clinton	Democrat	1993-2020
O'Connor	0.224	Reagan	Republican	1981-2006
Breyer	-1.23	Clinton	Democrat	1994-2022
Rehnquist	1.396	Nixon	Republican	1971-2005

Chief Justice, 2003

Chief Justice	Median	Court Score
Rehnquist	0.222	0.19

2004



Justices serving on the Court and Martin Quinn Ideology scores, 2004

Justices serving on the Court, 2004

Justice	Mean	President	Party of President	Years Served
Kennedy	0.541	Reagan	Republican	1987-2018
Scalia	2.727	Reagan	Republican	1986-2016
Thomas	3.966	Bush, G.H.W	Republican	1991-
Souter	-1.613	Bush, G.H.W	Republican	1990-2009
Stevens	-2.909	Ford	Republican	1975-2010
Ginsburg	-1.683	Clinton	Democrat	1993-2020
O'Connor	0.12	Reagan	Republican	1981-2006
Breyer	-1.067	Clinton	Democrat	1994-2022
Rehnquist	1.459	Nixon	Republican	1971-2005

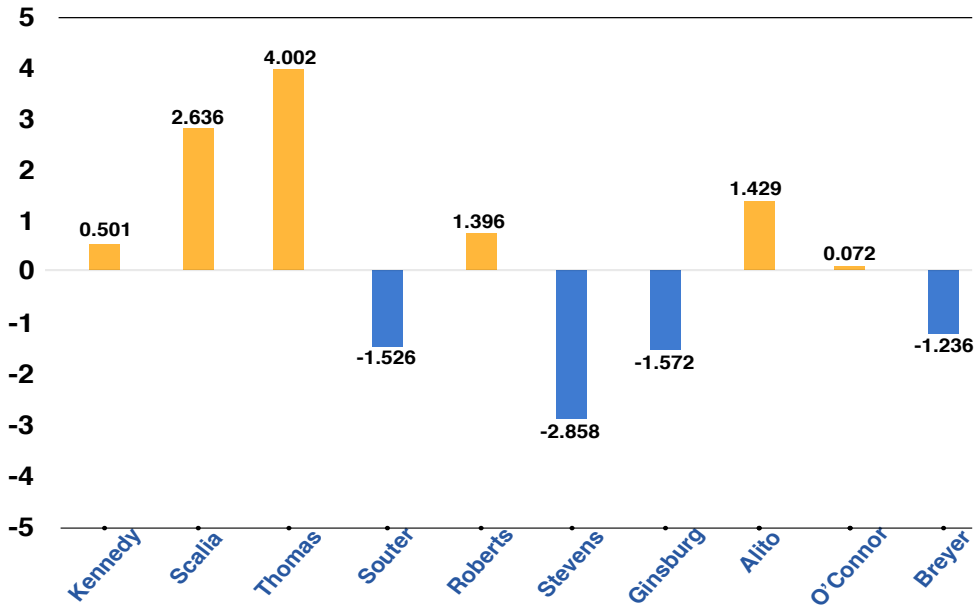
Chief Justice, 2004

Chief Justice	Median	Court Score
Rehnquist	0.111	0.17

Hiibel v. Sixth Judicial District of Nevada, Humboldt County (2004)

Missouri v. Seibert (2004)

2005



Justices serving on the Court and Martin Quinn Ideology scores, 2005

Justices serving on the Court, 2005

Justice	Mean	President	Party of President	Years Served
Kennedy	0.501	Reagan	Republican	1987-2018
Scalia	2.636	Reagan	Republican	1986-2016
Thomas	4.002	Bush, G.H.W	Republican	1991-
Souter	-1.526	Bush, G.H.W	Republican	1990-2009
Roberts	1.396	Bush, G.W	Republican	2005-
Stevens	-2.858	Ford	Republican	1975-2010
Ginsburg	-1.572	Clinton	Democrat	1993-2020
Alito	1.429	Bush, G.W	Republican	2005-
O'Connor	0.072	Reagan	Republican	1981-2006
Breyer	-1.236	Clinton	Democrat	1994-2022

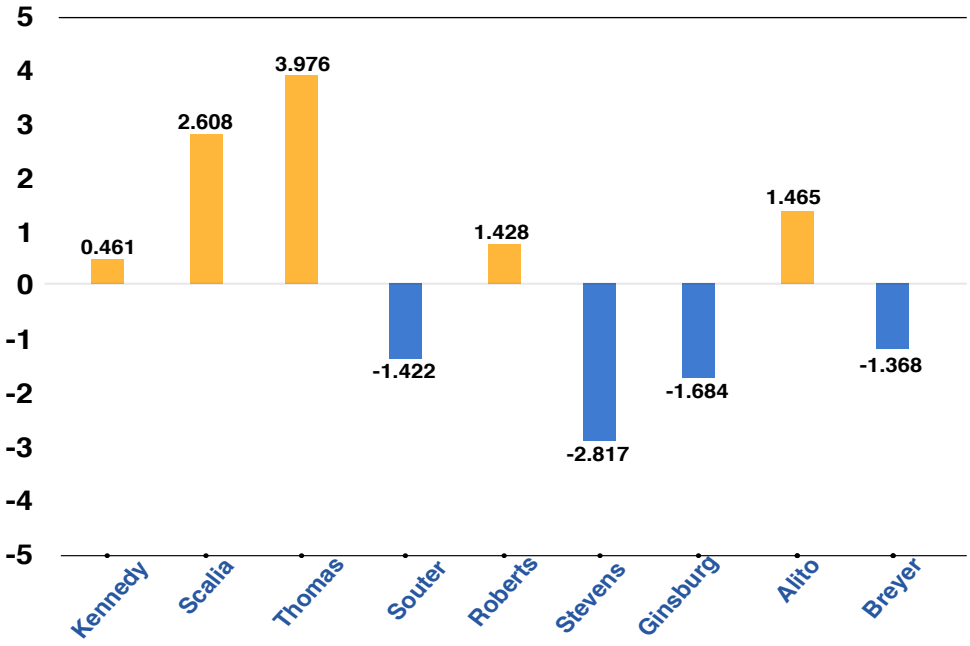
Chief Justice, 2005

Chief Justice	Median	Court Score
Roberts (a)	0.044	0.28
Roberts (b)	0.499	

Illinois v. Caballes (2005)

Donald P. Roper, Superintendent, Potosi Correctional Center v. Christopher Simmons (2005)

2006



Justices serving on the Court and Martin Quinn Ideology scores, 2006

Justices serving on the Court, 2006

Justice	Mean	President	Party of President	Years Served
Kennedy	0.461	Reagan	Republican	1987-2018
Scalia	2.608	Reagan	Republican	1986-2016
Thomas	3.976	Bush, G.H.W	Republican	1991-
Souter	-1.422	Bush, G.H.W	Republican	1990-2009
Roberts	1.428	Bush, G.W	Republican	2005-
Stevens	-2.817	Ford	Republican	1975-2010
Ginsburg	-1.684	Clinton	Democrat	1993-2020
Alito	1.465	Bush, G.W	Republican	2005-
Breyer	-1.368	Clinton	Democrat	1994-2022

Chief Justice, 2006

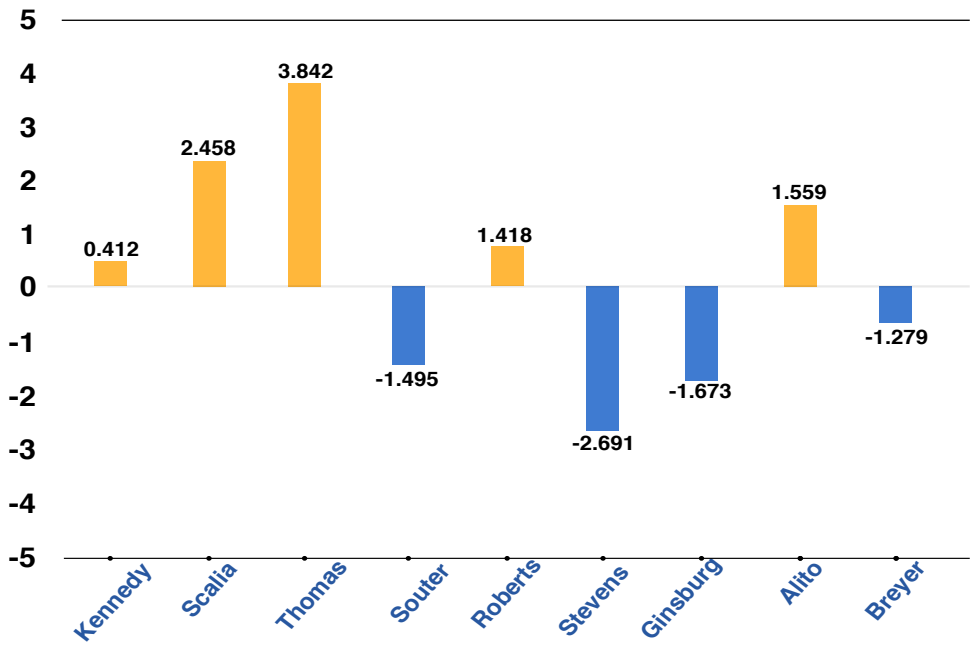
Chief Justice	Median	Court Score
Roberts	0.461	0.29

Hudson v. Michigan (2006)

Georgia v. Randolph (2006)

Kansas v. Marsh (2006)

2007



Justices serving on the Court and Martin Quinn Ideology scores, 2007

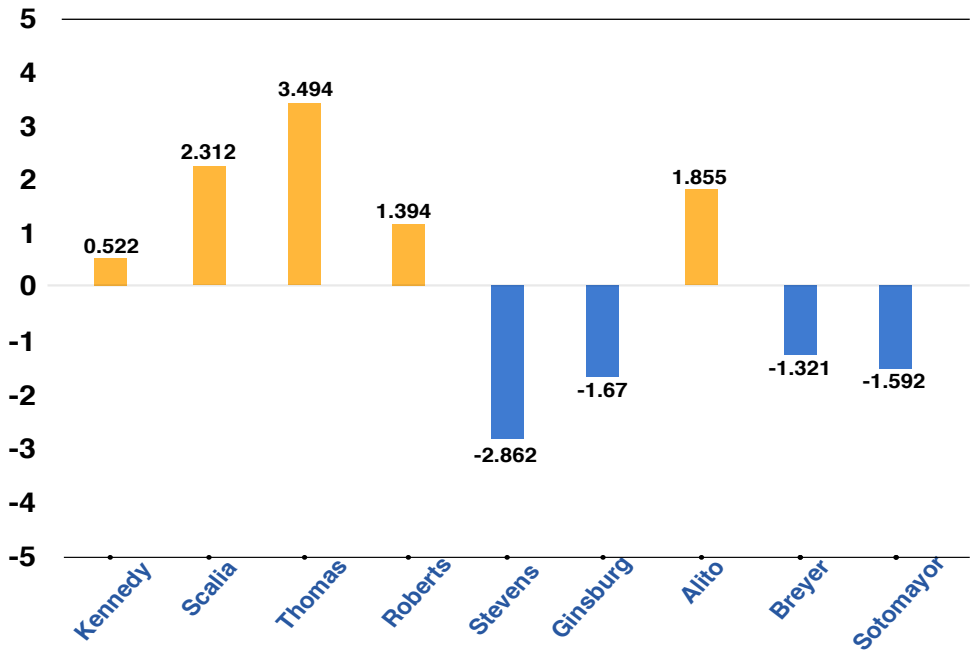
Justices serving on the Court, 2007

Justice	Mean	President	Party of President	Years Served
Kennedy	0.412	Reagan	Republican	1987-2018
Scalia	2.458	Reagan	Republican	1986-2016
Thomas	3.842	Bush, G.H.W	Republican	1991-
Souter	-1.495	Bush, G.H.W	Republican	1990-2009
Roberts	1.418	Bush, G.W	Republican	2005-
Stevens	-2.691	Ford	Republican	1975-2010
Ginsburg	-1.673	Clinton	Democrat	1993-2020
Alito	1.559	Bush, G.W	Republican	2005-
Breyer	-1.279	Clinton	Democrat	1994-2022

Chief Justice, 2007

Chief Justice	Median	Court Score
Roberts	0.412	0.28

2008



Justices serving on the Court and Martin Quinn Ideology scores, 2008

Justices serving on the Court, 2008

Justice	Mean	President	Party of President	Years Served
Kennedy	0.522	Reagan	Republican	1987-2018
Scalia	2.312	Reagan	Republican	1986-2016
Thomas	3.494	Bush, G.H.W	Republican	1991-
Roberts	1.394	Bush, G.W	Republican	2005-
Stevens	-2.862	Ford	Republican	1975-2010
Ginsburg	-1.67	Clinton	Democrat	1993-2020
Alito	1.855	Bush, G.W	Republican	2005-
Breyer	-1.321	Clinton	Democrat	1994-2022
Sotomayor	-1.592	Obama	Democrat	2008-

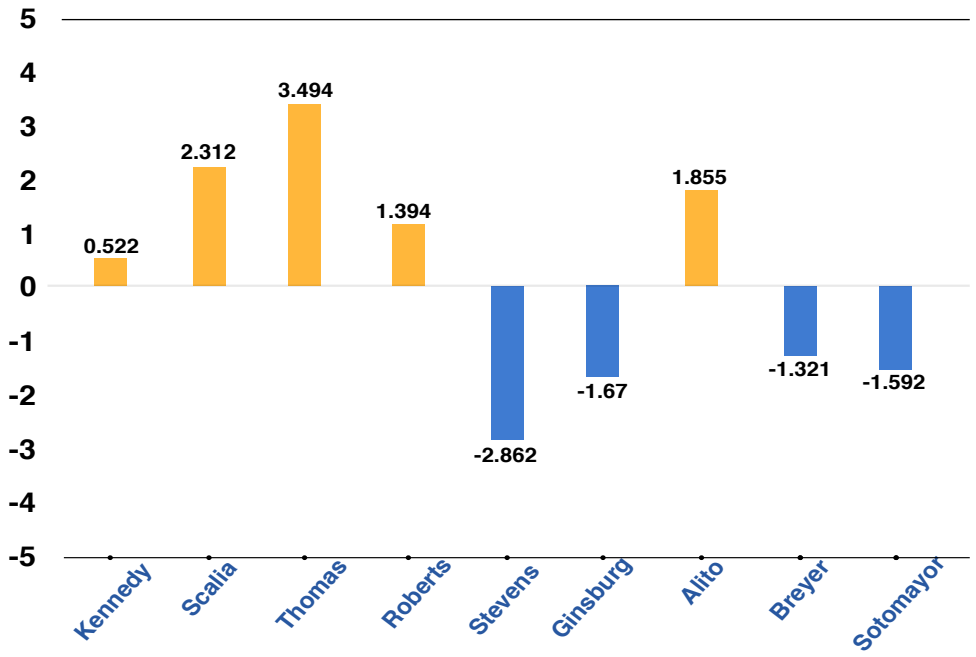
Chief Justice, 2008

Chief Justice	Median	Court Score
Roberts	0.579	0.24

Baze v. Rees (2008)

Kennedy v. Louisiana (2008)

2009



Justices serving on the Court and Martin Quinn Ideology scores, 2009

Justices serving on the Court, 2009

Justice	Mean	President	Party of President	Years Served
Kennedy	0.522	Reagan	Republican	1987-2018
Scalia	2.312	Reagan	Republican	1986-2016
Thomas	3.494	Bush, G.H.W	Republican	1991-
Roberts	1.394	Bush, G.W	Republican	2005-
Stevens	-2.862	Ford	Republican	1975-2010
Ginsburg	-1.67	Clinton	Democrat	1993-2020
Alito	1.855	Bush, G.W	Republican	2005-
Breyer	-1.321	Clinton	Democrat	1994-2022
Sotomayor	-1.592	Obama	Democrat	2008-

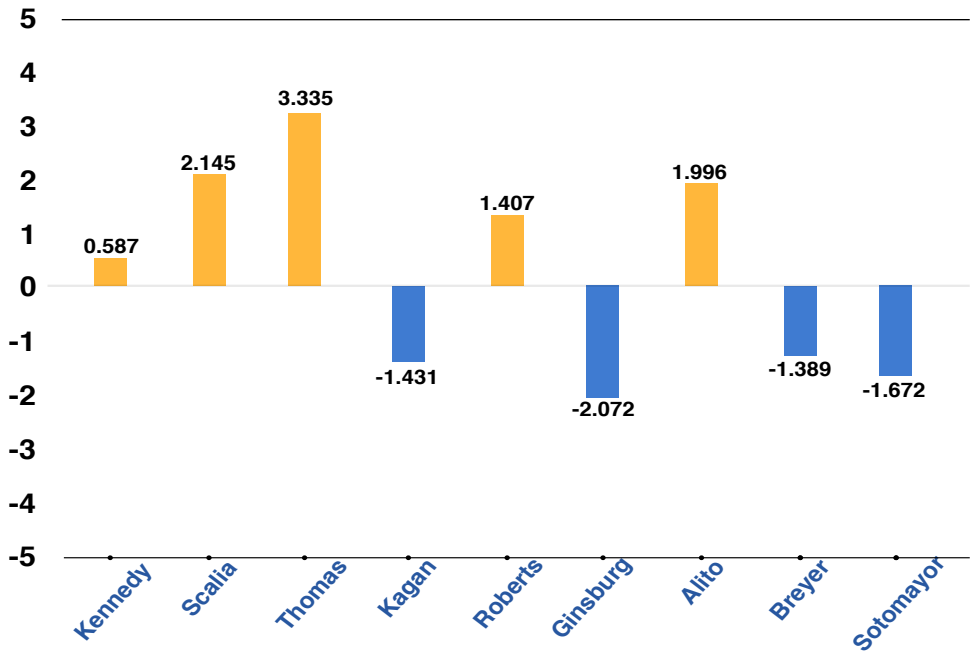
Chief Justice, 2009

Chief Justice	Median	Court Score
Roberts	0.522	0.24

Justices Serving on the Court 2010 - 2025

The following figures and tables include the names of the Justices serving on the Court and Martin Quinn scores for the indicated year. Each table also includes the name of the appointing President, the President's party affiliation and the years each Justice served on the Court. The first Justice listed is the Chief Justice of the Supreme Court.

2010



Justices serving on the Court and Martin Quinn Ideology scores, 2010

Justices serving on the Court, 2010

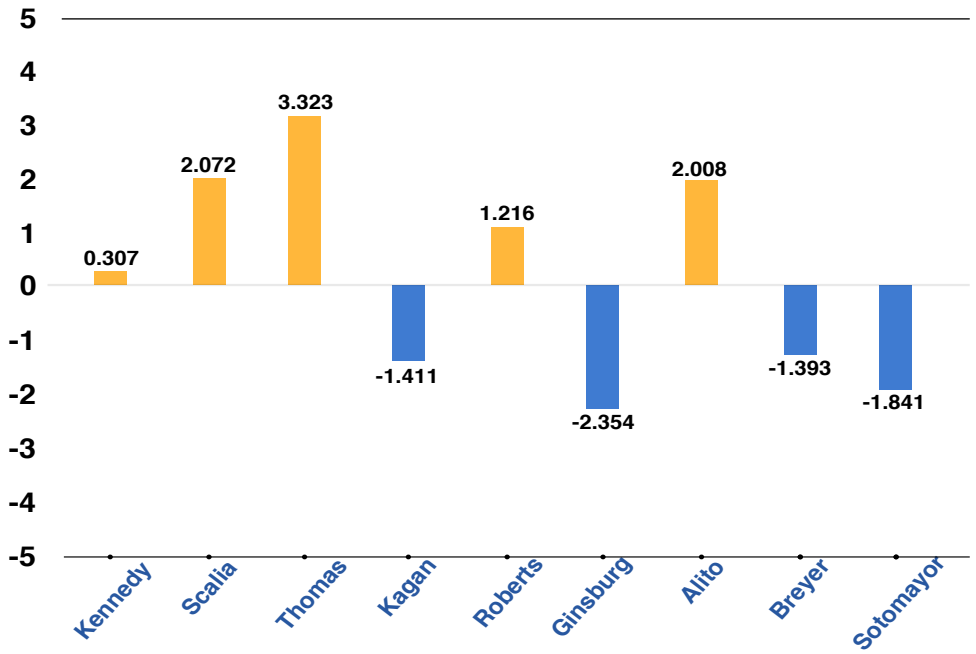
Justice	Mean	President	Party of President	Years Served
Kennedy	0.587	Reagan	Republican	1987-2018
Scalia	2.145	Reagan	Republican	1986-2016
Thomas	3.335	Bush, G.H.W	Republican	1991-
Kagan	-1.431	Obama	Democrat	2010-
Roberts	1.407	Bush, G.W	Republican	2005-
Ginsburg	-2.072	Clinton	Democrat	1993-2020
Alito	1.996	Bush, G.W	Republican	2005-
Breyer	-1.389	Clinton	Democrat	1994-2022
Sotomayor	-1.672	Obama	Democrat	2008-

Chief Justice, 2010

Chief Justice	Median	Court Score
Roberts	0.587	0.32

Kentucky v. King (2011)

2011



Justices serving on the Court and Martin Quinn Ideology scores, 2011

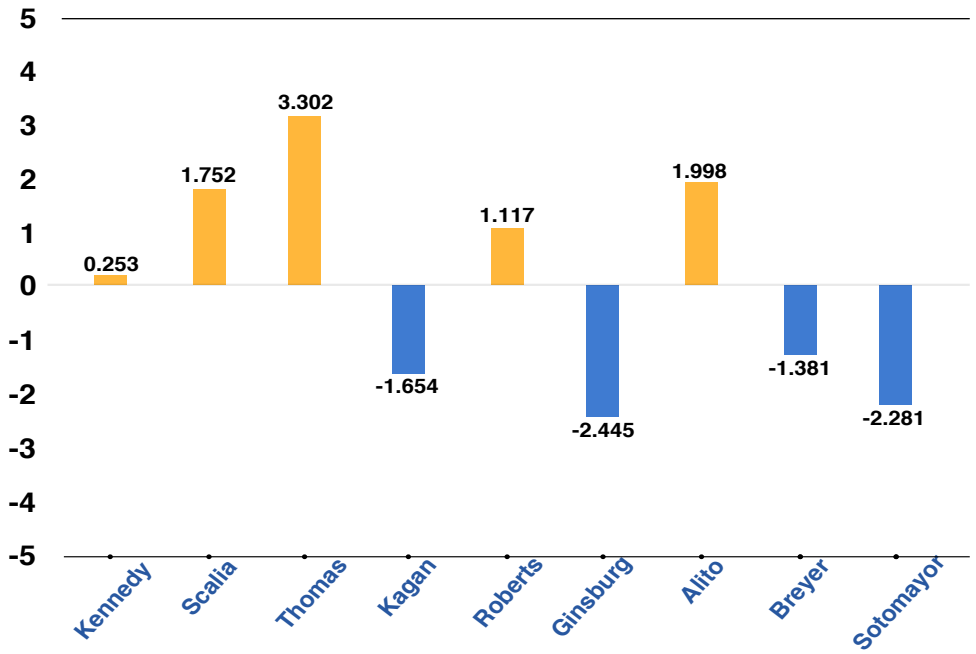
Justices serving on the Court, 2011

Justice	Mean	President	Party of President	Years Served
Kennedy	0.307	Reagan	Republican	1987-2018
Scalia	2.072	Reagan	Republican	1986-2016
Thomas	3.323	Bush, G.H.W	Republican	1991-
Kagan	-1.411	Obama	Democrat	2010-
Roberts	1.216	Bush, G.W	Republican	2005-
Ginsburg	-2.354	Clinton	Democrat	1993-2020
Alito	2.008	Bush, G.W	Republican	2005-
Breyer	-1.393	Clinton	Democrat	1994-2022
Sotomayor	-1.841	Obama	Democrat	2008-

Chief Justice, 2011

Chief Justice	Median	Court Score
Roberts	0.307	0.21

2012



Justices serving on the Court and Martin Quinn Ideology scores, 2012

Justices serving on the Court, 2012

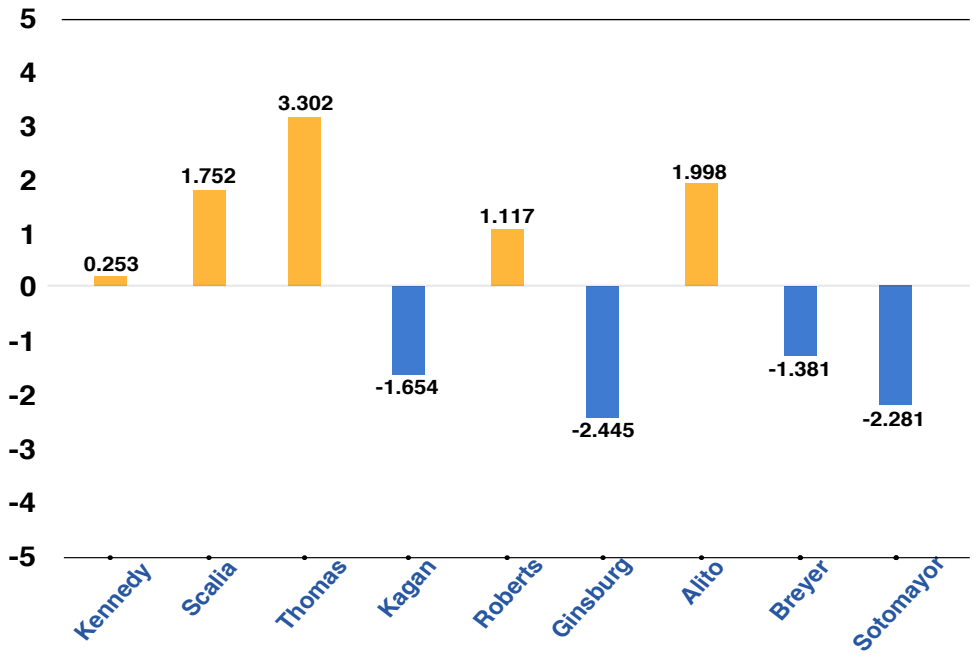
Justice	Mean	President	Party of President	Years Served
Kennedy	0.253	Reagan	Republican	1987-2018
Scalia	1.752	Reagan	Republican	1986-2016
Thomas	3.302	Bush, G.H.W	Republican	1991-
Kagan	-1.654	Bush, G.W	Republican	2005-
Roberts	1.117	Bush, G.W	Republican	2005-
Ginsburg	-2.445	Clinton	Democrat	1993-2020
Alito	1.988	Bush, G.W	Republican	2005-
Breyer	-1.381	Clinton	Democrat	1994-2022
Sotomayor	-2.281	Obama	Democrat	2008-

Chief Justice, 2012

Chief Justice	Median	Court Score
Roberts	0.253	0.07

United States v. Jones (2012)

2013



Justices serving on the Court and Martin Quinn Ideology scores, 2013

Justices serving on the Court, 2013

Justice	Mean	President	Party of President	Years Served
Kennedy	0.253	Reagan	Republican	1987-2018
Scalia	1.752	Reagan	Republican	1986-2016
Thomas	3.302	Bush, G.H.W	Republican	1991-
Kagan	-1.654	Bush, G.W	Republican	2005-
Roberts	1.117	Bush, G.W	Republican	2005-
Ginsburg	-2.445	Clinton	Democrat	1993-2020
Alito	1.988	Bush, G.W	Republican	2005-
Breyer	-1.381	Clinton	Democrat	1994-2022
Sotomayor	-2.281	Obama	Democrat	2008-

Chief Justice, 2013

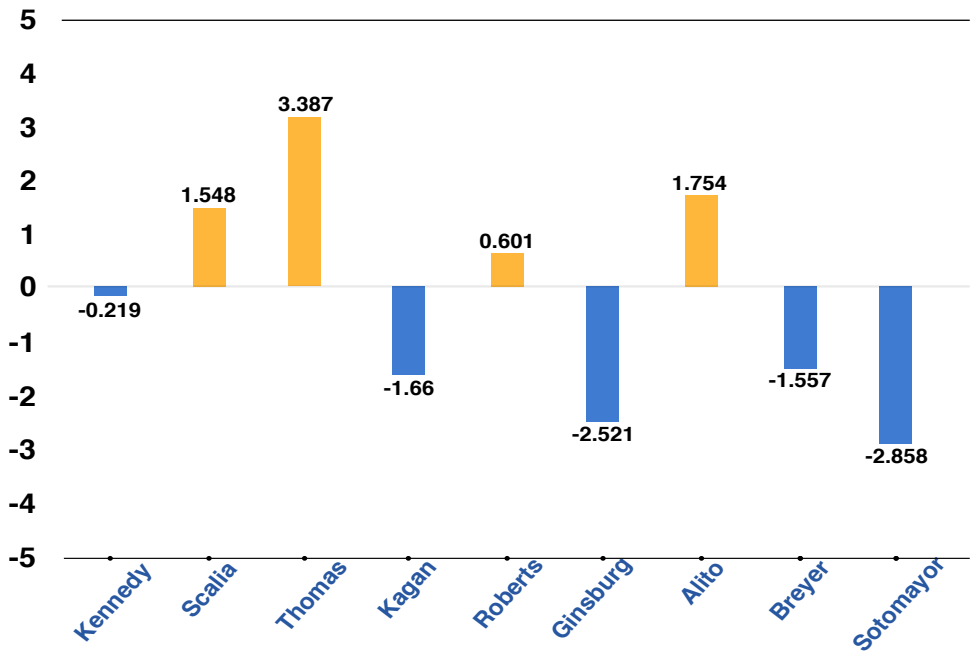
Chief Justice	Median	Court Score
Roberts	0.074	0.07

Maryland v. King (2013)

Missouri v. McNeely (2013)

Salinas v. Texas (2013)

2014



Justices serving on the Court and Martin Quinn Ideology scores, 2014

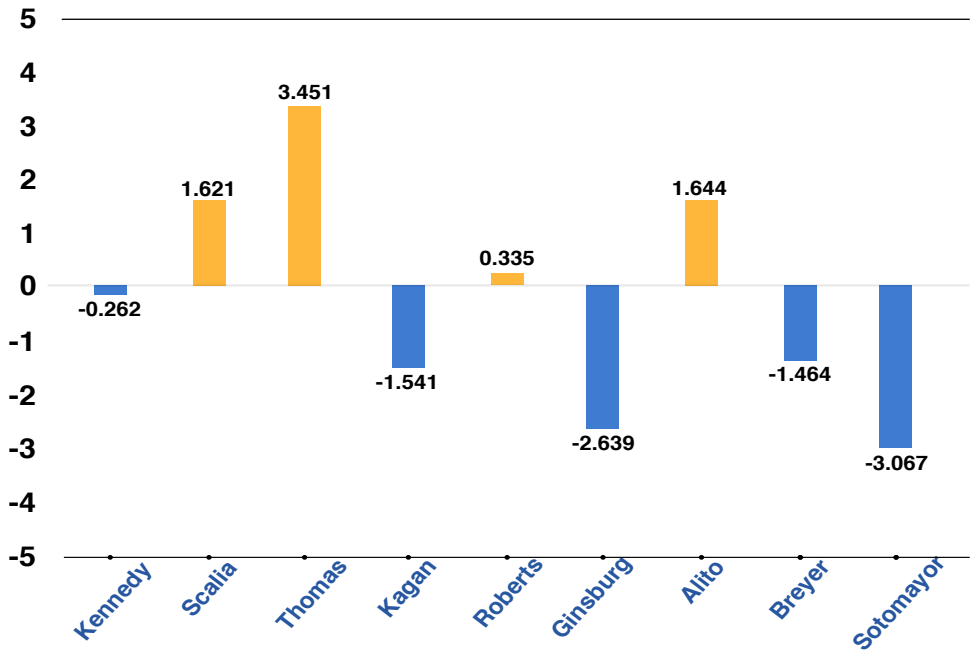
Justices serving on the Court, 2014

Justice	Mean	President	Party of President	Years Served
Kennedy	-0.219	Reagan	Republican	1987-2018
Scalia	1.548	Reagan	Republican	1986-2016
Thomas	3.387	Bush, G.H.W	Republican	1991-
Kagan	-1.66	Bush, G.W	Republican	2005-
Roberts	0.601	Bush, G.W	Republican	2005-
Ginsburg	-2.521	Clinton	Democrat	1993-2020
Alito	1.754	Bush, G.W	Republican	2005-
Breyer	-1.557	Clinton	Democrat	1994-2022
Sotomayor	-2.858	Obama	Democrat	2008-

Chief Justice, 2014

Chief Justice	Median	Court Score
Roberts	-0.219	-0.17

2015



Justices serving on the Court and Martin Quinn Ideology scores, 2015

Justices serving on the Court, 2015

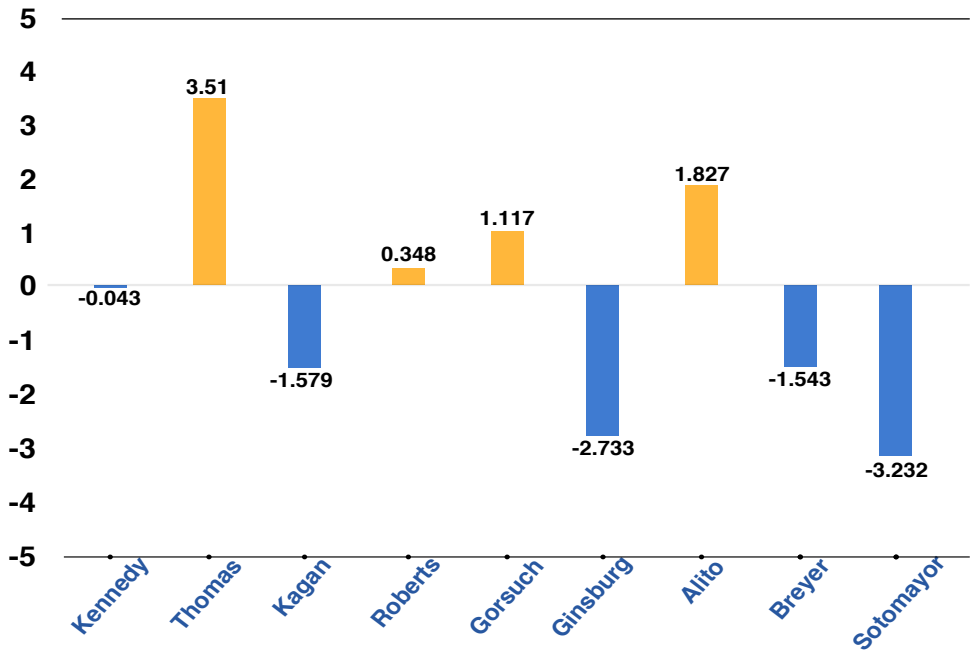
Justice	Mean	President	Party of President	Years Served
Kennedy	-0.262	Reagan	Republican	1987-2018
Scalia	1.621	Reagan	Republican	1986-2016
Thomas	3.451	Bush, G.H.W	Republican	1991-
Kagan	-1.541	Bush, G.W	Republican	2005-
Roberts	0.335	Bush, G.W	Republican	2005-
Ginsburg	-2.639	Clinton	Democrat	1993-2020
Alito	1.644	Bush, G.W	Republican	2005-
Breyer	-1.464	Clinton	Democrat	1994-2022
Sotomayor	-3.067	Obama	Democrat	2008-

Chief Justice, 2015

Chief Justice	Median	Court Score
Roberts	-0.264	-0.21

Glossip v. Gross (2015)

2016



Justices serving on the Court and Martin Quinn Ideology scores, 2016

Justices serving on the Court, 2016

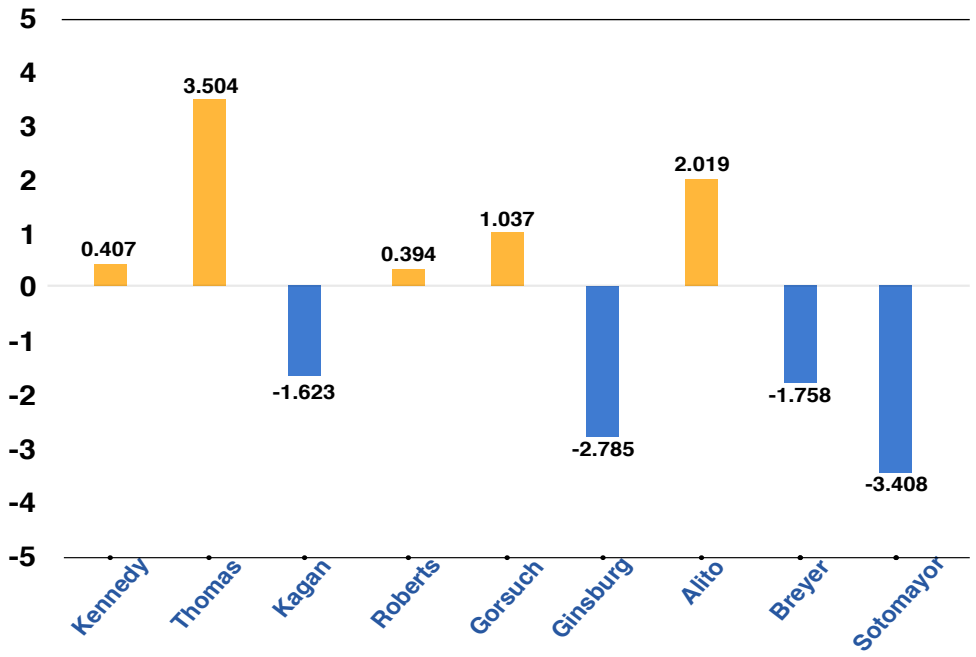
Justice	Mean	President	Party of President	Years Served
Kennedy	-0.043	Reagan	Republican	1987-2018
Thomas	3.51	Bush, G.H.W	Republican	1991-
Kagan	-1.579	Bush, G.W	Republican	2005-
Roberts	0.348	Bush, G.W	Republican	2005-
Gorsuch	1.117	Trump	Republican	2016-
Ginsburg	-2.733	Clinton	Democrat	1993-2020
Alito	1.827	Bush, G.W	Republican	2005-
Breyer	-1.543	Clinton	Democrat	1994-2022
Sotomayor	-3.232	Obama	Democrat	2008-

Chief Justice, 2016

Chief Justice	Median	Court Score
Roberts	-0.055	-0.26

Foster v. Chatman (2016)

2017



Justices serving on the Court and Martin Quinn Ideology scores, 2017

Justices serving on the Court, 2017

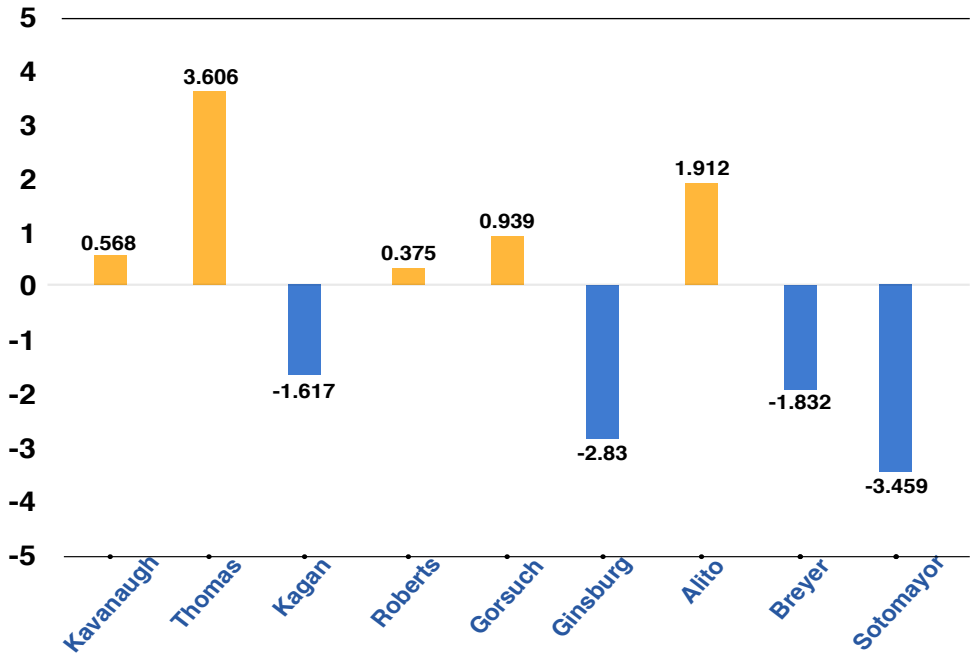
Justice	Mean	President	Party of President	Years Served
Kennedy	0.407	Reagan	Republican	1987-2018
Thomas	3.504	Bush, G.H.W	Republican	1991-
Kagan	-1.623	Bush, G.W	Republican	2005-
Roberts	0.394	Bush, G.W	Republican	2005-
Gorsuch	1.037	Trump	Republican	2016-
Ginsburg	-2.785	Clinton	Democrat	1993-2020
Alito	2.019	Bush, G.W	Republican	2005-
Breyer	-1.758	Clinton	Democrat	1994-2022
Sotomayor	-3.408	Obama	Democrat	2008-

Chief Justice, 2017

Chief Justice	Median	Court Score
Roberts	0.29	-0.25

Peña-Rodriguez v. Colorado (2017)

2018



Justices serving on the Court and Martin Quinn Ideology scores, 2018

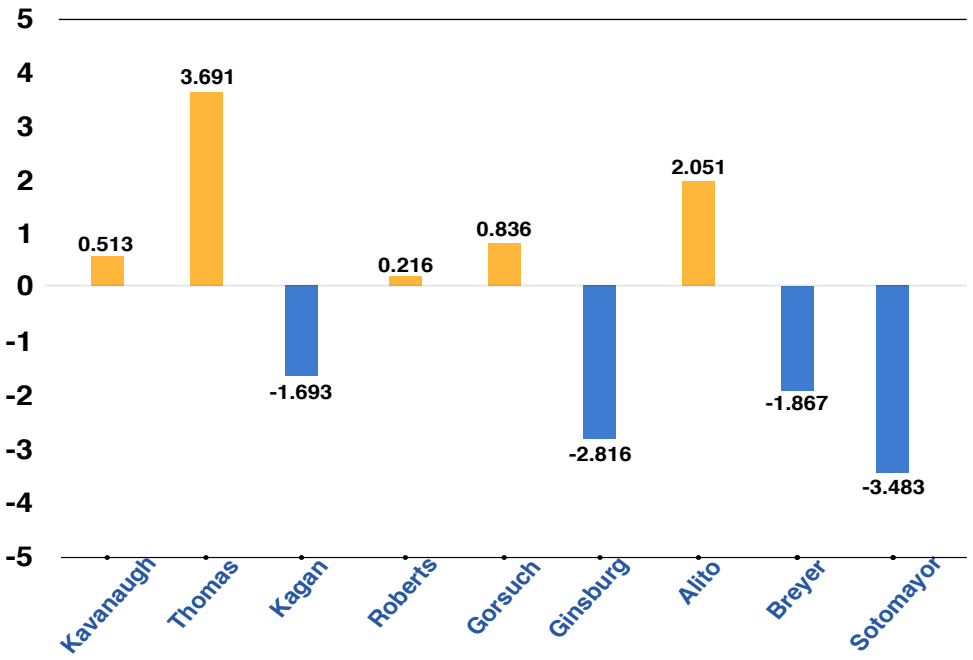
Justices serving on the Court, 2018

Justice	Mean	President	Party of President	Years Served
Kavanaugh	0.568	Trump	Republican	2018-
Thomas	3.606	Bush, G.H.W	Republican	1991-
Kagan	-1.617	Bush, G.W	Republican	2005-
Roberts	0.375	Bush, G.W	Republican	2005-
Gorsuch	0.939	Trump	Republican	2016-
Ginsburg	-2.83	Clinton	Democrat	1993-2020
Alito	1.912	Bush, G.W	Republican	2005-
Breyer	-1.832	Clinton	Democrat	1994-2022
Sotomayor	-3.459	Obama	Democrat	2008-

Chief Justice, 2018

Chief Justice	Median	Court Score
Roberts	0.326	-0.26

2019



Justices serving on the Court and Martin Quinn Ideology scores, 2019

Justices serving on the Court, 2019

Justice	Mean	President	Party of President	Years Served
Kavanaugh	0.513	Trump	Republican	2018-
Thomas	3.691	Bush, G.H.W	Republican	1991-
Kagan	-1.693	Bush, G.W	Republican	2005-
Roberts	0.216	Bush, G.W	Republican	2005-
Gorsuch	0.836	Trump	Republican	2016-
Ginsburg	-2.816	Clinton	Democrat	1993-2020
Alito	2.051	Bush, G.W	Republican	2005-
Breyer	-1.867	Clinton	Democrat	1994-2022
Sotomayor	-3.483	Obama	Democrat	2008-

Chief Justice, 2019

Chief Justice	Median	Court Score
Roberts	0.185	-0.28

2020

No Martin Quinn Scores

Justices serving on the Court, 2020

Justice	President	Party of President	Years Served
Kavanaugh	Trump	Republican	2018-
Thomas	Bush, G.H.W.	Republican	1991-
Kagan	Bush, G.W.	Republican	2005-
Roberts	Bush, G.W.	Republican	2005-
Gorsuch	Trump	Republican	2016-
Ginsburg	Clinton	Democrat	1993-2020
Alito	Bush, G.W.	Republican	2005-
Breyer	Clinton	Democrat	1994-2022
Sotomayor	Obama	Democrat	2008-

2021

No Martin Quinn Scores

Justices serving on the Court, 2021

Justice	President	Party of President	Years Served
Kavanaugh	Trump	Republican	2018-
Thomas	Bush, G.H.W.	Republican	1991-
Kagan	Bush, G.W.	Republican	2005-
Roberts	Bush, G.W.	Republican	2005-
Gorsuch	Trump	Republican	2016-
Barrett	Trump	Republican	2021-
Alito	Bush, G.W.	Republican	2005-
Breyer	Clinton	Democrat	1994-2022
Sotomayor	Obama	Democrat	2008-

2022

No Martin Quinn Scores

2023

No Martin Quinn Scores

2024

No Martin Quinn Scores

City of Grants Pass v. Johnson (2024)

2025

No Martin Quinn Scores